

## **The Roberts Court: Year 1**

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The 2005 term of the U.S. Supreme Court is of extraordinary interest to court observers. For the first time in 11 years, the Court's term commenced without Chief Justice Rehnquist and ended without Associate Justice O'Connor. The departure of these two justices marked the end of one of the longest natural court periods (a period when there are no personnel changes on the court) in history. The departure of Justice O'Connor, long the ideological center of the Court, also marked a potential shift in the direction of the Court's jurisprudence.

Given this, it is hardly surprising that legal scholars have been actively assessing the just-ended term. This paper contributes to that scholarship by examining the Court's seminal 2005 term "by the numbers": by empirically analyzing what the Court actually did, rather than substantively evaluating what it should have or could have done. In doing so, I look at the number of decisions issued by the Court, the issues which those decisions involved, the ideological direction of the decisions, and the vote margins by which those decisions were issued. I also look specifically at the voting records of the new justices, Chief Justice Roberts and Associate Justice Alito, examining the ideological direction of their votes, the issue areas in which they were most active, the number of concurring and dissenting opinions they each wrote, and the justices with which they most frequently aligned themselves.

This analysis yields several surprises. First, despite the addition of two new and presumably conservative justices, the ideological direction of the Court's decisions did not change dramatically. Second, the Court was - at least for this one term - more unified than it had been in the recent past, issuing a higher percentage of unanimous decisions and a lower percentage of 5 to 4 decisions than it

did in 2004. Finally, while Justices Roberts and Alito both, as generally expected, aligned themselves most frequently with the Court's conservative justices, a careful examination of their voting records shows that these justices actually were aligned more closely with each other than with the Court's established conservatives. Justice Roberts also showed a surprisingly high rate of agreement with some of the Court's more liberal justices, although this was not the case in the term's most controversial decisions.

### **Explanation of the Data**

This paper relies on the datasets and coding methodology developed by Harold Spaeth for use in the Supreme Court Databases.<sup>1</sup> The Spaeth databases include information about all U.S. Supreme Court decisions issued from 1953 to 2004. When making comparisons between the 2005 term and earlier terms, data about the earlier terms was culled from either the Spaeth Original Supreme Court database or the Spaeth Justice-Centered database, as updated and amended for my earlier work.<sup>2</sup> I coded the Court's 2005 term myself, following Spaeth's coding methodology.<sup>3</sup> My analysis throughout this paper includes only those cases in which the Court heard oral argument and issued a formal, full

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<sup>1</sup> The Spaeth databases are available at <http://www.as.uky.edu/polisci/ulmerproject/>. The creation of the Spaeth databases was supported by the National Science Foundation.

<sup>2</sup> The Spaeth justice-centered dataset was revised and updated by me for use in *Judicial Activism on the Rehnquist Natural Court*, forthcoming Spring 2007 in CONSTITUTIONAL COMMENTARY. The Spaeth Original Supreme Court database was updated and revised for me for use in *The Rehnquist Court: A 'By the Numbers' Retrospective*, forthcoming Spring 2007 in the UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW. The revised justice-centered dataset is available at <http://www.uky.edu/Law/faculty/ringhand.html> (as "Judicial Activism Dataset"). The revised Supreme Court dataset is also available at that location (as "Rehnquist Retrospective Dataset").

<sup>3</sup> The dataset I created to analyze the 2005 term is available at <http://www.uky.edu/Law/faculty/ringhand.html> (under "current research", "2005 Data").

opinion. This includes per curium decisions and plurality decisions, but does not include memorandum opinions and decrees.<sup>4</sup>

## **I. The 2005 Term: Decisions of the Court**

### *A. The cases: issue areas, ideological direction, and majority opinion writers*

In the 2005 term, the Roberts Court heard oral argument and issued full, formal opinions in 69 cases.<sup>5</sup> The issues raised in these cases were quite similar to those addressed by the Court in its 2004 term. As shown below, the 2005 Roberts Court and the 2004 Rehnquist Court both issued most of their decisions in two issue areas, criminal procedure and economic activity. Each court also issued a significant percentage of its decisions in the civil rights and judicial power areas:<sup>6</sup>

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<sup>4</sup> I also made certain substantive changes to the Spaeth databases. I did this when my examination of the underlying cases indicated that a coding error had occurred or that the coding protocols used by Spaeth were plainly substantively inappropriate for this project. The only systemic substantive change made to the Spaeth databases involved a coding choice made by Spaeth that resulted in some cases arising under the Eleventh Amendment or the Fourteenth Amendment being coded as raising questions of state-level judicial review, even though the Court in these cases actually considered the constitutionality of a federal statute. I changed this coding to reflect that the legally relevant decision in these cases involved the constitutionality of the federal, not the state, statute. A full explanation of the issue area groupings can be found in the Original U.S. Supreme Court Judicial Database Codebook at 45-56 [http://www.as.uky.edu/polisci/ulmerproject/allcourt\\_codebook.pdf](http://www.as.uky.edu/polisci/ulmerproject/allcourt_codebook.pdf) (hereinafter, Spaeth Codebook). A full list of the coding changes made to the publicly available Spaeth databases is available at <http://www.uky.edu/Law/faculty/ringhand.html> (under current research, “Changes to Spaeth Datasets: Explanatory Document”).

<sup>5</sup> A list of these cases, with citations, vote margins, issue areas, ideological direction, and each justice’s vote is listed in the Appendix. I did not code for all of Spaeth’s variables, opting instead to code only for the variables used herein.

