

## Supreme Court Controversies

*Has Chief Justice Roberts led an activist court?*

The Supreme Court opens a new term on Oct. 1 with a major affirmative action case from the University of Texas set for argument the next week. Chief Justice John G. Roberts Jr. is starting his eighth year on a court that is divided on many issues between five generally conservative Republican appointees and four liberal Democratic appointees. Court watchers are still debating the implications of Roberts' surprising vote in late June to join the liberal bloc in upholding President Obama's controversial health care law. Despite that decision, liberal critics continue to accuse the Roberts Court of political decision making, judicial activism and a pro-business orientation. The court's defenders say the justices are acting without regard to politics and following judicial restraint. Besides the affirmative action case, the justices may also tackle marriage equality and voting rights cases before the term ends next June.



Supporters and opponents of the Affordable Care Act demonstrate at the Supreme Court on March 26, 2012. The court's surprise decision to uphold the health care law on June 28 — with Chief Justice Roberts voting with the court's liberal bloc — focused new attention on the high court.

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# Supreme Court Controversies

BY KENNETH JOST

## THE ISSUES

Abby Fisher graduated from Louisiana State University in May with a business degree and landed a job as a financial analyst in Austin in her home state of Texas. But LSU was not Fisher's first choice for college.

Back in 2008, Fisher had hoped to enroll at the University of Texas' flagship Austin campus but was turned down — just like more than three-fourths of the 30,000 applicants that year. Fisher's rank in her high school class in Sugar Land, an affluent Houston area suburb, was too low to qualify for automatic admission to UT under a state law guaranteeing slots to all students in the top 10 percent of their class. And her grades and test scores were significantly below the 3.5 "academic index" level needed for admission under the university's scoring system.

Unlike other unsuccessful applicants, Fisher turned her rejection into a federal court case that has now reached the U.S. Supreme Court. Supported by a longtime opponent of racial preferences, Fisher, who is white, filed a suit in April 2008 challenging UT's use of race as a factor in admissions decisions. Two lower courts rejected her challenge, but the high court agreed on Feb. 21, 2012, to hear the suit. The action set up a showdown on a legal issue that has divided the justices and the nation for more than 40 years.<sup>1</sup> (See sidebar, p. 826; "At Issue," p. 833.)

Fisher's case, to be argued Oct. 10, will help provide a high-profile opening for the Supreme Court's new term, which begins on Oct. 1 — the traditional First Monday in October. When



Getty Images/Win McNamee

Barack Obama takes the oath of office as president from Chief Justice John G. Roberts Jr. at the Capitol on Jan. 20, 2009. Roberts presides over a Supreme Court that is sharply divided on legal and judicial philosophies. The court has handed down several controversial rulings, including upholding the Affordable Care Act and striking down campaign finance laws, during his seven years leading the court. A major affirmative action case tops the list of issues facing the justices in the new term beginning Oct. 1.

the justices convene that day, it will be the first time for the nine to be together in public since the dramatic end-of-term decision to uphold President Obama's health care reform plan.<sup>2</sup>

The June 28 ruling to uphold the Affordable Care Act, *National Federation of Independent Business v. Sebelius*, came with Americans focused on the Supreme Court more intensely than at any time since the court effectively decided the 2000 presidential election in the still controversial decision *Bush v. Gore*. It also came as President George W. Bush's choice to lead the court, John G. Roberts Jr., ended his seventh year as chief justice of the United States.

The Roberts Court has made its share of waves in legal and political waters since Roberts assumed the court's center seat on Oct. 3, 2005 — at age

50, the youngest chief justice in more than 200 years.\* Seven years later, Roberts appears to have aged hardly at all. All but invariably, Roberts enters the courtroom with a half-smile on his face and an active glint in his eyes. He presides with a light touch, cracks jokes occasionally and admonishes lawyers or his colleagues without ever raising his voice.<sup>3</sup>

Yet Roberts is merely the first among equals on a court that is sharply divided on legal and judicial philosophies. Roberts joins four other justices appointed by Republican presidents to form a conservative majority on some of the most closely divided issues. Four justices appointed by Democratic presidents — including Obama's two appointees, Sonia Sotomayor and Elena Kagan — form a liberal bloc that winds up in dissent in most of the court's 5-4 decisions. The balance of

power often rests with Justice Anthony M. Kennedy, the moderate conservative appointed by President Ronald Reagan in 1987 after the Democratic-controlled Senate rejected Reagan's first choice for the vacancy: the doggedly conservative Robert Bork. (See *justices' biographies*, p. 816.)

Until the health care ruling, conservatives had mostly warm feelings about the Roberts Court's general course. "It's been largely positive," says Curt Levey, president of the Committee for Justice, a conservative court-watching advocacy group. Levey cites decisions striking down campaign finance laws on First Amendment grounds, limiting use of race in pupil assignments and cutting

\* John Marshall was 45 years old when he became chief justice on Jan. 31, 1801.



## Meet the Roberts Court

*Justices share Ivy League credentials but are ideological opposites.*

The Roberts Court consists of five justices appointed by Republican presidents and four by Democrats. Eight were federal appeals courts judges at the time of their appointments; Elena Kagan was solicitor general of the United States. All are graduates of Ivy League law schools. Here are brief biographies of the justices showing their dates and places of birth, education, Senate confirmation dates and votes and selected major opinions since September 2005.



AFP/Getty Images/Paul J. Richards

**John G. Roberts Jr.**, chief justice: born Jan. 27, 1955, Buffalo, N.Y.; Harvard, Harvard Law School; appointed by President George W. Bush; confirmed Sept. 29, 2005 (78-22). Major opinions: *Parents Involved in Community Schools v. Seattle School District* (school integration); *Arizona Free Enterprise v. Bennett* (campaign finance); *National Federation of Independent Business v. Sebelius* (Affordable Care Act).



AFP/Getty Images/Paul J. Richards

**Antonin Scalia**, associate justice born March 11, 1936, Trenton, N.J.; Georgetown, Harvard Law School; appointed by President Ronald Reagan; confirmed Sept. 17, 1986 (98-0). Major opinions: *Wal-Mart Stores v. Dukes* (class actions); *Boumediene v. Bush* (dissent, Guantánamo); *District of Columbia v. Heller* (gun rights); *Arizona v. United States* (dissent, immigration).



AFP/Getty Images/Paul J. Richards

**Anthony McLeod Kennedy**, associate justice: born July 23, 1936, Sacramento, Calif.; Stanford, Harvard Law School; appointed by President Ronald Reagan; confirmed Feb. 3, 1988 (97-0). Major opinions: *Gonzales v. Carhart* (abortion); *Boumediene v. Bush* (Guantánamo); *Citizens United v. Federal Election Commission* (campaign finance); *Arizona v. United States* (immigration).



AFP/Getty Images/Paul J. Richards

**Clarence Thomas**, associate justice: born June 23, 1948, Pin Point, Ga.; Holy Cross, Yale Law School; appointed by President George H. W. Bush; confirmed Oct. 15, 1991 (52-48). Major opinions: *Hamdan v. Rumsfeld* (dissent, Guantánamo); *McDonald v. Chicago* (concurrence, gun rights).



Getty Images/Mark Wilson

**Ruth Joan Bader Ginsburg**, associate justice: born March 15, 1933, Brooklyn, N.Y.; Cornell, Columbia Law School; appointed by President Bill Clinton; confirmed Aug. 3, 1993 (96-3). Major opinions: *Gonzales v. Carhart* (dissent, abortion); *Ledbetter v. Goodyear Tire & Rubber Co.* (dissent, job discrimination); *Wal-Mart Stores v. Dukes* (dissent, class actions).

back on criminal procedure protections for defendants and suspects.

Offsetting those positives, Levey says, are two trends viewed critically by conservatives. The court has stood still on federalism issues after favorable rulings for states under Roberts' predecessor, Chief Justice William H. Rehnquist. And the court has imposed new limits on criminal sentencing, typically with Roberts in

dissent. Levey also acknowledges that the favorable trend has been "overshadowed" by the ruling to leave the Affordable Care Act almost completely intact.

Liberal groups find much to pan and little to praise. Nan Aron, president of the progressive Alliance for Justice, criticizes the court for favoring "a limited role for the federal government," adopting "conservative views

on social issues" and "tilting the court in a pro-corporate direction."

"We have seen him shift the court in a pro-corporate direction at the expense of everyday people," says Aron, after noting that the alliance opposed Roberts' confirmation. "There is a consistent theme in his opinions, a predisposition to rule in favor of large corporations."

Academic experts differ along ideological lines in assessing the Roberts



AFP/Getty Images/B. Sniadowski

**Stephen Gerald Breyer**, associate justice: born Aug. 15, 1938, San Francisco; Stanford, Magdalen College (Oxford), Harvard Law School; appointed by President Bill Clinton; confirmed July 29, 1994 (87-9). Major opinions: *Parents Involved in Community Schools v. Seattle School District* (dissent, school integration); *McDonald v. Chicago* (dissent, gun rights).



Getty Images/Mark Wilson

**Sonia Maria Sotomayor**, associate justice: born June 25, 1954, Bronx, N.Y.; Princeton, Yale Law School; appointed by President Barack Obama; confirmed Aug. 6, 2009 (68-31). Major opinion: *Southern Union Co. v. United States* (criminal fines).



AFP/Getty Images/Paul J. Richards

**Samuel Anthony Alito, Jr.**, associate justice: born April 1, 1950, Trenton, N.J.; Princeton, Yale Law School; appointed by President George W. Bush; confirmed Jan. 31, 2006 (58-42). Major opinions: *Ledbetter v. Goodyear Tire & Rubber Co.* (job discrimination); *McDonald v. Chicago* (plurality, gun rights); *Miller v. Alabama* (dissent, criminal sentencing).



AFP/Getty Images/Tim Sloan

**Elena Kagan**, associate justice: born April 28, 1960, New York, N.Y.; Princeton, Oxford, Harvard Law School; appointed by President Barack Obama; confirmed Aug. 5, 2010 (63-37). Major opinions: *Arizona Free Enterprise v. Bennett* (dissent, campaign finance); *Miller v. Alabama* (criminal sentencing).

— **Kenneth Jost**

Court's decisions even if they agree in describing the court's general orientation. "Overall, the Roberts Court has been what we expected," says Erwin Chemerinsky, dean of the University of California-Irvine Law School and an outspoken liberal critic of many of the court's decisions. "When the court's ideologically divided, the conservative position prevails much more than the liberal position."

Jonathan Adler, a professor at Case Western Reserve University School of Law in Cleveland who has been affiliated with conservative organizations, agrees. "It is a moderately conservative court," Adler says. "On most issues, the court is going to lean in a conservative direction." (See *decisions*, p. 818.)

