



1-1-2007

# Book Review: The Nine: Inside the Secret World of the Supreme Court

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## Recommended Citation

Charles D. Kelso & R. R. Kelso, *Book Review: The Nine: Inside the Secret World of the Supreme Court*, 39 McGeorge L. Rev. (2016).

Available at: <http://digitalcommons.mcgeorge.edu/mlr/vol39/iss4/7>

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## **The Nine: Inside the Secret World of the Supreme Court<sup>†</sup>**

*Reviewed by* Charles D. Kelso\* and R. Randall Kelso\*\*

### OVERVIEW

In 340 pages, supplemented by acknowledgments, notes, bibliography, photo credits, an index, and information about the author, Jeffrey Toobin provides individual portraits of current and recent Supreme Court Justices (Rehnquist and O'Connor), and their interactions in the context of discussions about recent cases and the appointment process.<sup>1</sup> Toobin explains in his notes that the book is “based principally on . . . interviews with the [J]ustices and more than seventy-five of their law clerks.”<sup>2</sup> He adds that it is also based on literature about the Court and study of its opinions.<sup>3</sup>

Toobin writes in well constructed sentences with a flair for strong descriptive words or phrases, such as “appalled,” “loathed,” “typing furiously,” and “robed crusader,” all of which appears on a single typical page.<sup>4</sup> Regarding the Justices, Toobin uses similar vivid phrases to describe their personality or behavior. Some descriptions are flattering; some are negative. Toobin includes favorable comments regarding Chief Justice Roberts, described as having “charm,” “deep knowledge of constitutional law,”<sup>5</sup> and “Midwestern reserve,”<sup>6</sup> with “winning manner[s]” and “broad erudition.”<sup>7</sup> Justice Stevens has “the shrewdness of age,”<sup>8</sup> “wisdom,” and “selflessness,”<sup>9</sup> and in *Bush v. Gore* displayed “dignified, clearheaded, and insistent eloquence.”<sup>10</sup> Justice Ginsburg is “[s]hy, awkward, [and] isolated,”<sup>11</sup> but always “[e]legant,”<sup>12</sup> and is a “woman with a big heart.”<sup>13</sup>

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† Doubleday, 2007. 369 pages, \$27.95.

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1. *See generally*, JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007).

2. *Id.* at 342.

3. *Id.*

4. *Id.* at 52.

5. *Id.* at 295.

6. *Id.* at 275.

7. *Id.* at 281.

8. *Id.* at 223.

9. *Id.*

10. *Id.* at 176.

11. *Id.* at 329.

12. *Id.* at 122.

Toobin does not characterize other Justices so favorably. Justice Scalia has displayed “juvenile petulance”<sup>14</sup> and is a mixture of “*élan* and erudition.”<sup>15</sup> Justice Kennedy is “sometimes prickly, often mysterious,”<sup>16</sup> “intellectually incoherent,”<sup>17</sup> and displays “naiveté and . . . grandiosity.”<sup>18</sup> Justice Souter has a “quirky personality,”<sup>19</sup> many “eccentricities,”<sup>20</sup> and “the habits of a gentleman from another century.”<sup>21</sup> Justice Thomas is the “friendliest, warmest [J]ustice, [but] full of rage.”<sup>22</sup> Also, he is “ideologically isolated, strategically marginal,” and on the bench, “embarrassingly silent.”<sup>23</sup> Justice Breyer has a “plodding, antirhetorical style,”<sup>24</sup> which results in “gnarled prose.”<sup>25</sup> Toobin describes Justice Alito the most negatively, referring to Alito as a person who is “[p]asty-faced, phlegmatic,”<sup>26</sup> and, during his confirmation hearings, was “charmless, evasive, and unpersuasive.”<sup>27</sup>

Beyond such gossipy matters, there emerges an over-all theme which embellishes the stories that Toobin builds around cases and other significant events, such as the confirmation of Justice Thomas, the retirement of Justice O’Connor, and the death of Chief Justice Rehnquist. The theme is that the Court, which appeared in 1990 to be in the hands of conservative forces that ascended during the Reagan presidency, never fully implemented the conservative agenda during the first Bush or the Clinton years. However, having in 2000 “elected” President G.W. Bush, who proceeded to nominate Chief Justice Roberts in 2005, and Justice Alito in 2006, the Court today is poised once again to carry out that agenda. Toobin says in concluding his Prologue, “That process—the counterrevolution that had been stymied for twenty years—has now begun.”<sup>28</sup>

Regarding years prior to 2006, Toobin’s theme seems pretty close to the mark and is strengthened by the chronological division of the book into four parts. In each part Toobin integrates personal information about the Justices with case analysis in ways that suggest how their personalities and interactions may have been influential in producing reasoning and/or results. At no time, however, does Toobin let his theme about case results predominate over his personal

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13. *Id.* at 72.