<sup>6</sup> A full explanation of the issue area groupings can be found in the Spaeth Codebook at 45-56. Each case is coded as involving only one issue. Following Spaeth, I have coded issue areas from a public policy, rather than a formally legal, standpoint. *See* Spaeth Codebook at 45. The “Criminal Procedure”, “Civil Rights”, “First Amendment”, and “Federal Taxation” issue areas are self-explanatory. “Due Process” cases include only non-criminal cases raising due process issues; “Economic Activity” cases include cases raising commercial and business issues, including tort actions and non-civil rights based employer/employee disputes. “Privacy” cases include abortion and sexual orientation cases; I also included the 2005 “right to die” case in this category. “Attorneys” cases include only those cases addressing the unique role of attorneys within the legal system, including fee cases. “Judicial Power” cases include questions of federal court jurisdiction or authority; “Federalism” cases include cases arising under s.5 of the 14<sup>th</sup> Amendment, 11<sup>th</sup> Amendment cases, and Commerce Clause cases.

	2004 Term	2005 Term
<b>Criminal Procedure</b>	27.0 %	29.4 %
<b>Economic Activity</b>	18.9	23.5
<b>Civil Rights</b>	16.2	13.2
<b>Judicial Power</b>	14.9	13.2
<b>1<sup>st</sup> Amendment</b>	8.1	8.8
<b>Due Process</b>	8.1	2.9
<b>Federalism</b>	4.1	2.9
<b>Miscellaneous</b>	2.7	2.9
<b>Privacy</b>	0.0	1.5
<b>Attorneys</b>	0.0	1.5

The ideological direction of the decisions issued in the two terms did vary, however. Of the 69 decisions issued by the Roberts Court in the 2005 term, 56.5 percent (39 cases) generated a conservative outcome, and 39 percent (27 cases) generated a liberal outcome.<sup>7</sup> Four percent (three cases) were ideologically uncodable.<sup>8</sup> This record is notably different than that of the Court’s 2004 term. In that year, the Court heard oral argument and issued formal opinions in 74 cases, of which only 46 percent

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<sup>7</sup> Spaeth codes decisions and opinions as ideologically “conservative” or “liberal” based on a complex coding scheme dependent in part on the issue raised in the case. A full explanation of Spaeth’s Coding protocols (followed by me here) is available in the Spaeth Original United States Supreme Court Database Codebook at 57-60 (hereinafter, Spaeth Codebook). The Spaeth Codebooks is available at <http://www.as.uky.edu/polisci/ulmerproject/>. The ideological coding generally follows expected, current political preferences: decisions in favor of an individual asserting a constitutional right are code as liberal (excepting “reverse race discrimination” cases, in which a decision in favor of the claimant is coded as conservative), as are decisions in favor of the exercise of federal government or judicial power, and in favor of unions, injured plaintiffs and debtors. Decisions favoring state’s rights, compelled arbitration, and property owners (in Takings Clause cases) are coded as conservative.

<sup>8</sup> Cases that do not fit any of Spaeth’s ideological codes are considered uncodable, as are cases with such fractured opinions that no single ideological direction can fairly be assigned to the opinion. The cases deemed ideologically uncodable here are *eBay v. MercExchange*, 126 S.Ct. 1837 (a unanimous decision involving a business practices patent); *Wachovia v. Schmidt*, 126 S.Ct. 941 (an 8 to 0 decision involving the location of a bank for purposes of diversity jurisdiction); and *League of United Latin American Citizens v. Perry*, 2006 WL 1749637 (a deeply fractured opinion involving a Texas redistricting effort that rejected a “political gerrymandering” claim while upholding a Voting Rights Act claim that one of the newly created districts depleted the voting rights of Hispanic citizens).

(34 cases) generated conservative outcomes, almost 53 percent (39 cases) generated liberal outcomes, and one was uncodable.

The Roberts Court thus appears to have generated notably more conservative opinions than did its predecessor. This is, however, somewhat misleading. While the Court in its 2005 term did issue a higher percentage of conservative cases than it did in its 2004 term, it actually was the 2004 term that was the ideological anomaly. Since the Rehnquist Court attained its final composition in 1994 (when Justice Breyer replaced Justice Blackmun), the Court has issued more conservative than liberal opinions in each term *except* the 2000 and 2004 terms. The Court’s 2004 term was, in fact, by far the Court’s most liberal term in recent history:

<b>Term</b>	<b>Conservative</b>	<b>Liberal</b>
<b>1994</b>	54 %	46 %
<b>1995</b>	51	49
<b>1996</b>	59	41
<b>1997</b>	59	41
<b>1998</b>	59	41
<b>1999</b>	51	49
<b>2000</b>	49	51
<b>2001</b>	59	41
<b>2002</b>	55	45
<b>2003</b>	52	48
<b>2004</b>	36	53
<b>2005</b>	56.5	39

As shown above, between the 1994 and 2004 terms, 53 percent of the decisions issued by the Supreme Court have been ideologically conservative. The Roberts Court’s 2005 term record of 56.5

percent conservative opinions is thus only slightly above the Rehnquist Court’s performance in recent years.<sup>9</sup>

Given that a majority of the decisions issued in the 2005 term were ideologically conservative, it is perhaps not surprising that Justices Scalia and Kennedy authored the most majority opinions that term, followed by Justice Thomas and Chief Justice Roberts himself. The number of majority opinions written by each justice, organized by the issue areas the opinions involved, is as follows:

	<b>Crim Pro</b>	<b>Civil Rights</b>	<b>1<sup>st</sup> Am</b>	<b>Due Pro</b>	<b>Priv</b>	<b>Attrny</b>	<b>Econ Act</b>	<b>Jud Pw</b>	<b>Fed</b>	<b>Misc</b>	<b>Total</b>
<b>Per Cur</b>	1	0	0	0	0	0	0	0	0	0	1
<b>Stevens</b>	1	1	0	0	0	0	4	0	1	0	7
<b>O’C</b>	0	1	0	0	0	0	1	0	0	1	3
<b>Scalia</b>	5	1	0	0	0	0	2	0	1	0	9
<b>Kennedy</b>	3	1	2	0	1	0	2	0	0	0	9
<b>Souter</b>	1	1	1	1	0	0	1	2	0	0	7
<b>Thomas</b>	3	1	0	0	0	0	2	1	1	0	8
<b>Ginsb.</b>	0	1	0	0	0	0	1	4	0	1	7
<b>Breyer</b>	2	1	1	0	0	0	2	0	0	0	6
<b>Roberts</b>	2	0	2	1	0	1	1	1	0	0	8
<b>Alito</b>	2	1	0	0	0	0	0	1	0	0	4
<b>Total</b>	20	9	6	2	1	1	17	8	3	2	69

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<sup>9</sup> The decisions of the modern Supreme Court have been fairly evenly ideologically divided: since 1953 (when Spaeth’s dataset begins) 48 percent of the Supreme Court’s formally issued opinions (excluding decrees and memorandum opinions) have been ideologically conservative and 52 percent have been ideologically liberal. Note, however, that Spaeth’s ideological coding is purely relative, meaning that an outcome is “liberal” or “conservative” only relative to the other possible outcome in the case. In other words, these terms are not keyed to any substantive political position or ideology and are thus subject to movement based on the types of cases heard by the Court and the positions taken by the parties in those cases.

Also not surprising, given his new position as the presumptive ideological center of the Roberts Court, is the fact that the opinions authored by Justice Kennedy generated an identical number of liberal and conservative outcomes:<sup>10</sup>

Majority Opinion Writer	Conservative Opinions	Liberal Opinions	Uncoded Opinions	Total
<b>Per Curiam</b>	0	1	0	1
<b>Stevens</b>	1	6	0	7
<b>Scalia</b>	7	2	0	9
<b>Kennedy</b>	4	4	1	9
<b>Souter</b>	5	2	0	7
<b>Thomas</b>	6	1	1	8
<b>Ginsburg</b>	2	4	1	7
<b>Breyer</b>	3	3	0	6
<b>Roberts</b>	6	2	0	8
<b>Alito</b>	2	2	0	4
<b>O'Connor</b>	3	0	0	3
<b>Total</b>	39	27	3	69

*b. Judicial unity: vote margins and separate opinions*

At his confirmation hearings, Chief Justice Roberts frequently expressed a desire to bring greater unity to the Supreme Court.<sup>11</sup> Consistent with this goal, the Supreme Court during his first term

<sup>10</sup> The ideologically conservative opinions authored by Justice Kennedy were *Anza v. Ideal Steel Supply*, 126 S.Ct. 1991 (2006); *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006)(holding that the First Amendment does not protect statements made by government employees in the course of their employment); *Rice v. Collins*, 126 S.Ct. 969 (2006)(upholding as race neutral a prosecutor’s preemptory strike of an African-American juror); *Randall v. Sorrell*, 126 S.Ct. 2479 (2006)(striking down as a violation of the First Amendment campaign regulations enacted by the State of Vermont). The ideologically liberal opinions he authored were *Hill v. McDonough*, 126 S.Ct. 2096 (2006)(allowing a challenge to the method of execution used in death penalty cases); *Dolan v. USPS*, 126 S.Ct. 1252 (2006)(holding that a tort claim against the U.S. Postal Office was not barred by the Federal Torts Claims Act); *Gonzales v. Oregon*, 126 S.Ct. 904 (2006)(holding that the federal Attorney General did not have statutory authority to block assisted suicides); and *House v. Bell*, 126 S.Ct. 2064 (2006)(allowing a convicted criminal to request a new hearing in light of new evidence). The uncoded opinion was the Texas redistricting case, *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594 (2006).

<sup>11</sup> See for example Chief Justice Robert’s testimony at his confirmation hearing, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091402308.html>.

has been slightly more unified than it was during Chief Justice Rehnquist’s last term. The Roberts Court in the 2005 term issued a lower percentage of 5 to 4 decisions, and a higher percentage of unanimous decisions, than did the Rehnquist Court in its 2004 term:

	<b>2004</b>	<b>2005</b>
<b>5-3</b>	5.4%	2.9%
<b>5-4</b>	21.6	15.9
<b>6-2</b>	2.7	4.3
<b>6-3</b>	12.2	11.6
<b>7-1</b>	0.0	2.9
<b>7-2</b>	14.6	8.7
<b>8-0</b>	6.8	17.4
<b>8-1</b>	6.8	2.9
<b>9-0</b>	29.7	33.3

While the political dynamics on the Supreme Court may be different than they were when Chief Justice Rehnquist first assumed leadership of the Court in 1986, Chief Justice Roberts also achieved notably greater unity in his first term than did Chief Justice Rehnquist in his:<sup>12</sup>

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<sup>12</sup> There is, however, at least one interesting similarity between the 1986 and the 2005 terms. In each of those terms, seven of the nine justices sitting were appointed by Republican presidents. In 1986, Justices Rehnquist (appointed by Nixon; elevated by Reagan), Scalia (Reagan), Blackmun (Nixon), Brennan (Eisenhower), O’Connor (Reagan), Powell (Nixon) and Stevens (Ford) were appointed by Republican presidents, while only Justices White (Kennedy) and Marshall (Johnson) were appointed by Democrats. In 2005, Chief Justice Roberts (G.W. Bush), Stevens, Scalia, Kennedy (Reagan), Thomas (G.H.W. Bush) and Alito (G.W. Bush) were appointed by Republican presidents, while only Justices Ginsburg (Clinton) and Breyer (Clinton) were appointed by Democrats. See U.S. Supreme Court webpage, <http://www.supremecourtus.gov/about/members.pdf>.