To some extent, however, the term that ended on June 28 belied that pattern.<sup>4</sup> In addition to upholding Obama's

health care law, the court also cheered liberal groups with a decision to strike down several provisions of Arizona's widely copied crackdown on undocumented immigrants. Kennedy wrote the majority opinion in the case, *Arizona v. United States*, joined by Roberts and three liberal justices. Immigrant-rights groups were disappointed, however, that the court unanimously left standing the most controversial provision in the Arizona law: the so-called "show me your papers" section. That provision instructs state and local police to conduct immigration status checks during an arrest or stop if they suspect the individual is in the country illegally.<sup>5</sup>

Civil liberties and criminal defense groups also counted several victories during the term, including a final-week decision written by Kagan to bar mandatory life-without-parole sen-

tences for juvenile murderers. Earlier, Kennedy had written companion decisions that allow defendants to challenge criminal convictions if they reject a favorable plea bargain based on bad or inadequate advice from their lawyers. Kennedy also wrote a decision striking down a federal law, the Stolen Valor Act, making it a crime to lie about having received military medals. The ruling continued the Roberts Court's general pattern of pro-free speech decisions.

Business groups fared well during the term, but the victories came in relatively minor cases. A year earlier, however, the headline decision of the term was the 5-4 ruling, split along ideological lines, that threw out a broad sex discrimination suit against Walmart, the nation's largest private employer. The ruling established new require-

## Key Roberts Court Decisions

Issues range from gun rights to campaign spending to *Guantánamo*. Most of these decisions came on 5-4 votes reflecting the court's conservative-liberal split.

	Name of Case	Vote	Holding
2006	<i>Hudson v. Michigan</i>	5-4	Violation of knock-and-announce rule does not require suppressing evidence
	<i>Hamdan v. Rumsfeld</i>	5-3	Military tribunals for Guantánamo detainees violate military law, Geneva Conventions
2007	<i>Gonzales v. Carhart</i>	5-4	Upholds federal "partial-birth" abortion ban
	<i>Ledbetter v. Goodyear Tire &amp; Rubber Co.</i>	5-4	Requires employees to file pay bias complaint within statutory deadline after last intentional act of discrimination; rejects "paycheck accrual rule"
	<i>FEC v. Wisconsin Right to Life</i>	5-4	Eases law limiting pre-election "issue-advertising" by unions, corporations
	<i>Parents Involved in Community Schools v. Seattle School Dist. No. 1</i>	5-4	Limits use of race to assign students to promote racial diversity; permits some other "general policies"
2008	<i>Boumediene v. Bush</i>	5-4	Strikes down Military Commissions Act; extends habeas corpus to Guantánamo detainees
	<i>Kennedy v. Louisiana</i>	5-4	Bars death penalty for child rape
	<i>Davis v. FEC</i>	5-4	Throws out "Millionaire's Amendment" in campaign finance reform law
	<i>District of Columbia v. Heller</i>	5-4	Strikes down D.C. gun ban
2009	<i>Ricci v. DeStefano</i>	5-4	Requires employers to have a "substantial basis" to fear disparate-impact liability before adopting race-conscious policies to avoid liability
	<i>United States v. Herring</i>	5-4	Limits use of exclusionary rule to reckless/intentional mistakes by police
	<i>Northwest Austin Municipal Utility District No. 1 v. Holder</i>	8-1	Expands eligibility for municipalities to "bail out" of preclearance requirement in Voting Rights Act; constitutional challenge left unresolved

ments for class actions — mass lawsuits favored by lawyers representing consumers and workers but feared by attorneys representing big companies. A second ruling that year allowed companies to enforce arbitration agreements to prevent customers from transforming individual complaints into class actions.<sup>6</sup>

The dramatic ruling in the health care case on June 28 was followed by an extraordinary leaked account from inside the court that Roberts had initially voted to strike down the law but changed his mind midway through the opinion-writing process. CBS's chief legal correspondent Jan Crawford, who has good sources in Republican and conservative circles, attributed her

July 1 scoop to "two sources with specific knowledge of the deliberations." Kennedy conducted a "relentless" effort to bring Roberts back around, according to Crawford. The dissent jointly authored by Kennedy and three other conservatives — Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. — reflected their anger with Roberts over his decision, Crawford reported.<sup>7</sup>

The University of Texas affirmative action case is now being eyed as a likely headline-grabber for the court's new term. "Universities all over the nation are looking at this case," says Dean Sparlin, a lawyer representing the Association for Affirmative Action, which filed a brief supporting the university. Roger

Clegg, president and general counsel of the Center for Equal Opportunity, which filed a brief supporting Fisher's position, says he is "cautiously optimistic" that the court will rule flatly that racial preferences in college and university admissions are unconstitutional. (See "At Issue," p. 833.)

The court's calendar includes several other closely watched cases, including one to be argued on the opening day that tests federal courts' jurisdiction over suits for human rights violations committed in other countries. And two other major issues are waiting in the wings: gay marriage and the federal Voting Rights Act. (See *calendar*, p. 820.)



	Name of Case	Vote	Holding
2010	<i>Citizens United v. FEC</i>	5-4	Permits corporations to spend own money on political campaigns
	<i>Bergbuis v. Thompkins</i>	5-4	Requires suspect to claim right of silence to suppress later incriminatory statement
	<i>McDonald v. Chicago</i>	5-4	Applies Second Amendment gun rights to state and local governments
	<i>Brown v. Plata</i>	5-4	Orders California prisons to reduce overcrowding to improve health services
2011	<i>Wal-Mart Stores, Inc. v. Dukes</i>	5-4	Rejects class action sex discrimination suit against Wal-Mart
	<i>Arizona Free Enterprise Club v. Bennett</i>	5-4	Strikes down "matching-fund" provision in Arizona public campaign financing law
	<i>United States v. Jones</i>	9-0	Defines extended GPS tracking of suspect's vehicle as search for Fourth Amendment purposes
2012	<i>FCC v. Fox Television Stations, Inc.</i>	8-0	Sets aside FCC order against TV networks for fleeting expletives, adult nudity
	<i>Southern Union Co. v. United States</i>	6-3	Requires jury finding beyond reasonable doubt to find facts to raise criminal fine
	<i>Miller v. Alabama</i>	5-4	Bars mandatory life-without-parole sentence for juvenile murderers
	<i>Arizona v. United States</i>	5-3	Strikes three parts of state immigration law; allows immigration status checks (8-0)
	<i>National Federation of Independent Business v. Sebelius</i>	5-4	Upholds Affordable Care Act; narrows enforcement of Medicaid expansion (7-2)

Source: Kenneth Jost, Supreme Court Yearbook (annual series)

On gay marriage, the justices are being asked to review decisions that strike down on equal protection grounds the federal Defense of Marriage Act, which bars marriage-like benefits under federal law to same-sex couples even if they are legally married in their states. Separately, opponents of gay marriage are seeking to reinstate California's Proposition 8 that barred recognition of same-sex couples. The federal appeals court for California ruled the 2008 initiative unconstitutional earlier this year.<sup>8</sup>

The challenges to the Voting Rights Act focus on section 5 of the 1965 law. It requires states and localities with a history of discrimination in voting to "preclear" any change in election procedure with the U.S. Department of Justice or a federal court in Washington. Two municipalities — Kinston, N.C., and Shelby

County (suburban Birmingham), Ala. — have appeals pending at the Supreme Court challenging the provision as an improper intrusion on state sovereignty.<sup>9</sup>

As the justices prepare to convene for the new term, here are some of the competing assessments of the Roberts Court being heard:

***Has the Roberts Court based decisions on the justices' political views?***

The Supreme Court split the difference on the hot-button issue of immigration on June 25 by striking down parts of the Arizona law while upholding the "show me your papers" provisions. But in a sharply worded dissent that he emphasized by summarizing it from the bench, Justice Antonin Scalia single-mindedly defended the state's right to control its own bor-

ders. For good measure, he added a tart criticism of Obama's decision 10 days earlier to grant temporary status to immigrants under age 30 brought to the United States as children.

Critics denounced Scalia's comments on Obama's actions as political. Jeffrey Rosen, a professor at George Washington University Law School in Washington, said Scalia "is sounding more like a conservative blogger or Fox News pundit than a justice." Scalia, in television interviews, dismissed the criticism. Appearing on "Fox News Sunday" a month later, Scalia said he was merely making the point that "Arizona is being prevented from enforcing federal immigration law."<sup>10</sup>

Scalia's dissenting bench slap at Obama came after a succession of other high-profile rulings in which the court had rejected the administration's

*Continued on p. 821*

## Major Cases Before the Supreme Court

The Supreme Court opens the 2012-2013 term with 31 cases scheduled for oral arguments during three two-week sessions that begin on Oct. 1, Oct. 29 and Nov. 26. Here are some of the major upcoming cases:

Case	Date of Oral Arguments	Issue
<i>Kiobel v. Royal Dutch Petroleum Co.</i>	Oct. 1	Federal court jurisdiction over suits for human rights violations abroad
<i>Ryan v. Gonzales;</i> <i>Tibbals v. Carter</i>	Oct. 9	Right to mental competency for death row inmates in habeas corpus proceedings
<i>Fisher v. University of Texas at Austin</i>	Oct. 10	Constitutionality of University of Texas' use of race in undergraduate admissions
<i>Clapper v. Amnesty International USA</i>	Oct. 29	Standing for plaintiffs challenging global terrorism wiretapping program
<i>Florida v. Jardines</i>	Oct. 31	Use of drug-sniffing dog at front door of house to justify search
<i>Florida v. Harris</i>	Oct. 31	Use of drug-sniffing dogs' "alerts" for probable cause for vehicle search
<i>Comcast v. Behrend</i>	Nov. 5	Evidence required for availability of class-wide damages to certify class action
<i>Amgen Inc. v. Connecticut Retirement Plans and Trust Funds</i>	Nov. 5	Evidence required to certify securities fraud class action based on "fraud-on-the-market" theory
<i>Vance v. Ball State University</i>	Nov. 26	Supervisory liability in hostile work environment suits
<i>Decker v. Northwest Environmental Defense Center;</i> <i>Georgia-Pacific West v. Northwest Environmental Defense Center</i>	Dec. 3	Environmental Protection Agency jurisdiction over channeled runoff from forest logging roads

### Major cases awaiting the justices' decisions whether to grant review:

Case	Issue
<i>National Organization for Marriage, Inc. v. McKee</i>	Constitutionality of campaign finance regulations on nonprofit organizations participating in ballot measure campaigns
<i>Mount Holly v. Mt. Holly Gardens Citizens in Action</i>	Liability under Fair Housing Act for unintentional ("disparate impact") discrimination
<i>Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill;</i> <i>Department of Health and Human Services v. Massachusetts;</i> <i>Office of Personnel Management v. Golinski;</i> <i>Windsor v. United States</i>	Constitutionality of section 3 of federal Defense of Marriage Act (DOMA)
<i>Nix v. Holder;</i> <i>Shelby County v. Holder</i>	Constitutionality of 2006 reauthorization of section 5 of federal Voting Rights Act (preclearance provision)
<i>Hollingsworth v. Perry</i>	Constitutionality of California's Proposition 8 defining marriage as union between a man and a woman.
<i>Maryland v. King</i>	Constitutionality of state law allowing collection of DNA samples from arrestees

Compiled by Rob Silverblatt, Niccolo Barber



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legal position. In the most dramatic instance, the court in the *Citizens United* decision in January 2010 struck down a major provision of a federal campaign finance law defended by the then solicitor general, Kagan. The ruling opened the door to unlimited campaign spending by corporations and unions. Six days afterward, Obama criticized the decision in his State of the Union speech, with six of the justices seated below him in the House chamber. Obama said the ruling would open the door to unlimited political spending by foreign corporations. In the television coverage, Justice Samuel A. Alito Jr. could be seen at that point shaking his head and mouthing the words “not true.”<sup>11</sup>

*Citizens United* is one in a series of Roberts Court decisions striking down or narrowing campaign finance laws. The rulings — with Republican appointees Roberts, Scalia, Kennedy, Thomas and Alito in the majority — are widely seen as favoring Republicans to Democrats’ disadvantage. *Citizens United* “ensures that corporations can give unlimited amounts of money,” says Alliance for Justice president Aron. The dissenters in the 5-4 ruling included three Democratic appointees — Ruth Bader Ginsburg, Stephen G. Breyer and Sotomayor — and the liberal Republican-appointed justice, John Paul Stevens. Kagan was nominated to succeed the retiring Stevens four months later.