14. *Id.* at 318.

15. *Id.* at 319.

16. *Id.* at 129.

17. *Id.* at 327.

18. *Id.* at 53.

19. *Id.* at 243.

20. *Id.* at 43.

21. *Id.*

22. *Id.* at 99.

23. *Id.* at 103.

24. *Id.* at 135.

25. *Id.*

26. *Id.* at 332.

27. *Id.* at 315.

28. *Id.* at 8.

observations and opinions about the Justices—whether or not Toobin relates them to specific cases. The result is a book enjoyable to read as both gossipy entertainment and a source of opinions about the Court and its Justices.

This review analyzes Toobin's thesis as presented in Parts I, II, III, and IV, and then evaluates his observations.

#### AN ANALYSIS OF TOOBIN'S MAIN THEME

In Part I, covering roughly 1990-2000, Toobin notes how President Reagan changed the personnel on the Court from the liberal instrumentalists of the 1960s Warren Court to a Court with a more conservative tilt, as evidenced by the nomination and the confirmation of Justices O'Connor (1981), Scalia (1986), and Kennedy (1987), and the confirmation of sitting Justice Rehnquist as Chief Justice (1986).<sup>29</sup> Despite the confirmation of Justice Thomas in 1991, Judicial outcomes during this period demonstrate that the conservative viewpoint did not control in decisions involving abortion, federalism, and affirmative action. This is likely attributable to the confirmations of Justices Souter (1990), Ginsburg (1993), and Breyer (1994).

Toobin begins by noting the background of cases from the Warren Court era that the Reagan Justices had to deal with.<sup>30</sup> These cases, decided by a Court that, during the 1960s, contained a majority of liberal members, included *Miranda v. Arizona*<sup>31</sup> (required warning prior to interrogation), and *Griswold v. Connecticut*<sup>32</sup> (recognition of a right to privacy). And from an early Burger Court era (1973), there was *Roe v. Wade*<sup>33</sup> (invalidating bans on abortion pre-viability and requiring strict scrutiny of all abortion regulations).<sup>34</sup>

Toobin then discusses in considerable detail *Planned Parenthood v. Casey*,<sup>35</sup> a 1992 case in which Justices O'Connor, Souter, and Kennedy wrote the controlling opinion. The opinion did not overrule *Roe v. Wade*, but did substitute an "undue burden" analysis in place of "strict scrutiny" when reviewing any abortion regulation.<sup>36</sup> The story of this rare joint opinion begins with Justice Souter.<sup>37</sup> He had unsuccessfully tried to steer the question presented to the effect of stare decisis, and opposed the opinion that Justice Rehnquist wrote for the Court, permitting a total ban on abortion.<sup>38</sup> Souter went to the chambers of Justice

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29. See *id.* at 11-22.

30. See *id.* at 11-14.

31. 384 U.S. 436 (1966).

32. 381 U.S. 479 (1965).

33. 410 U.S. 113 (1973).

34. See TOOBIN, *supra* note 1, at 11-12.

35. 505 U.S. 833, 876-79 (1992).

36. See *id.* at 876-79.

37. See TOOBIN, *supra* note 1, at 48-49.

38. See *id.* at 48-52.

O'Connor, who had written a letter in the vetting process indicating that she took a middle course on the abortion issue.<sup>39</sup> At Justice Souter's initiative, they worked together on an opinion carrying forward an idea that Justice O'Connor expressed in an earlier dissent—that abortion regulations should be upheld unless they imposed an undue burden on a woman.<sup>40</sup> Both Justices wanted to strike down as undue a spousal notification requirement in the Pennsylvania law under review.<sup>41</sup> Armed with the votes of Justices Blackmun and Stevens, who wanted to reject Pennsylvania's entire set of regulations, O'Connor and Souter went to Justice Kennedy's chambers in order to secure the necessary fifth vote.<sup>42</sup>