	<b>1986</b>	<b>2005</b>
<b>5-2</b>	0.7 %	0
<b>5-3</b>	1.4	2.9%
<b>5-4</b>	28.4	15.9
<b>6-2</b>	2.8	4.3
<b>6-3</b>	22.1	11.6
<b>7-0</b>	1.4	0
<b>7-1</b>	0	2.9
<b>7-2</b>	11	8.7
<b>8-0</b>	2.8	17.4
<b>8-1</b>	4.8	2.9
<b>9-0</b>	24.8	33.3

As shown above, 55 percent of the Court's 1986 opinions were issued by vote margins of 6 to 3 or closer, while only 35 percent of the 2005 opinions were. Moreover, it appears that Chief Justice Roberts, as promised in his confirmation hearings, has actively promoted this unity by voting with the majority more often than any other justice. As shown below, in the 2005 term Chief Justice Roberts voted with the majority in 57 of the 68 cases he took part in. Justice Scalia, in contrast, wrote or joined the most concurring opinions, while Justices Stevens and Breyer were the term's most frequent

dissenters. Of the justices that served the full term, Justice Stevens joined the fewest majority opinions.<sup>13</sup>

	<b>Wrote or joined Dissent</b>	<b>Wrote or joined Majority</b>	<b>Wrote or joined Concurrence</b>
<b>Stevens</b>	15	45	8
<b>Scalia</b>	6	51	11
<b>Kennedy</b>	6	54	8
<b>Souter</b>	12	53	3
<b>Thomas</b>	12	49	6
<b>Ginsburg</b>	13	49	6
<b>Breyer</b>	14	48	6
<b>Roberts</b>	4	58	4
<b>Alito</b>	3	27	3
<b>O'Connor</b>	0	18	0

As shown above, Justice Roberts also wrote or joined the fewest separate opinions of any of the justices sitting during the full 2005 term (Justice Alito did not join the Court until January 31, 2006 and thus did not serve the entire 2005 term).<sup>14</sup> Roberts signed concurring opinions in only 4 cases, and dissented in only 4 more. This gives him a dissent rate of only 6 percent, the lowest rate of any of the justices. This also is significantly lower than Justice Rehnquist's dissent rate in his first term as Chief Justice: in 1986, Justice Rehnquist dissented over 23 percent of time. In fact, among the justices sitting in the 2005 term, Justice Rehnquist's 1986 record is closest to Justice Stevens', who had a 2005 term dissent rate of 22 percent.

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<sup>13</sup> These categories are mutually exclusive, meaning that a justice joining or writing a concurring opinion is not also counted as voting with the majority in that case.

<sup>14</sup> See U.S. Supreme Court webpage, <http://www.supremecourtus.gov/about/members.pdf>.

Despite this (relatively) high level of agreement among the justices, there were distinct, clearly identifiable areas of disagreement. A closer examination of the issue areas and ideological direction of the 2005 cases, listed by the vote margin the cases were decided by, illustrates this:

		Vote in the Case								Total	
		5-3	5-4	6-2	6-3	7-1	7-2	8-0	8-1		9-0
<b>Conservative</b>	Crim Pro		3	0	2	0	2	2	1	3	13
	Civil Rights		0	1	1	0	1	1	1	0	5
	1 <sup>st</sup> Am		1	2	1	0	0	1	0	0	5
	Due Process		0	0	1	0	0	0	0	0	1
	Attorneys		0	0	0	0	0	0	0	1	1
	Econ Activity		1	0	0	1	2	1	0	2	7
	Judicial Pw		1	0	1	0	1	0	0	3	6
	Misc		0	0	0	0	0	0	0	1	1
<b>Total</b>			6	3	6	1	6	5	2	10	39

		Vote in the Case								Total	
		5-3	5-4	6-2	6-3	7-1	7-2	8-0	8-1		9-0
<b>Liberal</b>	Crim Pro	0	2		1	0		1		3	7
	Civil Rights	1	0		0	0		1		1	3
	1 <sup>st</sup> Am	0	0		0	0		1		0	1
	Due Process	1	0		0	0		0		0	1
	Privacy	0	0		1	0		0		0	1
	Econ Activity	0	0		0	1		3		4	8
	Judicial Pw	0	1		0	0		0		2	3
	Federalism	0	1		0	0		0		2	3
	<b>Total</b>	2	4		2	1		6		12	27

As shown above, the justices disagreed most frequently in criminal procedure cases. Criminal procedure cases generating conservative outcomes were the most controversial, with five of these cases decided by either a 5 to 4 or a 6 to 3 vote margin. Criminal procedure cases yielding liberal results contributed an additional three narrowly decided cases. Conservative First Amendment cases also were quite contentious, with four of those cases decided by a 6 to 3 vote margin or closer. Almost certainly not coincidentally, these two issue areas – criminal procedure (particularly habeas corpus cases) and

First Amendment (particularly election law regulation) – were two of the issue areas in which Justice O’Connor often cast a decisive vote.<sup>15</sup>

Economic Activity cases, in contrast, were the least contested, with all nine cases in that issue area decided by a 7 to 1 or higher vote margin. The Court’s federalism cases – an area that has generated numerous 5 to 4 decisions in recent years - also were surprisingly uncontroversial in the 2005 term. Of the three federalism cases decided by the Court, two were unanimously decided in favor of the federal government. A third, also favoring the federal government, was decided by a 5 to 4 vote.<sup>16</sup>