Case Western’s Adler is one of many experts who defend the campaign finance decisions at the same time that they minimize their impact. “A lot of people overstate the implications,” Adler says. He goes on to deny any partisan motivation on the justices’ part. “There are easier ways to explain the pattern of the court’s decisions that don’t require impugning motivations or suggesting anything other than fealty to their judicial oaths,” he says.

Others on the political right agree. “It’s not being political to say that different theories of constitutional interpretation correlate to the party of the president who appoints the justices,” says Ilya Shapiro, a senior fellow in constitutional studies at the libertarian Cato Institute and editor in chief of *Cato Supreme Court Review*. Levey with the Committee for Justice also maintains that the criticism is unfair because the same groups that praise other rights-expanding decisions criticize rulings in the opposite direction. “When conservatives try to rein that in, it’s political,” Levey says. “I think it’s a very, very one-sided term.”

Some critics of the Roberts Court also reject the description of the court as political. “I’m very hesitant to assume that the court acts out of partisan political motives,” says Steven Shapiro, national legal director of the American Civil Liberties Union (ACLU). “The majority is conservative, and that ideology more often lines up with Republicans than with Democrats. But I don’t think of the court as overtly political in the way others might.”

Chemerinsky of UC-Irvine echoes that view. “The court’s not political at all in the sense of lobbying, trading votes or responding to pressure,” he says. He adds that the court has always been “ideological,” dating to its earliest days. But he says the Roberts Court differs from those of previous years in one respect: “The ideology [of the justices] exactly corresponds to the political party of the president who appointed them.”

In fact, until recently presidents of both parties have appointed ideologically diverse justices to the court. Republican Dwight D. Eisenhower appointed liberal justices Earl Warren and William J. Brennan Jr. as well as the moderate conservatives John Marshall Harlan and Potter Stewart. Democrat John F. Kennedy named Byron R. White, who took conservative positions on many issues, as well as the solidly liberal Arthur J. Goldberg.

For his part, however, Scalia, a Reagan appointee, finds actions by today’s court completely unsurprising. “I don’t think the court is political at all,” he said on the “Fox News Sunday” broadcast. The current alignment, he continued, “doesn’t show they are voting politics. It shows that they had been selected because of their judicial philosophy.”

“The Republicans have been looking for, you know, originalist and textualist and restrained judges for 50 years. And the Democrats have been looking for the opposite, for people who believe in *Roe v. Wade*. Why should it be a surprise that after, you know, assiduously trying to get people with these philosophies, they end up with [these] philosophies?”<sup>12</sup>

### ***Is the Roberts Court biased in favor of business interests?***

Business groups cheered when the Supreme Court blocked a major sex-discrimination suit against Walmart later that month. But when the term ended in late June, the U.S. Chamber of Commerce counted up only 12 wins in the 21 cases in which it participated. Robin Conrad, executive director of the National Chamber Litigation Center, said the middling record disproved what she called “the silly myth” of a pro-business Supreme Court.

A year later, the Chamber had a better record: eight wins and no outright defeats. Neil Weare, senior counsel of the consumer-oriented Constitutional Accountability Center, said the record demonstrated “the roaring success” that the Chamber has enjoyed throughout the Roberts Court period: 60 wins out of 88 cases, according to the center’s count. But Conrad was still poor-mouthing the record. She stressed that the justices had skirted rulings on some of the business group’s issues.<sup>13</sup>

Liberal court watchers agree in labeling the Roberts Court pro-business. “This is the most pro-business court since the 1930s,” says Chemerinsky, referring to the court that struck down

several major laws enacted as part of President Franklin D. Roosevelt's New Deal program. In its compilation, the Constitutional Accountability Center says the Chamber's 68 percent success rate with the Roberts Court is higher than its win-loss records in the final years of either the Burger Court (43 percent) or Rehnquist Court (56 percent).

The Roberts Court "has been a friend to big business," says the ACLU's Shapiro. "The court is sympathetic to the anti-regulatory claims that business brings to the court."

Conservative court watchers are unconvinced. "I think the court is pretty balanced on this," says Levy with the Committee on Justice. "For the crowd that sees the court's job as standing up for the little guy, the court is failing. That's not what I see as the court's role."

Adler acknowledges that the court has taken up somewhat more business-related cases than in the past. Roberts was a successful Supreme Court advocate with a big corporate law firm in Washington for more than a

decade before being appointed to the federal appeals court in 2003, and he cheered business groups by hinting in his confirmation hearing that he favored the court's increasing the number of cases it agreed to decide. But Adler thinks business groups' win-loss record is mixed. "Business has gotten very little from this court," Adler says.

The Chamber essentially sat out the past term's two highest-profile cases. It took no position on Arizona's immigration law and argued in the health care

case only for striking down the entire law if any parts were ruled invalid. The eight victories came in non-headline cases, but several reflected general themes seen in past Roberts Court rulings.

In two separate rulings, for example, the court favored business interests by invoking the federal preemption doctrine, which blocks states from overriding or interfering with federal regulatory schemes. One decision struck down a California law regulating slaughterhouses as conflicting with federal law; the other barred asbestos-exposure

with other rulings limiting securities litigation, including a 5-3 decision in 2008 that made it harder to sue a company's suppliers or customers for helping it to perpetrate securities fraud.

Employers have fared well in many Roberts Court decisions, including a 5-4 ruling this year that spared drug companies from paying overtime to their sales representatives. Earlier, the court in 2009 had raised the burden of proof for plaintiffs in federal age discrimination suits. And in 2007 the court in the so-called *Ledbetter* case had made

it harder for workers to obtain back pay for long-standing equal pay violations. Those two decisions also came on 5-4 votes. Congress effectively overruled the *Ledbetter* decision in the first weeks of Obama's administration.<sup>14</sup>

Business interests also won an important criminal law decision this year with a 6-3 ruling calling for juries, not judges, to make any factual findings needed to raise criminal fines. The ruling, which set aside an \$18 million fine for a federal environmental violation, follows a line of other decisions generally strengthening juries' fact-finding roles in criminal cases.

Among the various pro-business rulings, defeats have come mostly in lesser cases. The most significant setback came in 2007 when Kennedy joined the liberal bloc in backing the Environmental Protection Agency's power to regulate so-called greenhouse gases.

Adler acknowledges the court leans against plaintiffs' interests in civil litigation. "The court is less willing to rubber stamp or green light new, creative plaintiffs' theories," he says. But he says the court has not issued any broad



Getty Images/Chip Somodevilla

*Lily Ledbetter, a supervisor at a Goodyear tire plant in Gadsden, Ala., sued the firm for paying her less than her male counterparts. In 2006 the Supreme Court rejected her claim, making it harder for workers to obtain back pay for long-standing equal-pay violations. The court's 5-4 decision — one of many Roberts Court rulings seen as pro-business — was effectively overruled by Congress in the first weeks of the Obama administration.*

suits in state courts against locomotive manufacturers because of a 1915 federal law. The court's record in previous preemption cases is mixed, but business won several of the more important, including a 5-4 decision in 2011 blocking state court product liability suits against generic drug manufacturers.

The court this year made it somewhat harder for shareholders to sue corporate insiders for profits improperly made on stock trades shortly after new stock offerings. The ruling was in line

ruling limiting punitive damages, a major issue for business groups. “This is not a court that is altering the law in a pro-business direction,” he says. “It’s much more a status-quo court on business issues than anything else.”

**Has the Roberts Court engaged in judicial activism?**

Early in the days of federal antitrust law, the Supreme Court issued a decision in 1911 that flatly prohibited a manufacturer from dictating the price that retailers could set for its products. The per se rule against “resale price maintenance” stood for nearly a century, untouched by Congress, until 2007 when the Roberts Court voted 5-4 to overrule it.

For the majority, Kennedy said the earlier ruling was poorly reasoned, had come under criticism from economists and others and actually hurt rather than helped competition. Writing for four liberal dissenters, Breyer argued for keeping the precedent. “I do not believe,” Breyer wrote, “that the majority has shown new or changed conditions to warrant overruling a decision of such long standing.”<sup>15</sup>

Reversals of prior rulings are one practice cited by legal experts as an example of judicial activism. Another are decisions to overturn federal, state or local laws as unconstitutional. Some legal experts also label rulings as activist if a court reaches out to decide an issue despite procedural hurdles or decides a case more broadly than necessary.

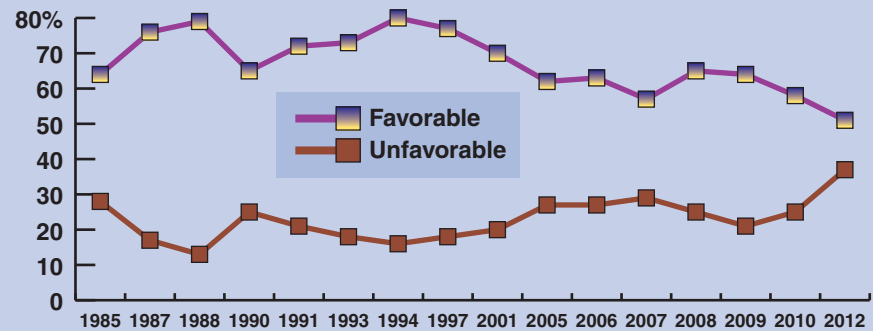
Legal experts offer these types of court actions to try to give objective substance to a politically charged term that many insist is simply a pejorative label people use for decisions with which they disagree. “I’ve long believed that judicial activism is the label we use for the decisions that we don’t like,” says UC-Irvine’s Chemerinsky. The Cato Institute’s Shapiro says activism is “an empty term without any meaning.”