Justice Kennedy, writes Toobin, "relished his public role and sought out opinions that would make the newspapers."<sup>43</sup> He was receptive to Souter's appeal, says Toobin, because of his "peculiar combination of traits—his earnestness and his ambition, his naiveté and his grandiosity, his reverence for the law and his regard for his own talents."<sup>44</sup> Justice Kennedy agreed with Justices O'Connor and Souter and wrote the opening section of the joint opinion. In an attempt to define the nature of the right of privacy, Justice Kennedy wrote, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>45</sup> Toobin says that this language and the joint opinion as a whole "sent Justice Scalia into a genuine rage."<sup>46</sup> Toobin asserts that Scalia "visited Kennedy at his home to try to talk him out of his position . . . [but] [n]othing worked."<sup>47</sup> So Scalia wrote an alternatively weary and angry dissent, saying that he would "respond to a few of the more outrageous arguments in today's opinion."<sup>48</sup>

Toobin describes similar stories about a number of cases decided in the 1990s wherein the Court eased legal doctrine away from earlier precedents. This included: (1) *Lamb's Chapel v. Center Moriches Union Free School District*, where the majority applied the *Lemon* test<sup>49</sup> under the Establishment Clause, which is typically used to support a strong concept of separation of church and state, but held that a public school which opened for social meetings could not exclude bible clubs;<sup>50</sup> (2) *Clinton v. Jones*, holding it was error for a trial court to

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39. See *id.* at 49-51.

40. See *id.* at 52.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 53.

45. *Id.* at 56 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

46. *Id.*

47. *Id.*

48. *Id.* at 57.

49. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) The court states "the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted) (citing *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 674 (1970)).

50. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); TOOBIN,

give the President an absolute immunity from law suits based on unofficial actions taken before being elected;<sup>51</sup> and (3) *United States v. Lopez*, holding that Congress lacks Commerce Clause power to criminalize carrying a gun in a schoolyard, although early precedents suggested broader power for Congress under the Commerce Clause.<sup>52</sup>

Part II discusses *Bush v. Gore*,<sup>53</sup> a 2000 case which Toobin says was so controversial that it changed some relationships between the Justices. In this case, he says “the [J]ustices displayed all of their worst traits—among them vanity, overconfidence, impatience, arrogance, and simple political partisanship.”<sup>54</sup> Toobin’s story begins with Justice Kennedy distributing a memo that monitored events in the Eleventh Circuit.<sup>55</sup> Toobin says this indicated that Kennedy’s “hunger for the case was palpable.”<sup>56</sup> In the chambers of the conservative Justices, says Toobin, there developed “a raw, consuming anger at the Florida Supreme Court.”<sup>57</sup> When it came time for the final opinion, writes Toobin, “[i]t all came down to Kennedy, which was as he preferred. The magnitude of the occasion suited Kennedy’s taste for self-dramatization.”<sup>58</sup> According to Toobin, Rehnquist insisted on a per curiam opinion “because the final opinion of the Court had been jointly assembled and the phrase would give a pretense of unanimity to the Court’s action.”<sup>59</sup> As for Justice Souter, writes Toobin, he believed “[h]is colleagues’ actions were so transparently, so crudely partisan that Souter thought he might not be able to serve with them anymore.”<sup>60</sup>

Part III runs from 2001 until 2005, during which time, writes Toobin, the conservative block crumbled. Justices Kennedy and O’Connor emerged as controlling centrists on the Court, with Justice O’Connor becoming the most influential member on the Court, although Kennedy sometimes joined the four more liberal Justices.<sup>61</sup> Regarding Kennedy’s “transformation,” Toobin attributes it to his greater “exposure to foreign law and foreign judges.” As a result, Justice Kennedy later referenced developments in foreign law when he wrote for the Court in *Lawrence v. Texas*, which held states could not make homosexual sodomy a crime.<sup>62</sup> Similarly, in his opinion in *Roper v. Simmons*, which held that

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*supra* note 1, at 94-96.

51. 520 U.S. 681, 704 (1997). See TOOBIN, *supra* note 1, at 116-19.

52. 514 U.S. 549, 600-02 (1995). See TOOBIN, *supra* note 1, at 99-100.

53. 531 U.S. 98 (2000).