This relative unity, however, should not obscure a key point: buried within the list of 5 to 4 and 6 to 3 decisions are almost *all* of the most important decisions of the 2005 term. These decisions, including *Rumsfeld v. Hamdan*<sup>17</sup> (limiting the President’s ability to unilaterally lower procedural protections available to individuals detained in the “war on terror”); *League of United Latin American Citizens v. Perry*<sup>18</sup> (upholding in part and striking down in part the mid-decade Texas redistricting orchestrated by former House Majority Leader Tom Delay); *Rapanos v. U.S.*<sup>19</sup> (involving the ability of the federal Environmental Protection Agency to regulate certain wetlands); and *Gonzales v. Oregon*<sup>20</sup> holding that the federal Justice Department did not have statutory authority to block physician-assisted

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<sup>15</sup> See Lori A. Ringhand, *The Rehnquist Court: A “By the Numbers” Retrospective*, forthcoming in the UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW, Spring 2007.

<sup>16</sup> The two unanimous cases were *Northern Ins. V. Chatham Co.*, 126 S.Ct. 1689 (holding that a political subdivision that is not an “arm of the State” cannot claim 11<sup>th</sup> Amendment Immunity); and *U.S. v. Georgia*, 126 S.Ct. 877 (holding that Congress has power under section 5 of the 14<sup>th</sup> Amendment to abrogate state sovereign immunity as to conduct that actually violates the 14<sup>th</sup> Amendment). The case decided by a 5 to 4 margin was *Central Virginia Community College v. Katz*, 126 S.Ct. 990 (holding over the dissents of Justices Thomas, Roberts, Scalia and Kennedy that a bankruptcy trustees’ proceeding to set aside the debtors’ preferential transfers to state agencies was not barred by state sovereign immunity). Justice Alito had not yet replaced Justice O’Connor when *Katz* was decided; Justice O’Connor voted with the majority.

<sup>17</sup> 126 S.Ct. 2749 (2006).

<sup>18</sup> 126 S.Ct. 2594 (2006).

<sup>19</sup> 126 S.Ct. 2208 (2006).

<sup>20</sup> 126 S.Ct. 904 (2006).

suicides). It is thus clear that, despite Chief Justice Roberts’ success in achieving a higher *overall* degree of unity than seen in the 2004 terms, he has been unable and perhaps unwilling to bring greater unity to the Court in precisely the high-profile cases where unity arguably would be the most beneficial.

## II. Justices Roberts and Alito

### A. Ideological direction

The 2005 term is, of course, interesting not just for the decisions made by the Court as a whole, but because it provides the first opportunity to evaluate the jurisprudence of Justices Roberts and Alito. Since Justice Alito did not join the Court until January, 2006, there were only 33 decisions issued in the 2005 term in which all of the currently sitting justices participated. Within this body of cases, both Justice Roberts and Justice Alito voted for almost twice as many conservative as liberal outcomes:

	Conservative	Liberal	Uncoded
<b>Stevens</b>	10	21	2
<b>Scalia</b>	22	9	2
<b>Kennedy</b>	19	12	2
<b>Souter</b>	10	21	2
<b>Thomas</b>	21	10	2
<b>Ginsburg</b>	13	18	2
<b>Breyer</b>	11	20	2
<b>Roberts</b>	<b>20</b>	<b>11</b>	<b>2</b>
<b>Alito</b>	<b>19</b>	<b>12</b>	<b>2</b>

As shown above, both Roberts and Alito cast conservative-leaning votes in roughly 60 percent of these cases (60.6 percent and 57.5 percent, respectively). Notably, however, while both new justices cast more conservative votes than the more liberal members of the Court (Justices Stevens and Breyer cast only 10 conservative votes each), they did not cast as many conservative votes as Justices Thomas

and Scalia: Justice Scalia cast the most conservative votes (22 votes, or 66.6 percent), followed by Justice Thomas (21 votes, or 63.6 percent). Justice Alito, in fact, cast exactly the same number of liberal and conservative votes as did centrist Justice Kennedy.<sup>21</sup>

The issue areas in which Justices Roberts and Alito cast these votes are as follows:

<b>Ideological Votes by Issue Area – Justice Roberts (Alito)</b>				
	<b>Conservative</b>	<b>Liberal</b>	<b>Uncoded</b>	<b>Total</b>
<b>Crim. Pro.</b>	8 (8)	5 (5)	0	13
<b>Civil Rights</b>	2 (2)	1 (1)	1	4
<b>1<sup>st</sup> Am.</b>	2 (2)	0 (0)	0	2
<b>Due Proc.</b>	1 (1)	0 (0)	0	1
<b>Econ. Act.</b>	3 (3)	2 (2)	1	6
<b>Judicial Power</b>	4 (3)	2 (3)	0	6
<b>Federalism</b>	0 (0)	1 (1)	0	1
<b>Total</b>	20 (19)	11 (12)	2	33

As shown above, both of the new justices cast a plurality of their conservative votes in criminal procedure cases, although, because of the quantity of cases heard in this area, it also is the largest single issue area in which both of the justices cast liberal votes. The sole case in which the two justices disagreed with each other about the proper outcome was *Empire Healthchoice v. McVeigh*,<sup>22</sup> a judicial power case in which a majority comprised of Justices Ginsburg, Roberts, Stevens, Scalia and Thomas held that no federal question was presented in a case involving a complex health insurance claim. Justice Alito joined Justices Breyer, Kennedy and Souter in voting in favor of the exercise of federal jurisdiction.