As Chemerinsky notes, the Roberts Court’s decision in *Citizens United* fits

**Key Decisions Sway Views of High Court**

*The public’s view of the Supreme Court has hit peaks and valleys over the past three decades (top). Favorability ratings dipped in 2005 after the court allowed local governments to take property and transfer it to another owner for redevelopment. Ratings dipped again amid a slew of conservative decisions in 2007 involving abortion, campaign finance and school integration, and again this summer after the court upheld President Obama’s health care law. Favorability was highest in summer 1994, after the court ended its term with no “blockbuster” rulings. Overall, Americans believe the Supreme Court’s ideology is “middle of the road,” but a significant number of Republicans believe the court is liberal while many Democrats view it as conservative (chart at bottom).*

**Americans’ View of the Supreme Court, 1985-2012**



**Americans’ Perception of the Supreme Court’s Ideology, 2012**

Ideology	Total	Republicans	Democrats	Independents
Conservative	24%	9%	39%	21%
Middle of the road	41	45	39	41
Liberal	23	36	12	24
Don’t know	12	9	10	13

Source: “Obama Holds Lead; Romney Trails on Most Issues,” Pew Research Center, July 2012, [www.people-press.org/2012/07/12/obama-holds-lead-romney-trails-on-most-issues/](http://www.people-press.org/2012/07/12/obama-holds-lead-romney-trails-on-most-issues/)

the attempt at an objective definition of judicial activism. The court could have decided the case on a narrower ground than it did; in fact, a recent account by legal journalist Jeffrey Toobin of CNN and *The New Yorker* says Roberts fa-

vored a narrow ruling but went along with a broader decision favored by the other four conservatives. The decision invalidated a major provision of the Bipartisan Campaign Reform Act, enacted only seven years earlier, and had to



overrule two recent Supreme Court precedents to do so.<sup>16</sup>

The *Citizens United* decision is exhibit No. 1 for Roberts Court critics to use in describing the court as activist. In a critical law review article, Geoffrey Stone, a prominent liberal law professor at the University of Chicago, says the decision represents “an aggressively activist approach.”<sup>17</sup> Chemerinsky points to two other high-profile rulings, in 2008 and 2010, that recognized a personal right under the Second Amendment to possess firearms for self-defense in the home. The rulings struck down handgun bans in Washington, D.C., and Chicago.<sup>18</sup>

The ACLU’s Shapiro says the activist label applies. “This is an activist court in the sense that it has shown itself willing, ready and able to give less deference to legislative enactments than a version of conservatism would otherwise apply,” he says.

Adler, the Case Western professor, insists, however, that the Roberts Court’s overall record is less, not more, activist than previous courts as measured by reversals of rulings and laws held unconstitutional. He cites statistics compiled by Supreme Court expert Lee Epstein in 2010 — at the end of the Roberts Court’s fifth term — showing fewer such decisions than the rate for the court during Rehnquist’s 19 years as chief justice.

Epstein counted eight reversals of precedents in the Roberts Court’s first five years, for an average of about one-and-a-half per year; the Rehnquist Court had 45 reversals in 19 years — more than two per year. Epstein counted 15 Roberts Court rulings declaring laws unconstitutional, or three per year; the Rehnquist Court averaged more than six per year: 120 rulings in 19 years.<sup>19</sup>

“If you’re going to label the court as activist, you can’t just look at one decision,” Adler says today. “You have to look at the overall trend. And if you look at the overall trend, it’s doing this less often than its predecessors.”

Levey with the Committee for Justice again argues that liberals use the label unfairly in criticizing the Roberts Court. “For years, liberals were viewed as the activists because they were the one who thought that the court should help the Constitution evolve,” Levey says. “I think they’ve tried to change the definition to mean not giving enough deference to the federal government. Conservatives generally favor deference, but conservatives also say it is very much the province of the court to strike down laws that are unconstitutional.”

The liberal critique is also undercut by the number of Roberts Court decisions striking down laws that liberal groups called unconstitutional. Adler cites as the strongest example the *Boumediene* decision in 2008 that guaranteed Guantánamo prisoners the right to use federal habeas corpus to challenge their detention. “*Boumediene* is the single most aggressive use of judicial review of a national security measure endorsed by both political branches that we have seen,” Adler says.<sup>20</sup>

The court also invalidated state sentencing laws when it barred life-without-parole for juvenile murders this year and outlawed the death penalty for child rape in 2008. And in a series of First Amendment decisions, the court has struck down a California law banning violent video games for minors (2011), a federal statute prohibiting depictions of animal cruelty (2010) and another federal law this year making it a crime to lie about having received military medals.

Adler also says Roberts “likes to save statutes when possible.” He notes that Roberts in 2009 helped skirt a constitutional challenge to the federal Voting Rights Act.<sup>21</sup> Roberts’ role in upholding the health care law fits that pattern, but the ACLU’s Shapiro says it is too soon to know what the ruling signifies for the future. “Whether we are entering a phase two of the Roberts Court, I don’t know the answer to that,” he says. “Only time will tell.” ■

## BACKGROUND

### Political Target

The Supreme Court was formed in 1789 with its powers undefined and no cases to hear. Through the 19th century the court gained in influence, most significantly by supporting a broad view of federal powers and its own power under Chief Justice John Marshall. The court also became the target of political attacks — notably from abolitionists over the slavery issue before the Civil War and from progressives and organized labor over social and economic reforms at the turn of the 20th century. The court’s influence increased through the century along with political attacks, which peaked in response to the mid-century explosion of judicial activism under Chief Justice Earl Warren (1953-1969).<sup>22</sup>

The Constitution listed the kinds of cases federal courts could hear but did not specify the powers they could exercise. The Supreme Court opened its first session in New York City on Feb. 1, 1790, with only three of the six justices present and nothing on the docket. Over the next decade, the court had so little stature that Chief Justice John Jay resigned in 1795 to be governor of New York and refused President John Adams’ reappointment in 1800. The post went instead to Marshall, who established the court as a powerful institution during his record 34-year tenure (1801-1835). The Marshall Court’s precedent-setting decisions established the court’s power to declare an act of Congress unconstitutional and to reverse state court decisions; other rulings supported a broad view of Congress’ powers vis-à-vis the states. Several of the rulings drew strong criticism from advocates of states’ prerogatives.

*Continued on p. 826*

# Chronology

*Supreme Court scholars use the term “natural court” to define the time period with no personnel changes on the court. The Roberts Court has had four “natural courts” so far.*

## **Rehnquist Court (1986-2006)**

*Chief Justice William H. Rehnquist leads conservative court; Sandra Day O'Connor and Anthony M. Kennedy are swing votes.*

### **2004**

Rehnquist operated on for thyroid cancer (Oct. 23).

### **2005**

Bush nominates John G. Roberts Jr. to succeed retiring O'Connor (July 19). . . . Rehnquist dies (Sept. 3). . . . Bush nominates Roberts for post (Sept. 5). . . . Senate confirms Roberts (Sept. 29).

## **Roberts 1 (2005-2006)**

*A new chief justice.*

### **2005-2006**

Roberts presides as new term opens (Oct. 3). . . . Bush nominates Samuel A. Alito Jr. for O'Connor's seat (Oct. 31). . . . Alito confirmed by Senate (Jan. 31).

## **Roberts 2 (2006-2009)**

*Alito solidifies conservative bloc.*

### **2006**

Alito provides crucial vote, after case reargued, in decision to limit exclusionary rule (June 15). . . . With Roberts recused, court rebuffs

Bush, Congress on military tribunals for Guantánamo prisoners (June 29).

### **2006-2007**

Court hardens conservative positions in 5-4 decisions on major issues: upholds federal ban on “partial birth” abortions (April 18, 2007). . . . eases rules on campaign-season issue advertising by corporations (June 25) . . . limits use of race in K-12 pupil assignments (June 28).

### **2007-2008**

Conservatives, liberals count wins in close cases: Court guarantees habeas corpus right for Guantánamo prisoners (June 12) . . . bars death penalty for child rape (June 25) . . . recognizes gun rights for self-defense in home (June 26).

### **2008-2009**

Barack Obama elected president (Nov. 4). . . . Roberts flubs oath at inauguration (Jan. 20, 2009). . . . Obama nominates Sonia Sotomayor to succeed David H. Souter (May 26). . . . Court skirts ruling on Voting Rights Act despite doubts from conservatives (June 22). . . . Sotomayor confirmed (Aug. 6).

## **Roberts 3 (2009-2010)**

*Sotomayor joins liberal bloc.*

### **2009-2010**

Court recognizes First Amendment right for corporations, unions to spend unlimited amounts on political campaigns (Jan. 21, 2010); Obama criticizes ruling in State of the Union speech (Jan. 27). . . . Obama nominates Elena Kagan to succeed John Paul Stevens (May 10). . . . Court extends gun rights ruling

to limit state, local laws (June 28). . . . Kagan confirmed (Aug. 5).

## **Roberts 4 (2010-Present)**

*Kagan seated; three women on court.*

### **2010-2011**

Court convenes with three female justices for first time in history (Oct. 4). . . . Court requires California to reduce prison overcrowding (May 23, 2011). . . . rejects major sex-discrimination suit against Walmart (June 20).

### **2011-2012**

Appeals on Obama's health care law granted (Nov. 14), argued (March 26-28, 2012). . . . Court bars life-without-parole sentences for juvenile murderers (June 25); strikes parts of Arizona immigration law but upholds provision for status checks at arrests, stops (June 25); upholds individual insurance mandate as tax, narrows penalty for states rejecting Medicaid expansion (June 28). . . . Court's approval rating falls in polls (May, July). . . . Ginsburg, Scalia squelch any talk of retirement (August).

### **2012-2013**

Court to convene on First Monday in October (Oct. 1). . . . Challenge to University of Texas-Austin affirmative action plan to be argued (Oct. 10). . . . Marriage equality, Voting Rights Act cases awaiting. Presidential, congressional elections (Nov. 6). . . . Justices end oral arguments for term (April 24). . . . Term will end in late June 2013; final decisions due.

## Use of Race Challenged in University Admissions

*Justice Kennedy could hold key to Texas decision.*

The Supreme Court is returning to the hot-button issue of affirmative action just 10 years after it issued a closely divided decision upholding the limited use of race in university admissions.

The justices will take on the issue in a case from the University of Texas (UT), which has been in and out of the courts over the past 20 years defending and refining its efforts to increase enrollment of African-American and Hispanic students at its flagship Austin campus.<sup>1</sup>

Opponents of affirmative action hope, and supporters fear, that the Supreme Court will use the UT case to narrow or possibly prohibit altogether consideration of race in university admissions. The reason: Justice Sandra Day O'Connor, who wrote the 5-4 decision upholding affirmative action in a case from the University of Michigan, has been replaced by Samuel A. Alito Jr., who has voted against race-conscious policies in several cases since joining the court in 2006.

UT tweaked its admission policies in 2004, the year after the University of Michigan case. Most of the slots in UT's incoming freshman class — about 75 percent today — are filled under a 1997 law that guarantees a seat to anyone who graduates from a Texas high school in the top 10 percent of the class. The remaining slots are filled through an admissions process, as revised in 2004, that evaluates applicants on the basis of grades and test scores as well as personal background and characteristics, including race or ethnicity.

UT's current system represents the evolution of legal developments dating from 1992, when unsuccessful white applicants challenged the admissions policies then being used. As the university now acknowledges, race was directly considered at that time and was often a controlling factor in admissions decisions.

The federal appeals court for Texas in 1996 ruled the procedures unconstitutional as a violation of equal protection. The ruling by the Fifth U.S. Circuit Court of Appeals in *Hopwood v. Texas* was the first federal court decision striking down use of racial preferences in college or university admissions. The Supreme Court declined to hear Texas' appeal after the university changed the system.<sup>2</sup>

UT says its previous admissions policy helped boost minority enrollment at the Austin campus to about 4.1 percent for African-Americans and 14.5 percent for Hispanics. After *Hopwood*, the number of African-Americans admitted for the entering class in 1997 dropped sharply by 40 percent; the number of Hispanics fell slightly, by 5 percent.

