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Legal Affairs

The Roberts Court and the Role of Precedent

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Conservatives are making their mark on the U.S. Supreme Court. AFP/Getty Images

Morning Edition, July 3, 2007 · For decades conservatives have yea Supreme Court.

For decades, they have been frustrated in achieving that goal, despit Republican appointees on the court. This term, though, conservative promised land. With new Chief Justice John Roberts at the helm an replacing justice Sandra Day O'Connor, the direction of the court fo transformed.

For conservatives, this term was pretty close to the best of times, an close to the worst of times. Although Roberts and Alito both promis hearings to honor precedent whenever possible, in their first full ter reversed a number of key precedents. In each case, it was by a 5-to-4

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

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

On school desegregation, the court limited the ability of school boards to adopt voluntary desegreg a factor in assigning some students to schools.

In each of these decisions, the key votes in the majority claimed to be adopting a modest and limite

"What we actually have is a pretty bold conservative agenda but it's clothed in the gentle language restraint," says Kathleen Sullivan, director of the Stanford Law Constitutional Law Center.

Or, as Stanford Professor Pam Karlan puts it, "I think, practically, the court has overruled a numbe say with a straight face, 'I didn't vote to overrule it. I simply limited the earlier decisions to its facts earlier decision.'"

The court was more polarized than at any time in recent memory, with fully one-third of the court's 5-to-4 vote, and the liberals spoke with an unusually unified voice in dissent. As Justice Stephen Bre desegregation case: "It is not often in the law that so few have so quickly changed so much."

The court's new swing justice, Anthony Kennedy, was in the majority in each of the 24 5-to4 rulings Tom Goldstein says Kennedy's influence has been significant.

"No justice has had so strong an influence on a Supreme Court term in at least 40 years," says Gold the raw number of decisions where he dissented, only twice, or the 5-4 decisions where he was neve unquestionably Justice Kennedy's term and it looks like it's Justice Kennedy's court."

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

"John Roberts presides but Kennedy pivots," says Amar.

Notre Dame Law School Professor Rick Garnett says Kennedy's role is clear. "Justice Kennedy sees mediating between these two increasingly polarized ways of understanding the constitution and se be relishing it," says Garnett.

But all is not peace and love on the conservative side of the court.

Justices Antonin Scalia and Clarence Thomas, in a number of cases, wanted to go farther than Rob campaign finance case, Scalia accused Roberts of effectively overruling the court's past decision wi judicial restraint, said Scalia, is judicial obfuscation.

"Justice Scalia is saying in his opinion that the chief justice's modesty, his unwillingness to overtu precedents is actually phony. That he's not being honest about how conservative he is," says Goldste

Sullivan says Scalia and Thomas have a very different approach from Roberts and Alito.

"It's as if Justices Scalia and Thomas would like to come in and blow things up. And Chief Justice take some of these old precedents, and, instead, they chip away at the foundations, so that they'll bl it's a very different approach."

George Mason University Professor Neomi Rao is a former law clerk for Justice Thomas. "There's amongst some of the conservatives and some of the liberals that the minimalists as it were are bei what they're doing," she says.

Ted Olson, who served as solicitor general in the first Bush administration, says Scalia is worried conservative approach while he can.

"I think he's looking into the future, who's going to be the next justice on the court and how will tha the court doesn't do away with precedents that he thinks are unacceptable and wrongly decided the bite him later on," Olson says.

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

"Part of what you're seeing may be that he finds Roberts and Alito less scary than Justices Scalia ar aren't bomb throwers, and it's possible that the Roberts strategy of incremental moves and not ack overturning precedents is appealing to Justice Kennedy," says Dorf.

What's more, says Goldstein, conservatives still win in the end. "The differences between the conse of beans. It's all about theory, in practice five justices on the right agreed on the result and were wi direction the thought it had to go," says Goldstein.

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

George Annas, chairman of the Department of Health Law, Bioethics and Human Rights at Boston until this term's abortion decision, most scholars considered the doctor-patient relationship to be p fundamental constitution sense.

"That as long as physicians were practicing for the best interests and health of their patients, with consent, and consistent with good medical practice, the government could not interfere with that re the law," says Annas.

In many cases this term, the court's majority did not rule on the merits of a case, but ruled that ind court. For example, the court, by a 5-to-4 vote, ruled that taxpayers could not challenge the preside court.

One small case that many scholars consider emblematic of the court's new formalism was a ruling had lost his right to appeal because his lawyer relied on a judge's order to file the appeal within 17 in the statute. The judge had erroneously factored in the weekend in setting the deadline. The court overruled a line of previous decisions, to say there should be no flexibility when such errors inadve

"These results strike me as simply mean, in that they enforce a kind of strict letter of the law appro benefit. This struck me at least as something out of a Dickens novel, or perhaps even Kafka," says D

That echoes what the four, liberal dissenters said in many cases, but they did not prevail.

At his confirmation hearing, Roberts said he viewed the role of a judge as that of an umpire, to call

"One of the most famous umpires in major ball history, Bill Klem, was once asked, 'Was that a bal 'You know, it's not a ball or a strike until I say it is.' So this idea of the umpire as someone who jus been kind of exploded this term," says Karlan.

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