<sup>21</sup> These votes were, however, not always cast in the same cases. See Appendix.

<sup>22</sup> 126 S.Ct. 2121 (2006).

### *B. Judicial alignment rates*

Despite the high rate of agreement between Justices Roberts and Alito, there were subtle differences between them, and (less subtly) between them and the other members of the Court. These differences can be captured by looking beyond majority/minority voting blocs and examining the rates at which the justices joined each other's concurring and dissenting opinions.

Again examining only the cases in which all of the currently sitting nine justices participated, the alignment rates of the justices is below. In calculating alignment rates, I opted against dividing the justices into simple majority and dissenting blocs, choosing instead to construct my analysis in a way that captures the deeper levels of agreement expressed by a justice's decision to write or join concurring and dissenting opinions. Under my methodology, each justice is counted as aligned with only one opinion per case, but that opinion can be a majority, concurrence, or dissent. For example, if Justices Roberts, Kennedy, Alito, Scalia and Thomas each join a majority opinion written by Justice Roberts, but Justice Scalia also writes a concurring opinion joined only by Justice Thomas, then Justices Scalia and Thomas will be counted as aligned with each other, but neither will be counted as aligned with Justice Roberts.<sup>23</sup> (If a justice authors an opinion him or herself, he or she always is aligned with that opinion.)<sup>24</sup>

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<sup>23</sup> In cases in which a justice joined more than one non-majority opinion, I made a subjective assessment about which secondary opinion was substantively more significant and aligned the justice with that opinion. The only case of the 33 coded for this analysis which presented a serious problem was *Day v. McDonough*, in which Justice Breyer joined the dissents of both Justice Stevens and Justice Scalia. Because Justice Stevens' dissent did not address the merits of the majority's decision (it disagreed with the decision to enter judgment in the case while a related case remained pending), I aligned Justice Breyer's vote in this case with Justice Scalia's more substantive dissent.

<sup>24</sup> This actually made some of the most fractured decisions the easiest to code. For example, in the Texas political gerrymandering case (*League of United Latin American Citizens v. Perry*) six justices authored opinions, leaving only Justices Thomas, Alito and Ginsburg to be aligned elsewhere. I ultimately opted to group the justices in that case as follows: 1) Kennedy; 2) Stevens; 3) Souter and Ginsburg; 4) Breyer; 5) Roberts and Alito; and 6) Scalia and Thomas.

Unlike tabulating agreement rates by simply dividing justices into majority and dissenting blocs, this methodology tracks the nuanced differences of opinion between the justices as evidenced in their concurring and dissenting opinions.<sup>25</sup> It is thus a far more subtle way of measuring the justices' preferences. It also, however, means that lack of alignment between justices in any particular case (for example, the lack of alignment between Justices Roberts and Scalia in the example given above) is not necessarily evidence of actual *disagreement* – it means only that there was an opinion written in the case which a given justice agreed with *more* than the opinions with which he or she is not aligned.

Using this methodology, the rates of alignment between the justices in the 2005 cases (including only those in which each of the currently sitting justices participated) was as follows:<sup>26</sup>

	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Roberts	Alito
<b>Stevens</b>	<b>33 %</b>	42 %	61 %	36 %	54.5 %	61 %	45.5 %	36 %
<b>Scalia</b>	--	51.5	45.5	76	42	45.5	70	64
<b>Kennedy</b>		--	54.5	61	48.5	48.5	70	70
<b>Souter</b>			--	45.5	70	76	58	58
<b>Thomas</b>				--	42	45.5	79	73
<b>Ginsburg</b>					--	51.5	58	45.5
<b>Breyer</b>						--	57.5	48.5
<b>Roberts</b>							--	<b>85</b>

That Justices Scalia and Stevens were aligned the least often is hardly surprising. Much more interesting is the extraordinarily high level of alignment between Justices Roberts and Alito. As noted above, there is only one case (*Empire Healthchoice v. McVeigh*) in which these two justices voted for

<sup>25</sup> Because these more nuanced levels of agreement can be culled even from unanimous cases (if, for example, a justice writes a concurring opinion), unanimous cases were not excluded from my analysis as they are often are from similar works.

<sup>26</sup> Unless a percentage falls precisely between two numbers, percentages are rounded to the nearest whole number.

different outcomes. There were only five additional cases, however, in which Justices Roberts and Alito were not perfectly aligned.<sup>27</sup>

There are several possible explanations for this: two justices nominated in quick succession by the same President and confirmed by the same Senate may reasonably be assumed to have very similar judicial ideologies; two new justices joining a well-established group of justices may find a natural affiliation with each other regardless of their ideological preferences; or both justices as new justices may have chosen to exercise a similarly cautious approach during their first months on the Court. This extremely high alignment rate may, however, indicate that Justice Roberts and Justice Alito have a unique and common jurisprudential approach, one that is distinct from that of the Court's more established conservative justices. This possibility certainly warrants attentive scrutiny in the coming years.