The university sought to increase recruiting of African-American

and Hispanic students, but it also urged the legislature to pass the "Top Ten Percent" law as an ostensibly race-neutral policy that could pass muster under *Hopwood*. The law — signed by then-Gov. George W. Bush — was explicitly aimed at increasing minority enrollment by admitting top students from predominantly African-American and Hispanic schools without regard to other admissions criteria.

The policy had only limited effect, the university says today. In fall 2002, African-American and Hispanic enrollment remained below the 1996 levels; in 2004, the numbers were slightly higher: 4.5 percent African-American enrollment, 16.9 percent Hispanic enrollment. The increase in Hispanic enrollment was far less than the overall increase in the state's Hispanic population.

The Supreme Court's decision in the Michigan case, *Grutter v. Bollinger* (2003), gave UT officials the opening to reintroduce some consideration of race in its admissions policies. The ruling allowed colleges and universities to use an applicant's race or ethnicity as a factor in admissions decisions as long as it was part of a "holistic" evaluation of the applicant and not tied to a specific racial or ethnic quota. The ruling explicitly recognized racial and ethnic diversity as a "compelling interest" for public colleges and universities. The four dissenters included three justices still on the court: Antonin Scalia, Anthony M. Kennedy and Clarence Thomas.<sup>3</sup>

UT contends its current policies conform precisely to the "holistic" consideration of applicants allowed by *Grutter*. Race or ethnicity is one of many personal factors, along with grades and test scores, that go into a "personal achievement index" (PAD) used for final admissions decisions. Race is, as the university describes it, "a factor of a factor of a factor of a factor." Today, in UT's incoming freshman class of 8,092 students, Hispanics account for about 18.4 percent of the class, African-Americans 4.5 percent.<sup>4</sup>

The challenge to the UT policies comes from Abigail Fisher, an unsuccessful white applicant in 2008 from the affluent Houston suburb of Sugar Land. Fisher's father is a longtime friend of Edward Blum, a UT graduate who created the Project on Fair Representation to challenge race-conscious public policies. Through the project, Blum is funding Fisher's lawsuit and also supporting pending constitutional challenges to the federal Voting Rights Act.

Fisher, who has not given interviews during the litigation, did not qualify for admission to UT under either of the available routes. With a 3.65 GPA, she ranked at the 12th percentile in her graduating class of 674 students at Stephen F. Austin High School in Sugar Land. Her "academic index" score, based on grades and test scores alone, was 3.1 — below the 3.5 level needed to qualify.

*Continued from p. 824*

The court under Chief Justice Roger Taney (1836-1864) drew political fire from a different source: abolitionists

opposed to the court's condoning of slavery. Despite the Taney Court's deference to states' rights, the court issued two controversial rulings (in 1842

and 1859) that enforced the federal Fugitive Slave Act in the face of state laws seeking to shield escaped slaves. And the court in the infamous *Dred*



And her PAI was below six — the level that might have qualified her for admission, according to the university. (The exact score is sealed.) But she contends that the use of race allowed less qualified minority applicants to be admitted to UT ahead of her.

Two lower courts rejected Fisher's suit. U.S. District Court Judge Sam Sparks ruled in August 2009 that the admissions policy satisfied the criteria in *Grutter* that it be "narrowly tailored to further a compelling government interest." A three-judge Fifth Circuit panel affirmed that decision in January 2011, but in a splintered opinion. The Supreme Court agreed to hear Fisher's appeal on Feb. 21, 2012, in time for the case to be argued early in the court's next term. By the end of August, 92 friend-of-

the-court briefs had been filed with the court: 17 on Fisher's side from conservative groups and individuals opposed to racial preferences and 73 supporting UT from national organizations such as the American Bar Association, more than a dozen *Fortune* 500 companies and a host of education and traditional civil rights groups.

The Obama administration is also supporting the university. In its brief, the government argues that the United States "has a critical interest in ensuring that educational institutions are able to provide the educational benefits of diversity." The government's involvement in the case is affecting the composition of the court that will decide it. Liberal Justice Elena Kagan has recused herself, presumably because she participated in the case as U.S. solicitor general before joining the court in 2010.

Two other friend-of-the-court briefs take no direct position on the case. In one, the Equal Employment Advisory Council, an employers group, cautions the court against any decision that would make it harder for government contractors to comply with affirmative action guidelines on hiring and promotions. In the other, UCLA law professor Richard Sander and lawyer-journalist Stuart Taylor Jr. argue, in a statistics-laden brief, that racial preferences in university admissions actually hurt the minority students the policies are intended to benefit. A group of social scientists filed an opposing brief sharply disputing



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*Abigail Fisher contends that the use of race allowed less qualified minority applicants to be admitted to the University of Texas ahead of her.*

Sanders' and Taylor's so-called "mismatch" thesis.

As a result of Kagan's recusal, the court will hear the case with eight justices. Based on their previous votes in race-related cases, liberal justices Ruth Bader Ginsburg, Stephen G. Breyer and Sonia Sotomayor are seen as likely votes to uphold UT's admissions policies, while Chief Justice John G. Roberts Jr., Scalia, Thomas and Alito are thought likely to rule for Fisher. In an earlier case that limited the use of race in pupil assignments in K-12 education, Roberts ended the main opinion in the 5-4 decision by writing, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Scalia, Thomas, and Alito joined the opinion, but not Kennedy.<sup>5</sup>

Based on that history, all eyes will be on Kennedy in the UT case. "What happens depends on psychoanalyzing Anthony Kennedy," says Louis Michael Seidman, a professor at Georgetown University Law Center in Washington. Kennedy could join the other conservatives in limiting race-conscious admissions policies. If he joins the liberal bloc, a 4-4 vote would affirm the Fifth Circuit's decision and leave UT's policies intact. The decision would be due by the end of June 2013.

— **Kenneth Jost**

<sup>1</sup> Background is drawn from legal materials in the Supreme Court case, *Fisher v. University of Texas*, 11-345, which are compiled on the websites for the organization representing the plaintiff, the Project on Fair Representation ([www.projectonfairrepresentation.org/current-litigation](http://www.projectonfairrepresentation.org/current-litigation)) and the university ([www.utexas.edu/vp/irla/Fisher-V-Texas.html](http://www.utexas.edu/vp/irla/Fisher-V-Texas.html)).

<sup>2</sup> The citation is 78 F.3d 932 (5th Cir. 1996). See Linda Greenhouse, "Justices Decline Affirmative-Action Case," *The New York Times*, July 2, 1996, p. A12.

<sup>3</sup> The citation is 539 U.S. 306 (2003). In a companion decision, the court struck down, by a 6-3 vote, the admissions policies for University of Michigan graduates because race played a greater role in decisions. *Gratz v. Bollinger*, 539 U.S. 244 (2003). For a comprehensive account of the cases, see Kenneth Jost, *Supreme Court Yearbook 2002-2003*.

<sup>4</sup> "The University of Texas at Austin Releases Preliminary Enrollment Data," Sept. 19, 2012, [www.utexas.edu/news/2012/09/19/2012-preliminary-enrollment-data/](http://www.utexas.edu/news/2012/09/19/2012-preliminary-enrollment-data/).

<sup>5</sup> The decision is *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). For a full account, see Kenneth Jost, *Supreme Court Yearbook 2006-2007*.

*Scott* decision (1857) emphatically declared slaves ineligible for citizenship and barred Congress from limiting slavery in territories or newly admit-

ted states. The future president Abraham Lincoln criticized the ruling as "erroneous" and vowed to do what he could to overrule it. The decision was

overturned after the Civil War by the 14th Amendment, which extended citizenship to "all persons born or naturalized" in the United States.

With the Civil War over, the court entered a 70-year-long conservative era marked by a generally pro-business orientation even as progressive forces and organized labor gained political influence. The court's solicitude for business can be seen in a trio of rulings in 1895 that limited the still new Sherman Antitrust Act, barred a federal income tax and authorized federal judges to block strikes. A year later, the court in the infamous decision *Plessy v. Ferguson* upheld legally enforced racial segregation in public accommodations. The court shifted somewhat in 1917 by ruling racial segregation ordinances unconstitutional, but its pro-business orientation continued — exemplified by two decisions striking down federal laws to prohibit child labor. Political opposition to the court's rulings prompted the successful drive to ratify the 16th Amendment authorizing a federal income tax and unsuccessful efforts to adopt amendments overturning the child labor decisions or limiting the Supreme Court's power to nullify congressional statutes.

The ideological storm over the court intensified in the 1930s as a conservative majority struck down several major parts of President Franklin D. Roosevelt's New Deal program. Roosevelt railed against the "nine old men" and crafted a proposal after his landslide re-election in 1936 to "pack" the court by appointing new justices for each member of the court past the age of 70. Faced with strong public opposition to Roosevelt's power grab, the Senate rejected the plan. But Roosevelt got his chance to remake the court in a more liberal image with eight appointments over the next four years. Even earlier, however, the court had moved toward a more assertive role in protecting individual rights with decisions applying provisions of the Bill of Rights to the states and reviewing some criminal law convictions for constitutional violations — most

notably, the notorious rape case against the so-called Scottsboro Boys, black youths wrongly accused in Alabama of assaulting a white girl.

The Warren Court expanded on these precursors of judicial activism with rulings that brought more sustained political attacks on the court than ever before or since. The landmark school desegregation ruling in *Brown v. Board of Education* (1954) prompted a decade of "massive resistance" in the South and opposition to what critics called "forced integration" that continues to this day. The court's rulings in the 1950s limiting anti-subversive laws prompted an unsuccessful effort in the Senate to strip the court of jurisdiction over internal-security cases. Opponents of the court's decisions in the early 1960s to bar government-sponsored prayer in public schools tried for decades to overturn them by constitutional amendment. State officials mobilized against the court's "one-man, one-vote" reapportionment rulings. And the Warren Court's so-called criminal law revolution — exemplified in the famous *Miranda* decision in 1966 establishing guidelines for police interrogation — became a major issue in Richard M. Nixon's successful presidential campaign in 1968. As president, Nixon followed through on his campaign promises by appointing four justices, including a new chief justice, Warren E. Burger, expected to steer the court to the right.

### Partisan Fights

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The Supreme Court was lastingly shifted to the right from the 1970s on thanks to appointments of conservative justices by three Republican presidents: Nixon, Ronald Reagan and George H. W. Bush. With the court's balance of power at stake, Democrats and liberal advocacy groups mounted efforts to block Senate confirmation of some of the nominees; they succeeded three times and fell only four votes

short in one other fight. In early rulings, the Burger Court broke new ground on abortion rights and the death penalty, but in later decisions both the Burger and Rehnquist courts generally staked out conservative positions on those and other issues, including affirmative action.