54. TOOBIN, *supra* note 1, at 141.

55. *Id.* at 146.

56. *Id.* at 147.

57. *Id.* at 161.

58. *Id.* at 171.

59. *Id.* at 175.

60. *Id.* at 177.

61. See *id.* at 181-227.

62. See 539 U.S. 558, 578 (2003); TOOBIN, *supra* note 1, at 189-90.

the death penalty could not be administered to juvenile offenders,<sup>63</sup> Justice Kennedy observed that the “United States [was] the only country in the world that continu[ed] to give official sanction to the juvenile death penalty.”<sup>64</sup>

Another important case during this time period was *Grutter v. Bollinger*.<sup>65</sup> The question was whether the race-conscious affirmative action program of the University of Michigan Law School violated the Equal Protection Clause.<sup>66</sup> Four Justices believed Michigan had gone too far in using race to help achieve a racially diverse student body, with Justices Scalia and Thomas, in particular, supporting a “color-blind” Constitution disallowing any race-based affirmative action.<sup>67</sup> Justices Stevens, Souter, Ginsburg, and Breyer believed that some affirmative action advantage could be given to “racial minorities, either to redress prior discrimination or to foster the goal of diversity.”<sup>68</sup> That left matters up to Justice O’Connor, who decided to uphold the law school program where race was only a factor in individual consideration of each applicant’s file, as necessary to achieve the compelling interest of a racially diverse student body. She also agreed to invalidate the college program at the University of Michigan, which gave a absolute numerical boost based on race to any applicant of that race.<sup>69</sup> Since Stevens was the senior Justice in the majority, he could have assigned the *Grutter* opinion to himself but, according to Toobin, Stevens thought the majority would be better held together if Justice O’Connor wrote the opinion.<sup>70</sup>

Part IV deals first with background for the nomination and confirmation of Chief Justice Roberts and Justice Alito, including the nomination and withdrawal of Harriet Miers.<sup>71</sup> Toobin notes that conservatives with influence in the White House had been concerned about several decisions of this Court prior to those nominations, particularly *Kelo v. City of New London*, where the Court held that a public purpose satisfied the Fifth Amendment requirement that property may be taken for “public use.”<sup>72</sup> Toobin claims *Kelo*, among others, led to the one major and enduring project of the Bush administration, the transformation of the Supreme Court;<sup>73</sup> although, astute political observers would probably suggest transforming the Court was a project from the very beginning of the Bush Administration, and not driven by *Kelo* or other such cases. With the confirmations of Chief Justice Roberts and Justice Alito, Toobin writes, “[q]uickly, almost instantly by the usual stately pace of the [J]ustices, the Court

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63. See 543 U.S. 551, 575 (2005); TOOBIN, *supra* note 1, at 194-97.

64. *Roper v. Simmons*, 543 U.S. 551, 575 (2005); see TOOBIN, *supra* note 1, at 195.

65. 539 U.S. 306 (2003).

66. TOOBIN, *supra* note 1, at 210; see *Grutter*, 539 U.S. at 311.

67. *Grutter*, 539 U.S. at 378.

68. TOOBIN, *supra* note 1, at 210.

69. See *id.* at 221-22.

70. *Id.* at 223.

71. See *id.* at 257-98.

72. See 545 U.S. 469, 484 (2005); TOOBIN, *supra* note 1, at 306-07.

73. See TOOBIN, *supra* note 1, at 306-08.

in 2006 and 2007 became a dramatically more conservative institution.”<sup>74</sup> Toobin cites *Gonzales v. Carhart* as his case in point,<sup>75</sup> where the Court upheld a federal ban on “partial birth” abortion, which did not contain an exception that permitted the procedure to protect the health of the mother.<sup>76</sup> In that case Justice Kennedy was the swing vote, as he was in all twenty-four of the five to four cases decided in the 2006 term.<sup>77</sup>

#### AN EVALUATION OF TOOBIN’S OBSERVATIONS AND THESIS

Regarding Toobin’s observations of the personalities and other characteristics of the Justices, it is difficult for these reviewers to draw conclusions. One reason is that Toobin paints an overall negative portrait of Justice Kennedy that in some respects appears not fully justified. Members of the faculty at McGeorge, where Justice Kennedy has been a colleague for over twenty years, would be surprised to learn that he is “sometimes prickly, often mysterious,”<sup>78</sup> and has a peculiar combination of “naiveté and . . . grandiosity,”<sup>79</sup> and a “taste for self-dramatization.”<sup>80</sup> Those observations are far from what has personally been observed by the senior author, and two of his sons who served as law clerks to Justice Kennedy. That leaves us doubtful as to the accuracy of similar personal assessments regarding other Justices—as to whom, however, we lack a personal basis for judgment. So, rather than evaluate Toobin’s interesting observations of personal idiosyncracies among the Justices, we will concentrate on evaluating his theme that a conservative revolution is underway.