Also interesting is the surprisingly high rate of alignment Justice Roberts shares with Justices Ginsburg and Souter. Justice Roberts aligned himself with these two justices 58 percent of the time. He aligned himself with Justice Breyer almost as often – 57.5 percent of the time. This makes Justice Roberts' alignment rate with Clinton-appointees Ginsburg and Breyer higher than the alignment rate between those two justices themselves: Justices Ginsburg and Breyer aligned with each other in only 51.5 percent of the cases examined here. While it obviously is too soon to make informed predictions on

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<sup>27</sup> These cases are *eBay v. MercExchanges*, 126 S.Ct. 1837 (2006)(an ideologically uncoded economic activity case involving a patent dispute, in which Justice Roberts concurs with the majority opinion Justice Alito joins); *Burlington No. v. White*, 126 S.Ct. 2405 (2006) (a liberal civil rights case involving employment discrimination in which Justice Alito concurs with the majority opinion Justice Roberts joins); *Dixon v. US*, 125 S.Ct. 2437 (2006)(a conservative criminal procedure case in which Justice Alito concurs with the majority opinion Justice Roberts joins); *Rapanos v. U.S.*, 126 S.Ct. 2208 (2006)(a conservative economic activity case involving regulation of certain wetlands by the federal Environmental Protection Agency in which Justice Roberts concurs with the majority opinion Justice Alito joins); and *Randall v. Sorrell*, 126 S.Ct. 2479 (2006)(a conservative First Amendment case striking down Vermont's campaign finance regulations in which Justice Alito concurs with a majority opinion which Justice Roberts joins).

this point, these alignment rates raise the intriguing possibility that Justice Roberts may be willing to cross ideological lines – at least in low profile cases - and work with the Court’s more liberal justices to create a “minimalist majority” that counters the much more “maximalist” jurisprudence of Justices Scalia and Thomas.

### **Conclusion**

This “by the numbers” examination of the 2005 term reveals several interesting things. First, while the Roberts Court issued many more conservative opinions than did the Rehnquist Court in the 2004 term, it was the 2004 term, not the 2005 term, that was inconsistent with the Court’s recent ideological record. Thus, it appears that the addition of (presumably) conservative Justices Roberts and Alito has not – or not yet – dramatically altered the ideological direction of the Court. This may provide some reassurance to those who feared that Justice Roberts and Alito would move the Court sharply rightward. Second, it appears that Chief Justice Roberts has, at least partially, accomplished his stated goal of bringing more unity to the Court. The Roberts Court issued fewer closely divided decisions in the 2005 term than the Rehnquist Court had in 2004. Although this unity broke down in the Court’s more important cases, Chief Justice Roberts himself contributed to the relative harmony by writing notably fewer concurring or dissenting opinions than the other justices. Moreover, Chief Justice Roberts’ apparent reluctance to write concurring or dissenting opinions, and the relatively high rates of alignment between himself and the Court’s more liberal justices resulting from that reluctance, may indicate a willingness of the new Chief Justice to at least sign on to the type of narrow, minimalist opinions that can garner broader support on the Court. Finally, the extremely high alignment rate of the Court’s two newest justices shows that these justices may have more in common with each other than

with the other conservatives on the Court, an intriguing possibility that warrants ongoing attention as these Justices continue to serve together in coming years.

## Appendix

Citation	vote	dir	value	Stevens	Scalia	Ken	Souter	Thomas	Ginsbur	Breyer	Roberts	Alito	OC
126 S.Ct. 1675	54	liberal	judicial pw	dissent	dissent	majority	majority	dissent	majority	dissent	majority	majority	.
126 S.Ct. 1689	90	liberal	federalism	majority	majority	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 1752	90	liberal	econ activity	majority	majority	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 1735	90	liberal	judicial pw	concur	majority	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 1727	90	liberal	crim pro	majority	majority	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 1854	90	con	judicial pw	majority	majority	majority	majority	majority	concur	majority	majority	majority	.
126 S.Ct. 1869	90	con	econ activity	majority	majority	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 1843	90	liberal	econ activity	majority	majority	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 1837	90	n/a	econ activity	concur	concur	concur	concur	majority	concur	concur	concur	majority	.
126 S.Ct. 1943	90	con	crim pro	concur	majority	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 2378	63	con	judicial pw	dissent	majority	majority	dissent	majority	dissent	concur	majority	majority	.
126 S.Ct. 2405	90	liberal	civil rights	majority	majority	majority	majority	majority	majority	majority	majority	concur	.
126 S.Ct. 2422	81	con	civil rights	dissent	majority	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 2437	72	con	crim pro	majority	concur	concur	dissent	majority	majority	dissent	majority	concur	.
126 S.Ct. 2188	63	liberal	crim pro	majority	dissent	dissent	majority	dissent	majority	majority	majority	majority	.
126 S.Ct. 2193	63	con	crim pro	majority	majority	majority	dissent	majority	majority	dissent	majority	majority	.

126 S.Ct. 2266	81	con	crim pro	majority	majority	majority	majority	dissent	majority	majority	majority	majority	.
126 S.Ct. 2208	54	con	econ activity	dissent	majority	concur	dissent	majority	dissent	dissent	concur	majority	.
126 S.Ct. 2121	54	con	judicial pw	majority	majority	dissent	dissent	majority	majority	dissent	majority	dissent	.
126 S.Ct. 2557	54	liberal	crim pro	majority	majority	dissent	majority	dissent	majority	majority	dissent	dissent	.
126 S.Ct. 2516	54	con	crim pro	dissent	concur	majority	dissent	majority	dissent	dissent	majority	majority	.
126 S.Ct. 2145	90	con	judicial pw	majority	concur	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 2159	54	con	crim pro	dissent	majority	concur	dissent	majority	dissent	dissent	majority	majority	.
126 S.Ct. 2096	90	liberal	crim pro	majority	majority	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 1976	90	liberal	crim pro	majority	majority	majority	majority	majority	majority	majority	majority	majority	.
126 S.Ct. 1991	72	con	econ activity	majority	concur	majority	majority	dissent	majority	dissent	majority	majority	.
126 S.Ct. 1951	54	con	1 <sup>st</sup> Am	dissent	majority	majority	dissent	majority	dissent	dissent	majority	majority	.
126 S.Ct. 1515	54	liberal	crim pro	concur	dissent	majority	majority	dissent	majority	concur	dissent	.	.
126 S.Ct. 1494	80	con	crim pro	concur	majority	concur	majority	concur	majority	majority	majority	.	.
126 S.Ct. 1503	80	liberal	econ activity	majority	majority	majority	majority	majority	majority	majority	majority	.	.
126 S.Ct. 1297	80	con	1 <sup>st</sup> Am	majority	majority	majority	majority	majority	majority	majority	majority	.	.
126 S.Ct. 1281	80	liberal	econ activity	majority	majority	majority	majority	majority	majority	majority	majority	.	.
126 S.Ct. 1264	80	liberal	econ activity	majority	majority	majority	majority	majority	majority	majority	majority	.	.
126 S.Ct. 1276	80	con	econ activity	majority	majority	majority	majority	majority	majority	majority	majority	.	.
126 S.Ct. 1226	80	con	crim pro	majority	concur	majority	majority	concur	majority	majority	majority	.	.