Partisan confirmation fights became frequent occurrences in the late 1900s. Senate Republicans had flexed their muscles in 1968 by blocking a vote on President Lyndon B. Johnson's lame-duck nomination of Justice Abe Fortas to succeed Warren as chief justice. Burger's appointment as chief justice sailed through the Senate, but Democrats defeated Nixon's two choices for the next vacancy (Clement Haynsworth and G. Harrold Carswell) before the president settled on Harry A. Blackmun. Rehnquist was confirmed in 1971, but with 26 votes cast against him; 15 years later, he won confirmation as chief justice with 33 no votes — the most ever cast against a chief justice. Two more tumultuous confirmation fights followed: the 58-42 rejection of the hard-line conservative Bork in 1987 — that seat went to Kennedy instead — and the narrow 52-48 confirmation of Clarence Thomas in 1991 after the dramatic airing of still unresolved accusations of sexual harassment.

With Warren Court holdovers still in the majority, the early Burger Court issued liberal rulings on three major issues: upholding the use of busing in school desegregation cases (1970), invalidating existing death sentences (1972) and recognizing a qualified right to abortion (1973). The court backed away from those rulings as the conservative bloc gelled. On the death penalty, the court in 1976 allowed states to adopt capital punishment if the death penalty was limited to well-defined crimes, and juries had full discretion to consider aggravating and mitigating circumstances. In later rulings, the court barred the death penalty for some offenses — notably, rape —

but it rejected the broadest attacks against capital punishment.

On reproductive rights, the 7-2 ruling in *Roe v. Wade* provoked the strongest backlash against a court decision since *Brown v. Board of Education*. Anti-abortion groups mounted efforts to overrule the decision by constitutional amendment or limit it by legislative action in Washington or in state capitals. The court sustained many of the newly enacted restrictions, typically in closely divided decisions. Most significantly, the court upheld laws prohibiting the use of Medicaid funds to pay for abortions for poor women. By the late 1980s, anti-abortion forces thought they were close to a majority of justices willing to overrule *Roe v. Wade* outright. But in 1992 the court largely reaffirmed *Roe* in a pivotal opinion jointly authored by three Republican appointees: Sandra Day O'Connor, Kennedy and David H. Souter.

On racial issues, the court began re-treating on school desegregation within a few years of the busing decision and adopted a skeptical position toward affirmative action in the first cases to reach the justices. The significant milestones included a 1974 ruling that blocked courts from combining urban and suburban school districts in desegregation orders. Four years later, in the *Bakke* decision — *Regents of the University of California v. Bakke* — the court gave only a limited green light to racial

preferences in university admissions. In later rulings, the Burger and Rehnquist courts set limits on affirmative action policies by government employers and minority preferences in government contracting. In the 1990s, the Rehnquist Court issued a series of decisions significantly limiting federal courts' role in desegregation suits. Most of the rulings were closely divided, often by 5-4 votes.

at church-affiliated schools. Those decisions culminated in a 2002 ruling upholding a broad tuition-voucher program for pupils at parochial and other private schools. Major decisions again came on 5-4 votes.

None of the Rehnquist Court's 5-4 decisions had more impact or stirred more partisan criticism than the ruling in December 2000 that effectively cinched the presidential election for George W.

Bush. The ruling in *Bush v. Gore* ended a ballot recount in Florida that Democrat Al Gore had asked for in hopes of reversing Bush's apparent edge for the state's crucial 27 electoral votes. The conservative majority said Florida courts had failed to establish consistent rules for recounting votes; the liberal dissenters said the recount should have been allowed to continue. Critics said the ruling conflicted with the majority's customary deference to state courts; supporters said the court had to step in to settle the issue. In the years since, Justice Scalia has repeatedly defended the ruling in public comments. To critics, Scalia has a blunt answer: "Get over it."<sup>23</sup>



Getty Images/Time Life Pictures/Carl Iwasaki

*The parents of these and other black children filed the suits that eventually led to the Supreme Court's 1954 Brown v. Board of Education ruling overturning public school segregation. The landmark decision prompted a decade of massive resistance in the South and opposition to what critics called "forced integration" that continues to this day.*

The Rehnquist Court staked out new conservative positions in two other major areas: federalism and church-state issues. On federalism, the court limited Congress' ability to pass laws intruding on states' prerogatives and protected states from private damage suits for violating federal laws. On church-state issues, the justices relaxed restrictions on display of religious messages in public sites and moved to allow use of public funds for pupils

## Roberts' Court?

Two presidents — the Republican Bush and the Democrat Obama — filled vacancies on the Supreme Court with like-minded justices who first fortified the court's conservative bloc and then re-energized the liberal wing. All four of the new justices — Roberts, Alito, Sotomayor and Kagan — first had to survive partisan con-



firmation fights in the Senate that emphasized the polarized atmosphere surrounding the court. Roberts and Alito made their marks in their first two terms with a burst of conservative rulings at odds with prior decisions. Over the next five terms, the conservative and liberal blocs traded victories, with Kennedy most often casting the decisive vote until Roberts played that role in the dramatic showdown over Obama's health care law.<sup>24</sup>

Bush nominated Roberts initially to succeed O'Connor as an associate justice and then picked him to succeed Rehnquist as chief justice just two days after Rehnquist died of cancer on Sept. 3, 2005. Roberts made an impressive appearance in his confirmation hearing but still drew 22 Democratic votes against his confirmation later that month. Among those voting against Roberts was Obama, then the junior senator from Illinois, who said he thought Roberts "has far more often used his formidable skills on behalf of the strong in opposition to the weak."<sup>25</sup>

O'Connor agreed to stay on until a successor was confirmed; Alito won confirmation, by a narrower 58-42 margin, in late January 2006, with both Obama and his future vice president, Joe Biden, voting no. Alito made an identifiable impact by casting decisive votes in three cases that were reargued after O'Connor's departure — pre-



*The Supreme Court under Chief Justice Roger Taney (1836-1864) drew fire from abolitionists opposed to the court's condoning of slavery. The court issued two controversial rulings, in 1842 and 1859, that enforced the federal Fugitive Slave Act in the face of state laws seeking to shield escaped slaves. And in the infamous Dred Scott decision (1857), the court emphatically declared Scott (above) and other slaves ineligible for citizenship and barred Congress from limiting slavery in territories or newly admitted states.*

sumably because the remaining eight justices were evenly divided. In one of the reargued cases, the court voted 5-4 to limit application of the exclusionary rule — the doctrine that bars the use of illegally obtained evidence in criminal trials.

The conservatives flexed their muscles more dramatically in the first full term with Roberts and Alito on the court. In rulings that either overturned or diverged from prior decisions, the court in 2007 upheld a federal ban on so-called partial-birth abortions, limited

taxpayer suits challenging government spending on church-state grounds and eased campaign finance restrictions on issue-oriented advertising. Other decisions limited punitive damages and — in the *Ledbetter* case — made it harder for employees to win back pay in job discrimination suits. The term ended with a ruling overturning a century-old antitrust doctrine and a final decision, announced by Roberts, limiting the use of race in pupil assignments in K-12 public education. Except for the punitive damages case, the rulings came on 5-4 votes with Kennedy and the other conservatives in the majority. "Conservatives got everything they could reasonably have hoped for," remarked Thomas Goldstein, a frequent Supreme Court advocate and publisher of *SCOTUSBlog*, a comprehensive compendium of court-related materials.<sup>26</sup>

Conservatives claimed many more victories over the next four terms, but they were offset by some significant liberal rulings. Among the most dramatic decisions were 5-4 rulings in 2008 and 2010 by the conservative majority that established a Second Amendment right to possess firearms in the home for self-defense. The rulings struck down handgun bans first in a case from Washington, D.C., and then in a case from Chicago that applied to state and local governments nationwide. The conservative bloc showed its distaste for campaign finance laws not only with the *Citizens United* decision but with rulings in 2008 and 2011 that struck down a federal provision and an Ari-

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zona law intended to help candidates facing high-spending, privately financed opponents. But Roberts apparently helped divert conservatives in 2009 from a clear ruling on the constitutionality of the Voting Rights Act; instead, he led an 8-1 decision favoring the challenger on a narrow ground and voicing doubts about the law's continuing validity without resolving the question.

The liberal wing won its most important victories thanks to pivotal support from Kennedy. Kennedy wrote the 5-4 decision in 2008 that guaranteed Guantánamo prisoners the right to challenge their detention in federal courts — the third rebuff to Bush's handling of suspected enemy combatants. In the same year, Kennedy wrote the ruling that barred the death penalty for child rape as a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause. Three years later, Kennedy again relied on the Eighth Amendment in a 5-4 decision requiring California to reduce severe overcrowding in its prison system.

The court opened its new term in October 2011 with the politically contentious challenges to the Affordable Care Act and the Arizona immigration law at its doorstep. The justices agreed to hear both controversial cases, setting aside three full mornings in late March for arguments in the health care case. By then, the court had cheered privacy advocates with a unanimous ruling setting some, but unspecified, limits on law enforcement use of global positioning systems (GPS) to track criminal suspects. Liberals won other significant victories, including decisions in two companion cases strengthening the right to counsel for defendants in plea bargaining. The ruling to strike down some parts of Arizona's immigration law came on June 25 as the court began its final week; on the same day Kennedy also provided the crucial vote to bar mandatory life-without-parole sentences for juvenile murderers.

The ruling on the Affordable Care Act three days later ended the term in dramatic and unexpected fashion. Summarizing an opinion that no other justice joined in toto, Roberts began by rejecting the administration's main rationale for the law's individual mandate requiring most people to have health insurance or pay a financial penalty, but he then ended by upholding the provision as a tax measure. Kennedy followed with a stern delivery of the joint dissent by four conservatives arguing that the law should be struck down in its entirety. Ginsburg concluded the session by summarizing her opinion defending both the mandate and the law's Medicaid-expansion provision, which the majority upheld but narrowed somewhat.

Obama hailed the ruling, while his Republican opponent, Mitt Romney, stressed that the court had upheld the law without endorsing it; he promised to work to repeal it if elected. For court watchers, however, the big story was the chief justice. "Roberts Straddles Ideological Divide," a *Wall Street Journal* headline declared. A *New York Times* headline said Roberts had emerged as the "court's fulcrum." To *SCOTUSBlog's* Goldstein, the decision was Roberts' "signature statement that he is not a partisan."<sup>27</sup> ■

## CURRENT SITUATION

### 'Hefty' Docket

The Supreme Court is starting a new term with a major affirmative action case set for early argument and high-profile cases on voting rights and gay marriage expected to be granted review by the end of the year.

The justices will open the term on Oct. 1 with a case testing whether fed-

eral courts can hear suits by foreign nationals against a foreign-headquartered multinational company with U.S. operations for human rights violations committed abroad. A month later, the court will hear arguments on whether human rights groups, journalists and lawyers can challenge the constitutionality of the foreign electronic surveillance program crafted by Congress and the George W. Bush administration in Bush's last full year in the White House.

Other issues already teed up for the justices include use of drug-sniffing dogs by police and rules for high-impact class action suits against corporations. In all, the court has accepted 39 cases for review during the term, including six added on Sept. 25 after an all-day conference the previous day to review appeals that had accumulated over the summer.