*The Nine* concludes with the accurate observation in the epilogue that the future of the Court and constitutional law depends on the persons who serve on the Court, and that, in turn, depends primarily on the people elected to the presidency and the Senate. The future of the court also depends on which Justices die or retire and what cases the bar brings to the court for its consideration.<sup>81</sup> These facts make highly uncertain Toobin’s observation in the Prologue that a counterrevolution has now begun. This counterrevolution may begin in 2009 if a Republican president is elected in 2008 and one or more of the liberal Justices leaves the Court. If Americans elect a Democratic president, the conservative revolution may stall, although the chance for a substantial liberal reorientation among a majority of Justices on the Court is not great in the near term, as the conservative Justices are relatively young.

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74. *Id.* at 324.

75. TOOBIN, *supra* note 1, at 328-29.

76. *See* 127 S. Ct. 1610, 1639 (2007).

77. Michael S. Greve, *Does the Court Mean Business?*, 26 FEDERALIST OUTLOOK, Sept. 2007, [http://www.aei.org/include/pub\\_print.asp?pubID=26834](http://www.aei.org/include/pub_print.asp?pubID=26834) (on file with the *McGeorge Law Review*).

78. TOOBIN, *supra* note 1, at 129.

79. *Id.* at 53.

80. *Id.* at 171.

81. *See id.* at 339.

In our view, the most likely short term future is more of the same. Justice Kennedy has shown himself to be a moderate who carefully studies each case and who sometimes joins with the liberal Justices, and sometimes with the conservative Justices, at least as to case outcomes, but only rarely with their reasoning. His reasoning also tends to be relatively consistent from year to year, with little unpredictability in decision making if one has competently studied his prior opinions.

Looking to the short run, one can examine whether the 2006 term evidenced the start of a counterrevolution. In most of the twenty-four cases decided by a five to four vote, where Justice Kennedy was always the decisive factor, the Court did lean toward the conservative side, but it was only a lean. The more extreme positions held by Justices Scalia and Thomas, and sometimes joined by the Chief Justice and Justice Alito, did not command a majority, nor did the liberal side score many wins.

The most significant case in 2006-07 that leaned toward the liberal side was *Massachusetts v. Environmental Protection Agency*.<sup>82</sup> Justice Stevens wrote for a five to four Court, with Justice Kennedy joining the liberals, that if Congress had provided a procedural right for any person to sue a federal agency that was not following the law, and the plaintiff was a state seeking to protect its sovereign interests in its coast line, the state was accorded a “special solicitude” in standing analysis.<sup>83</sup> It may be recalled that Justice Kennedy wrote a concurring opinion in *Lujan v. Defenders of Wildlife*, in which he said that Congress could create standing in situations not recognized by the Court if Congress “identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit.”<sup>84</sup> The dissenting views of Chief Justice Roberts, and Justices Scalia, Thomas, and Alito, who have a more limited view of standing, concluded that Massachusetts’ claimed potential injury from global warming was too speculative to satisfy the injury-in-fact requirement of Article III.<sup>85</sup>

All of the other leading cases in 2006-07 tilted to the conservative side but only to middle-ground views. For example, in *Wilkie v. Robbins*, officials of the Bureau of Land Management were accused of harassment and intimidation, but the Court dismissed the case because the plaintiff had an administrative process, and ultimately a judicial procedure, for vindicating his rights.<sup>86</sup> Thus, no *Bivens* action<sup>87</sup> was necessary. Justices Scalia and Thomas would have restricted *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* to its precise

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82. 127 S. Ct. 1438 (2007).

83. *See id.* at 1454-55.

84. 504 U.S. 555, 580 (1992).

85. *Envil. Prot. Agency*, 127 S. Ct. at 1467-68.