126 S.Ct. 1235	80	liberal	civil rights	majority	majority	majority	majority	majority	majority	majority	majority	majority	.	.
126 S.Ct. 1252	71	liberal	econ activity	majority	majority	majority	majority	dissent	majority	majority	majority	majority	.	.
126 S.Ct. 1246	80	con	civil rights	majority	majority	majority	majority	majority	majority	majority	majority	majority	.	.
126 S.Ct. 1204	71	con	econ activity	majority	majority	majority	majority	dissent	majority	majority	majority	majority	.	.
126 S.Ct. 1211	80	liberal	1st Am	majority	majority	majority	majority	majority	majority	majority	majority	majority	.	.
126 S.Ct. 980	72	con	judicial pw	dissent	majority	dissent	majority	majority	majority	majority	majority	majority	.	majority
126 S.Ct 990	54	liberal	federalism	majority	concur	concur	majority	concur	majority	majority	concur	concur	.	majority
126 S.Ct. 952	90	con	judicial pw	majority	majority	majority	majority	majority	majority	majority	majority	majority	.	majority
126 S.Ct. 969	90	con	crim pro	majority	majority	majority	concur	majority	majority	concur	majority	majority	.	majority
126 S.Ct. 961	90	con	misc	majority	majority	majority	majority	majority	majority	majority	majority	majority	.	majority
126 S.Ct. 941	80	n/a	misc	majority	majority	majority	majority	.	majority	majority	majority	majority	.	majority
126 S.Ct. 904	63	liberal	privacy	majority	dissent	majority	majority	dissent	majority	majority	dissent	dissent	.	majority
126 S.Ct. 884	54	con	crim pro	dissent	majority	majority	dissent	majority	dissent	dissent	majority	majority	.	majority
126 S.Ct. 846	90	con	crim pro	concur	majority	majority	majority	majority	majority	majority	majority	majority	.	majority
126 S.Ct 860	72	con	econ activity	dissent	majority	majority	majority	dissent	majority	majority	majority	majority	.	majority
126 S.Ct. 877	90	liberal	federalism	concur	majority	majority	majority	majority	concur	majority	majority	majority	.	majority
126 S.Ct. 699	90	con	econ activity	majority	concur	majority	majority	majority	majority	majority	majority	majority	.	majority
126 S.Ct. 704	90	con	attorneys	majority	majority	majority	majority	majority	majority	majority	majority	majority	.	majority
126 S.Ct. 676	72	con	civil rights	majority	majority	dissent	majority	majority	dissent	majority	majority	majority	.	majority

126 S.Ct. 606	90	liberal	judicial pw	majority	majority	majority	majority	majority	majority	majority	majority	.	majority		
126 S.Ct. 528	62	con	civil rights	concur	majority	majority	majority	majority	dissent	dissent	.	.	majority		
126 S.Ct. 510	90	liberal	econ activity	majority	majority	majority	majority	majority	majority	majority	majority	.	majority		
126 S.Ct. 514	90	liberal	econ activity	majority	majority	majority	majority	majority	majority	majority	majority	.	majority		
126 S.Ct. 1695	62	con	1st Am	majority	majority	majority	majority	majority	dissent	dissent	.	.	.		
126 S.Ct. 2064	80	liberal	crim pro	majority	concur	majority	majority	concur	majority	majority	concur	.	.		
126 S.Ct. 1708	53	liberal	due process	majority	dissent	dissent	majority	dissent	majority	majority	majority	.	.		
126 S.Ct. 2572	62	con	1st Am	dissent	concur	majority	majority	concur	dissent	majority	majority	.	.		
126 S.Ct. 2594	54	n/a	civil rights	split	split	majority	split	split	split	split	split	split	.		
126 S.Ct. 2669	63	con	crim pro	majority	majority	majority	dissent	majority	concur	dissent	majority	majority	.		
126 S.Ct. 2455	63	con	civil rights	dissent	majority	majority	dissent	majority	concur	dissent	majority	majority	.		
126 S.Ct. 2479	63	con	1st Am	dissent	concur	majority	dissent	concur	dissent	majority	majority	concur	.		
126 S.Ct. 2546	72	con	crim pro	dissent	majority	concur	majority	majority	dissent	majority	majority	majority	.		
126 S.Ct. 2709	63	con	due process	dissent	majority	majority	majority	majority	dissent	concur	majority	majority	.		
126 S.Ct. 2749	53	liberal	civil rights	majority	dissent	concur	concur	dissent	concur	concur	dissent	dissent	.		
	69			69		69		69	68		69		67	34	18