The court will likely add 30 to 40 more cases by early January to be argued next year and to be decided by late June, continuing the Roberts Court's output of 75 or fewer decisions per term. The docket "is sparse but not without heft," says the Cato Institute's Shapiro.<sup>28</sup>

The affirmative action case, *Fisher v. University of Texas*, revives an issue the court last dealt with in 2003, when it upheld the use of race as one of several factors in admissions at the University of Michigan School of Law. Lawyers representing unsuccessful UT applicant Fisher argue that the school's use of race goes beyond what was authorized in the Michigan decision, *Grutter v. Bollinger*; alternatively, they urge that *Grutter* be overruled. Lawyers for UT, backed by the Obama administration, defend both the admissions system and the court's prior ruling. The case has drawn more than 90 friend-of-the-court briefs: 17 on Fisher's side, 73 for the school and two others ostensibly filed on behalf of neither side. The Oct. 10 argument features prominent Washington attorney Bert Rein for Fisher and former U.S. solicitor general Gregory Garre for the university.



The human rights case, *Kiobel v. Royal Dutch Petroleum Co.*, stems from allegations by 12 Nigerian nationals now living in the United States that the multinational oil company aided Nigeria's military government in a brutal campaign in the 1990s to put down opposition to oil drilling in the country's Ogoni region. The court initially heard arguments in the case on Feb. 28 on the question whether a corporation could be sued under the federal Alien Tort Statute. But the justices asked for a second round of arguments on the broader question whether federal courts have any jurisdiction over such suits, whether against an individual or corporation. The action was an ominous sign for human rights lawyers, who have used the 220-year-old law to try to bring human rights violators to justice in U.S. courts.

The foreign intelligence surveillance case, *Clapper v. Amnesty International USA*, to be argued Oct. 29, is before the justices on the preliminary question whether opponents of the super-secret program have legal standing just to get into court with their challenge. The government keeps tight wraps on the program, which Congress authorized in 2008 to replace the warrantless terrorism surveillance the Bush administration instituted as part of its war on terrorism in 2001. The various plaintiffs say they fear their conversations with individuals or groups overseas may be subject to surveillance, but the government says they have failed to show the kind of actual injury needed to have standing for a federal court suit.

Two cases from Florida test the rules for using trained dogs to sniff for evidence of drugs. In *Florida v. Jardines*, the justices have to decide whether police can use a dog at the front door of a private house to try to detect drugs inside. In *Florida v. Harris*, the issue is what police have to show about a dog's training to use the dog's reaction — a so-called "alert" — as the evidence needed to get a search warrant. Both cases are to be argued on Oct. 31.



Getty Images/Mario Tama

*The Supreme Court's Boumediene decision in 2008 gave the court's liberal wing one of its most important victories. The 5-4 vote, with pivotal support from Justice Anthony M. Kennedy, guaranteed terrorists being held at the Guantánamo Bay prison in Cuba the right to challenge their detention in federal court.*

The class action cases both represent efforts by corporate defendants to tighten the rules for plaintiffs to get a suit certified for treatment as collective litigation. In *Amgen v. Connecticut Retirement Plans and Trust Fund*, the big biotech company argues that investors in a securities fraud suit must first prove that alleged misstatements about the safety of its products actually influenced the investors to buy or hold the company's stock. In *Comcast v. Bebrand*, the big cable company is seeking to prevent class certification of an antitrust suit over rate increases to up to 2 million subscribers. The two cases are to be argued on Nov. 5.

The gay marriage issue all but certain to be taken up by the justices is the constitutionality of the provision in the Defense of Marriage Act (DOMA), section 3, that denies federal benefits to same-sex couples even if legally married in their states. Judges in three separate cases have ruled the law unconstitutional on equal-protection grounds. Also pending is the appeal by supporters of California's Proposition 8 seeking to reinstate the ban on gay marriage that was invalidated by the federal appeals court for California on Feb. 7. Many court watchers expect the justices to defer action on the Prop. 8 case until after ruling on one or more of the DOMA challenges.

The justices are also widely expected to agree to review the constitutionality of the federal Voting Rights Act after diverting a challenge to the act in 2009. The most likely vehicle is a broad attack on the law filed in 2010 by Shelby County, Ala., contending that the formula enacted in 1965 to determine the states and local jurisdictions that have to get "preclearance" for any election law change is now out of date. The federal appeals court for the District of Columbia rejected the challenge in a 2-1 decision on May 18.

## Vanishing Issue?

O bama and Romney are campaigning on party platforms with sharply divergent views on legal issues, but the Supreme Court itself is getting virtually no attention so far out on the campaign trail.

*Continued on p. 834*



# At Issue:

## *Should the Supreme Court prohibit racial preferences in university admissions?*



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WRITTEN FOR *CQ RESEARCHER*, SEPTEMBER 2012

**t**he Supreme Court should prohibit racial preferences in university admissions because the Constitution and federal statutes say so. The Constitution says, “No State” — and that includes state universities — “. . . shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person . . . the equal protection of the laws,” and foremost in the Framers’ minds at that time (1868) was racial discrimination.

Congress said, more recently and even more clearly, that in any institution receiving federal funding (and, again, that includes the University of Texas), “No person in the United States shall, on the ground of race, color, or national origin, . . . be subjected to discrimination. . . .” Congress has also said, “All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts” without regard to race, and the Supreme Court has expressly held that this includes school admissions and tuition.

The only justification offered by universities for ignoring all this is that some academics say there are “educational benefits” to interracial campus conversations. Seriously — that’s it. Role-model and historical and societal discrimination arguments have, rightly, been rejected by the Court already.

This shaky benefit doesn’t justify ignoring federal law, nor does it outweigh the many costs of admissions discrimination:

It’s personally unfair, passes over better qualified students and sets a disturbing legal and moral precedent in allowing racial discrimination;

It creates resentment;

It stigmatizes the supposed beneficiaries in the eyes of their classmates, teachers and themselves, as well as future employers, clients and coworkers;

It mismatches African-Americans and Latinos with institutions, setting them up for failure;

It fosters a victim mentality, removes the incentive for academic excellence and encourages separatism;

It compromises the academic mission of the university and lowers the academic quality of the student body;

It creates pressure to discriminate in grading and graduation;

It breeds hypocrisy among college officials;

It obscures the real problem of why so many African-Americans and Latinos are academically uncompetitive; and

It involves states and schools in unsavory activities such as deciding which minorities will be favored and which ones (e.g., Asians) not, and how much blood is needed to establish group membership — an untenable legal regime as America becomes increasingly multiracial and multiethnic.



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WRITTEN FOR *CQ RESEARCHER*, SEPTEMBER 2012

**i**f the term “racial preferences” means equal opportunity through diversity programs, the answer is an unequivocal “no.” The Supreme Court, which will decide the *Fisher v. University of Texas at Austin* case this year, should agree if it follows its own cases.

In *Regents of the University of California v. Bakke* (1978) and *Grutter v. Bollinger* (2003), the court made clear that “student body diversity is a compelling state interest that can justify the use of race in university admissions.” The benefits that flow from racial and ethnic diversity as well as other factors, including grades and scores, study abroad, fluency in several languages, the ability to overcome personal hardship and other considerations contribute to achieving a student body that is varied, rich and intellectually challenging.

To minimize the burden on nonminority applicants, the law requires that diversity admissions programs be narrowly tailored and that the university consider race-neutral alternatives to achieve the same goal.

In *Grutter*, the court embraced a “holistic,” individualized view of the student. Use of quotas, set asides or other numerical factors was prohibited. At the University of Michigan as well as the University of Texas, nonminority students with lower grades and test scores than those of under-represented minority applicants were admitted as part of an individualized review.

The *Grutter* Court believed that including diverse perspectives improved the quality of the educational process. Student body diversity also better prepared students as professionals because it helped to remove stereotypes and promoted better understanding of individuals of different races.

According to the U.S. Census Bureau, racial and ethnic minorities constituted the majority of babies born in 2011. Some states, including Texas, have already become “majority minority.” Diversity is not only desirable, it is essential if, in the Supreme Court’s words, the “dream of one Nation, indivisible, is to be realized.”

In a recent survey 11 percent of admissions directors said they admit male applicants (presumably nonminority) with below-average credentials because women are becoming the majority of college students. Prohibiting diversity could affect the aspirations of men as well.

It would be unfortunate to close the educational gateway to the intended beneficiaries of the 14th Amendment’s Equal Protection Clause by prohibiting race and ethnicity as factors in higher education admissions. This nation’s future depends on keeping that gateway open — for everyone.

# SUPREME COURT CONTROVERSIES

Continued from p. 832

“It’s quite remarkable to me that the talk about the Supreme Court has been entirely absent from the presidential campaign as compared to past years,” says the ACLU’s Shapiro. “I have literally not heard it mentioned, not even once.”

The Democratic platform cites Obama’s appointments of “two distinguished jurists,” Sotomayor and Kagan, to the Supreme Court and promises to continue appointment of “men and women of unquestionable talent and character” to the federal bench. The Republican platform calls for appointment of “constitutionalist jurists, who will interpret the law as it was originally intended rather than make it.” It goes on to praise GOP senators for opposing Obama’s nomination of “activist judges.”<sup>29</sup>

Both party documents emphasize economic issues, but they also lay out clear differences on issues that have been and are likely to return to the court’s docket. Democrats say the party “strongly and unequivocally supports *Roe v. Wade* and a woman’s right to make decisions regarding her pregnancy”; Republicans say they oppose abortion because it “endangers the health and well-being of women.” The Democratic platform notes that the Affordable Care Act guarantees insurance coverage of contraception; the GOP platform says the law “has promoted the notion of abortion as health care.”

The Republican platform promises to protect “traditional marriage,” while the Democrats say they support “marriage equality” and “the movement to secure treatment under law for same-sex cou-

ples.” The GOP platform says a Republican administration “will fulfill its responsibility to defend all federal laws in court, including the Defense of Marriage Act.”

The Democrats say the party “will preserve Americans’ Second Amendment right to own and use firearms,” but add that the right “is subject to reasonable regulation.” The GOP platform calls the Second Amendment right “fundamental” and implicitly criticizes the District of Columbia for enacting an overly restrictive gun law after the Supreme Court rejected its handgun ban.

The parties also differ on immigration. The Democrats call for “compre-

tain that the winning candidate in November will have the opportunity to name one new justice during his presidency. Three justices — Ginsburg, Scalia and Kennedy — will reach age 80 by the end of the next president’s term in January 2017.<sup>30</sup>

Of the three, Ginsburg is the oldest at 79 and the only one to have set a target date for her retirement. Ginsburg has said several times, most recently in an interview with Reuters’ Joan Biskupic, that she wants to serve at least until she reaches 82 — the age at which her judicial hero, Louis Brandeis, retired from the Supreme Court.<sup>31</sup>

Scalia and Kennedy are both 76. Scalia batted away any talk of retirement in an interview this summer. “My wife doesn’t want me hanging around the house, I know that,” Scalia said on “Fox News Sunday.” Kennedy is not known to have addressed the subject publicly.<sup>32</sup>

Ginsburg, a two-time cancer survivor, cracked two ribs in a fall at her home in June but says she is in good health. Scalia and Kennedy are not known to have any health problems. Of the other justices, Breyer is 74, Thomas and Alito are in their early 60s, and Roberts, Sotomayor and

Kagan are in their 50s.