86. 127 S. Ct. 2588, 2604-05 (2007).

87. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The Court held that the Constitution itself creates a limited cause of action against federal officials for denial of constitutional rights. *Id.* at 397.

facts,<sup>88</sup> while Justices Stevens and Ginsburg concluded that the alternative remedies were not adequate and would have granted a *Bivens* action.<sup>89</sup> The decision of the Court was in the middle of these views.

In reviewing another standing issue, the Court held in *Hein v. Freedom From Religion Foundation, Inc.*, that taxpayers did not have standing to challenge executive branch action that possibly violated the Establishment Clause—here an executive action regarding a faith-based initiative program.<sup>90</sup> The majority distinguished *Flast v. Cohen*<sup>91</sup> as limited to granting taxpayer standing to bring an Establishment Clause challenge to congressional appropriations under the Spending Clause.<sup>92</sup> Justices Scalia and Thomas would have overruled *Flast* as inconsistent with modern standing doctrine requiring distinct and palpable injuries.<sup>93</sup> On the other hand, Justices Stevens, Ginsburg, Breyer, and Souter dissented on the ground that *Flast* supports standing for taxpayers regarding any government action possibly violating specific guarantees of the Constitution.<sup>94</sup> The decision of the Court again rejected the extremes for a narrow holding based on the facts of the case.

Moving to substantive matters, Justice Kennedy wrote for the Court that diversity is a compelling interest for affirmative action programs, but that the several school systems involved in *Parents Involved in Community Schools v. Seattle School District No. 1*, had not made clear that they were not using race as an absolute point preference, or a quota, or set-aside.<sup>95</sup> His ruling was consistent with *Grutter* decided four years earlier. Justices Scalia, Thomas, and Alito, along with Chief Justice Roberts, agreed that the affirmative action programs were invalid, but did not conclude, as Justice Kennedy did, that diversity in education is a compelling interest.<sup>96</sup> The liberals on the Court—Justices Stevens, Ginsburg, Breyer, and Souter—would have upheld the programs because they believed the schools had narrowly drawn regulations not substantially more burdensome than necessary.<sup>97</sup>

In *Gonzales v. Carhart* the Court upheld a congressional ban on partial-birth abortion without a mother's health exception.<sup>98</sup> Consistent with his dissent seven years earlier in *Stenberg v. Carhart*,<sup>99</sup> Justice Kennedy wrote an opinion for the

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88. See *Wilkie*, 127 S. Ct. at 2608.

89. See *id.* at 2608-09.

90. 127 S. Ct. 2553, 2559 (2007).

91. 392 U.S. 83 (1968). Taxpayers have standing to bring an Establishment Clause challenge against a congressional appropriation. *Id.* at 106.

92. *Hein*, 127 S. Ct. 2553, 2559 (2007).

93. *Id.* at 2574.

94. *Id.* at 2584.

95. 127 S. Ct. 2738, 2752-53 (2007).

96. *Parents Involved in Cmty. Schs.*, 127 S. Ct. at 2789.

97. See *id.* at 2829-30.

98. 127 S. Ct. 1610, 1639 (2007).

99. 530 U.S. 914 (2000).

Court which found that in view of the uncertainty among the medical profession as to whether this procedure was ever needed for health purposes, the congressional judgment on that matter should be given deference—at least in an action involving a facial challenge.<sup>100</sup> The case, as we see it, did not foreshadow a conservative revolution because it stood for a narrow principle regarding a facial challenge. Further, Justice Kennedy noted that a woman may have an “as applied” challenge by showing that the ban in her case would be a significant obstacle to her abortion choice.<sup>101</sup> It would then constitute an undue burden, would trigger strict scrutiny review, and would result in a likely invalidation of the ban as applied to her. Kennedy’s opinion was joined by Justices Scalia and Thomas, who stated that they reject the entire *Roe/Casey* view of abortion rights,<sup>102</sup> and by Justices Alito and Chief Justice Roberts. Justices Stevens, Souter, Ginsburg, and Breyer viewed the congressional ban on partial-birth abortion, with no substantial medical emergency exception, as an undue burden on abortion rights, and therefore unconstitutional.<sup>103</sup>