At least since 1970, justices have timed their retirements to coincide with a like-minded president in the White House unless forced to step down by health issues. The Democrat-appointed White and the liberal Republican appointee Blackmun retired in good health with Democrat Clinton in the White House. O’Connor stepped down after George W. Bush’s re-election. Stevens and Souter, liberals on the court despite their



Getty Images/Mark Wilson

*Anti-abortion advocates protest on Capitol Hill on July 13, 2009, before the start of Senate confirmation hearings for President Obama’s first Supreme Court nominee, Sonia Sotomayor. She was confirmed along party lines, 68-31. Sotomayor and another Obama appointee, Elena Kagan, join Clinton appointees Ruth Bader Ginsburg and Stephen Breyer to form a liberal bloc that dissents in most of the court’s 5-4 decisions.*

hensive immigration reform,” while the Republicans say Obama’s approach “has undermined the rule of law.” On another issue, Democrats say they favor campaign finance reform “by constitutional amendment if necessary,” while Republicans “oppose any restrictions or conditions that would discourage Americans from exercising their constitutional right to enter the political fray.”

Despite the limited discussion of the court so far, it is likely though not

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Republican backgrounds, waited until Obama was in the White House.

If that practice continues, Ginsburg might be considered likely to retire in 2015 if Obama is re-elected but to try to extend her tenure if Romney is president. Scalia and Kennedy could be thought of as potential retirees if Romney wins but unlikely to step down if Obama is still in the White House. ■

## OUTLOOK

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### Watershed Term?

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Every time a new justice is appointed, “it’s a different court,” Byron White famously remarked.<sup>33</sup> By that standard, John Roberts is now presiding over his fourth court in only seven years — a dizzying series of transformations after nearly 11 years with no changes in court personnel before his appointment in September 2005.

Roberts presided first over a transitional court with O’Connor in her final half-term in a swing justice’s seat and then over a court with his fellow Reagan administration alumnus Alito helping to fortify a general conservative majority. Roberts’ third and fourth courts came with the appointment of Sotomayor, as the first Hispanic justice, and Kagan’s selection to bring the number of women on the court to three for the only time in history.

Each of the new justices changed the court, just as White suggested. Roberts brought a younger face and lighter touch to the center chair than his predecessor, Rehnquist. Alito is credited with asking penetrating questions from a conservative perspective, less argumentative than those from the loquacious Scalia. Sotomayor, who grew up in a housing project in the Bronx, sometimes injects a real world perspective into oral arguments, while

Kagan, a former Harvard Law School dean, is winning praise for insightful questions from the bench and clear yet forceful writing in her opinions.

With Roberts’ surprising vote in the health care case, some court watchers question whether the new term will see the emergence of Roberts 4.1 — a court that further tempers its conservative instincts to try to lower its political profile in a politically polarized country. But the answer from many appears to be no.

“Liberals should have no illusion that Roberts is in the midst of an ideological conversion,” *Newsweek* special correspondent and former managing editor Daniel Klaidman writes. “In the coming year, the safe bet is that he will side with conservatives on affirmative action, gay marriage and voting rights.”<sup>34</sup>

Rosen, the George Washington University Law School professor and legal affairs editor for *The New Republic*, suggests that Roberts’ vote in the health care case may encourage him to harden his conservative stance on issues. “His health care votes may embolden him to join the conservatives in striking down only affirmative action and the Voting Rights Act next year, but in enforcing other limits on federal power in the future,” Rosen wrote.<sup>35</sup>

Largely in agreement, Adam Winkler, a professor at UCLA Law School, says Kennedy, not Roberts, remains the court’s most essential justice. “My own view is that things have not changed radically on the ground on who the swing justice is,” Winkler says. “It’s still Justice Kennedy.”

Still, the Cato Institute’s Shapiro contends — counter to the court’s liberal critics — that Roberts has guided the court toward “minimalist” decisions. “The court is very deliberate,” he says. “They don’t go out of their way to reach issues or pronounce sweeping opinions that aren’t called for.”

Based on that view, Shapiro is among several court watchers who predict a narrow, Texas-specific decision in the new term’s affirmative action case that will leave the precedent in the

Michigan case largely untouched. Court watchers are less certain about what the court will do with the Voting Rights Act case. The justices could decline to hear the case, leaving the law unchanged; if they accept the case, they could keep a low profile by upholding the law or crafting a narrow decision or, more perilously, expose the court to sharp political attack by invalidating the pre-clearance provision in whole or in part.

As for gay marriage, many court watchers on the left confidently predict that Kennedy will join the liberal bloc in ruling DOMA unconstitutional. But several experts from across the ideological spectrum see the Proposition 8 case as likely to be resolved narrowly or deferred in some way. With gay marriage recognized in only six states and the District of Columbia, the court is seen as nowhere near establishing a constitutional rule on the subject. “We’re not going to get a decision where the Supreme Court says the state of Mississippi has to recognize same-sex marriage,” says Georgetown law professor Louis Michael Seidman.

The court’s role will re-emerge as a national issue when the next vacancy arises. Levey with the Committee for Justice forecasts another partisan confirmation fight, no matter who is president or which party controls the Senate. “It’s now become a very acrimonious issue on both sides,” he says. “I don’t know how to get out of it.”

For Roberts, the political attention may be unwelcome, but Case Western professor Adler suggests it is inevitable. “He wanted to extricate the court from these political fights, but that’s really hard to do.” ■

### Notes

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<sup>1</sup> The case is *Fisher v. University of Texas*, 11-345. For comprehensive coverage and compilation of materials, see *SCOTUSBlog*, [www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin/?wpmp\\_switcher=desktop](http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin/?wpmp_switcher=desktop). Some additional materials on the website of the Project for Fair Representa-



tion: [www.projectonfairrepresentation.org/current-litigation/](http://www.projectonfairrepresentation.org/current-litigation/). For coverage, see Adam Liptak, “Justices Take Up Race as a Factor in College Entry,” *The New York Times*, Feb. 22, 2012, p. A1; Ralph K. M. Haurwitz, “High court to hear race case,” *The Austin American-Statesman*, Feb. 22, 2012, p. A1 (includes timeline). For background, see Peter Katel, “Affirmative Action,” *CQ Researcher*, Oct. 17, 2008, updated June 19, 2012.

<sup>2</sup> See Kenneth Jost, “Health Law Upheld in Fractured Ruling,” *CQ Researcher Blog*, June 28, 2012, [http://cqresearcherblog.blogspot.com/2012\\_06\\_01\\_archive.html](http://cqresearcherblog.blogspot.com/2012_06_01_archive.html). See also Marcia Clemmitt, “Assessing the New Health Care Law,” *CQ Researcher*, Sept. 21, 2012, pp. 789-812.

<sup>3</sup> For profiles, see Daniel Klaidman, “How Chief Justice John Roberts Will Handle Obamacare,” *The Daily Beast*, Sept. 10, 2012, [www.thedailybeast.com/newsweek/2012/09/09/how-chief-justice-john-roberts-will-handle-obamacare.html](http://www.thedailybeast.com/newsweek/2012/09/09/how-chief-justice-john-roberts-will-handle-obamacare.html); Jeffrey Rosen, “Big Chief: How to understand John Roberts,” *The New Republic*, Aug. 3, 2012, pp. 13-14.

<sup>4</sup> See Kenneth Jost, “Supreme Court Blurred Ideological Lines in Momentous Term,” *CQ Researcher Blog*, July 2, 2012, <http://cqresearcherblog.blogspot.com/2012/07/scotus-2011-12-wrap-up.html>.

<sup>5</sup> For background, see Kenneth Jost, “Immigration Conflict,” *CQ Researcher*, March 9, 2012, pp. 229-252.

<sup>6</sup> See “CQ Press Major Cases,” in Kenneth Jost, *Supreme Court Yearbook 2010-2011*; and Kenneth Jost, “Class Action Lawsuits,” *CQ Researcher*, May 13, 2011, pp. 433-456.

<sup>7</sup> Jan Crawford, “Roberts switched views to uphold health care law,” CBS News, July 1, 2012, [www.cbsnews.com/8301-3460\\_162-57464549/roberts-switched-views-to-uphold-health-care-law/](http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/).

<sup>8</sup> See Lyle Denniston, “Same-sex marriage

cases: made simple,” *SCOTUSBlog*, Sept. 13, 2012, [www.scotusblog.com/2012/09/same-sex-marriage-cases-made-simple/](http://www.scotusblog.com/2012/09/same-sex-marriage-cases-made-simple/); Kenneth Jost, “Anti-Gay Marriage Measure Struck Down,” *CQ Researcher Blog*, Feb. 7, 2012, <http://cqresearcherblog.blogspot.com/2012/02/anti-gay-marriage-measure-struck-down.html>.

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Associate Editor **Kenneth Jost** graduated from Harvard College and Georgetown University Law Center. He is the author of the *Supreme Court Yearbook* and *The Supreme Court from A to Z* (both CQ Press). He was a member of the *CQ Researcher* team that won the American Bar Association’s 2002 Silver Gavel Award. His previous reports include “Re-examining the Constitution” and “States and Federalism.” He is also author of the blog *Jost on Justice* (<http://jostonjustice.blogspot.com>). Research assistants Rob Silverblatt and Niccolo Barber contributed to this report.



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<sup>29</sup> The Democratic platform is here: [www.democrats.org/democratic-national-platform/](http://www.democrats.org/democratic-national-platform/); the Republican platform, here: [www.gop.com/news/press-releases/mc-releases-2012-republican-party-platform/](http://www.gop.com/news/press-releases/mc-releases-2012-republican-party-platform/).

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**Criminal Justice Legal Foundation**, 2131 L St., Sacramento, CA 95816; 916-446-0345; [www.cjlf.org](http://www.cjlf.org). Public interest law organization supporting a balance of rights between crime victims and the criminally accused.

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**National Association of Criminal Defense Lawyers**, 1660 L St., N.W., 12th Floor, Washington, DC 20036; 202-872-8600; [www.nacdl.org](http://www.nacdl.org). Criminal defense organization promoting a fair and proper administration of criminal justice.

**National Organization for Marriage**, 2029 K St., N.W., Suite 300, Washington, DC 20006; 1-888-894-3604; [www.nationformarriage.org](http://www.nationformarriage.org). Nonprofit political organization opposing the legalization of same-sex marriage.

**U.S. Chamber of Commerce**, 1615 H St., N.W., Washington, DC 20006; 202-659-6000; [www.uschamber.com](http://www.uschamber.com). Lobbying group representing the interests of businesses and trade associations.

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**SCOTUSBlog**, sponsored by Bloomberg Law, compiles coverage and materials on Supreme Court cases ([www.scotusblog.com](http://www.scotusblog.com)). The Legal Information Institute at Cornell University Law School is another online resource for Supreme Court materials ([www.law.cornell.edu/supct/](http://www.law.cornell.edu/supct/)).

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The Supreme Court's legitimacy would be enhanced if Americans could believe that ideology hasn't played a role in the court's deliberations over the Affordable Care Act, says a columnist.

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