In *Morse v. Frederick*, the “Bong Hits for Jesus” case, the Court applied minimum rationality review to a sanction on speech on the theory that the speech occurred in a non-public forum as part of a school-sanctioned and school-supervised event, where the students had been led out of the classroom to watch the Olympic Torch Relay pass the school.<sup>104</sup> The Court indicated that the school had a legitimate interest in regulating speech that could rationally be viewed as promoting illegal drug use in violation of school policy.<sup>105</sup> Justices Stevens, Souter, and Ginsburg, dissenting, would have applied the *Tinker* substantial disruption test.<sup>106</sup> Justices Kennedy and Alito, whose votes were critical to the majority, said they would also apply *Tinker* if the speech was not connected to the curriculum and was student generated, even if the speech was in conflict with the general educational mission of the school.<sup>107</sup> So once again a middle ground carried the day.

Finally, the 2006-07 Court held in *FEC v. Wisconsin Right to Life*, that certain political ads posted within sixty days of a general election, and thus barred by a federal ban on political ads within that time, were protected by the Constitution because they were “issue ads” and not “express advocacy” for a candidate.<sup>108</sup> Under this analysis, most ads would be protected as issue ads, since

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100. *Gonzales*, 127 S. Ct. at 1638.

101. *Id.* at 1638-39.

102. *Id.* at 1639-40.

103. *Id.* at 1640-41.

104. 127 S. Ct. 2618, 2627 (2007).

105. *Id.* at 2624.

106. *Morse*, 127 S. Ct. at 2645. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that students have a right to speak on school grounds unless it would substantially disrupt the school or interfere with the rights of others).

107. See *Morse*, 127 S. Ct. at 2636-37.

108. 127 S. Ct. 2652, 2673 (2007).

Chief Justice Roberts said that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,”<sup>109</sup> and the courts “must give the benefit of any doubt to protecting rather than stifling speech.”<sup>110</sup> The court rejected a more extreme position that would have invalidated regulation of all “issue ads” or “express advocacy” ads.<sup>111</sup> In dissent, Justices Stevens, Souter, Ginsburg, and Breyer would have rejected Chief Justice Robert’s distinction between “express advocacy” and “issue ads,” all of which they regarded as the functional equivalent of express advocacy.<sup>112</sup>

For one case decided during the 2006 term it is difficult to tell whether the results should be characterized as conservative or liberal. In *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*, the Court upheld a waste flow control ordinance requiring haulers who picked up waste in the city to bring it to facilities owned and operated by a state-created public benefit corporation.<sup>113</sup> The majority held that the law did not discriminate against interstate commerce and, applying the *Pike v. Bruce Church* balancing test,<sup>114</sup> found that any incidental burden on interstate commerce was not clearly excessive.<sup>115</sup> Justices Scalia and Thomas, concurring, said that the Court should abandon all dormant commerce clause review, but the majority of the Court again rejected this more extreme view.<sup>116</sup> Justices Stevens, Kennedy, and Alito dissented, viewing the ordinance in this case as essentially the same as the ordinance in *C & A Carbone, Inc. v. Town of Clarkstown*,<sup>117</sup> where, in an opinion by Justice Kennedy, the ordinance had been ruled unconstitutional as limiting the hauling business that could be obtained by out-of-state haulers.<sup>118</sup>

It thus appears that although the Roberts Court is not prepared to extend progressive precedents established by the Court in the 1960s and 1970s, and on new issues is inclined toward the conservative side, neither is it likely to embark on the revolutionary constitutional path down which Toobin predicts that Justices Scalia, Thomas, Alito, and possibly Roberts, would like to lead the Court. However, regardless of whether Toobin’s prediction of an oncoming counterrevolution was supported in 2006-07 by the performance of the Roberts Court—or the Kennedy Court—Toobin’s book is a most readable and plausible

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109. *Id.* at 2667.

110. *Id.* at 2655.

111. *Id.*

112. *Id.* at 2696-97.

113. 127 S. Ct. 1786, 1790 (2007).

114. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) The Court asked whether the burden on interstate commerce is clearly excessive in relation to the local benefits, considering the nature of the local interest and whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 143.

115. *United Haulers Ass’n*, 127 S. Ct. at 1798.

116. *Id.* at 1798-99.

117. 511 U.S. 383, 393 (1994).

118. *United Haulers Ass’n*, 127 S. Ct. at 1803.

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presentation of what is promised by his sub-title: *Inside the Secret World of the Supreme Court*.