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A Different Take on the Roberts Court: The Court as an Institution, Ideology, and the Settled Nature of American Constitutional Law

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I. INTRODUCTION

In the principal article for this Symposium, Professor Erwin Chemerinsky develops the thesis that the Roberts Court, or, as he puts it, in actuality the Anthony Kennedy Court, "is the most conservative Court since the mid-1930s and is a court that generally favors the government over claims of individual rights and business interests over those of employees and consumers."1 He maintains that, "[o]n issues that are defined by ideology, the conservative position prevails in the Roberts Court except when Justice Kennedy joins with Justices Stevens, Souter, Ginsburg, and Breyer,"2 and that, "[w]hen the Court is divided 5-4 on issues where there are clear liberal and conservative positions, Justice Kennedy is the swing vote."3 As to the Court's conservatism, Chemerinsky states as follows:

What does it mean to say that the Court is more conservative than its predecessor courts, the Rehnquist, Burger and Warren Courts? It is notably more conservative on the issues that in our society today are often the litmus tests for ideology: abortion and
race. I also believe that it will be much more conservative on issues of separation of church and state, but they have not yet been presented to the Roberts Court. Also, it is a Court that, overall, is very pro-business. The one area where the Roberts Court has not been conservative is in its rulings against the Bush Administration’s actions as to the Guantanamo detainees. But this is because Justice Kennedy has joined Justices Stevens, Souter, Ginsburg, and Breyer in these cases.⁴

Professor Chemerinsky goes on to say that he does not want to overstate the conservatism of the Roberts Court, that there have been rulings where the Court did not come down on the conservative side of the issue, and that, “the most important disappointments for conservatives have been in the two cases ruling against the Bush administration with regard to the Guantanamo detainees, [where] Justice Kennedy joined with Justices Stevens, Souter, Ginsburg, and Breyer to create the majority.”⁵

There is no doubt that in terms of the ideological views of the Justices on the Court, the Roberts Court is more conservative than the Rehnquist Court, since conservative Chief Justice Roberts replaced moderate Justice O’Connor, and conservative Chief Justice Rehnquist was replaced by conservative Justice Alito.⁶ As Professor Chemerinsky has demonstrated, in ten high profile 5-4 decisions of the Court during the Roberts years, Justice Kennedy decided with the conservatives in seven of them and with the liberals in only three.⁷ This change in the ideological line-up of the Court, and the pattern of results in these cases support Professor Chemerinsky’s thesis as to the conservative direction of the Roberts Court.

It should be noted that Professor Chemerinsky and other commentators use the terms “liberal,” “conservative,” and “moderate” in the popular sense rather than in any philosophical or theoretical sense. “Conservative” Justices are opposed to the use of racial preferences⁸ and support the right of individual gun ownership under the Second Amendment.⁹ “Liberal” Justices support limited racial preferences for

⁴. Id. at 956.
⁵. Id. at 972. The cases are Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and Boumediene v. Bush, 128 S. Ct. 2229 (2008). Both cases will be discussed more fully subsequently.
⁶. See discussion, infra.
⁷. See Chemerinsky, supra note 1, at 953-55.
racial minorities and oppose an "individual rights" interpretation of the Second Amendment. In those two areas then, it is the "conservative" Justices who favor the individual and the "liberal" Justices who favor the government. When it comes to abortion and other individual rights asserted under the Due Process and Equal Protection Clauses, the "liberal" Justices favor the recognition of individual rights and the "conservative" Justices oppose it. In regard to the rights of persons accused of crime, the "liberal" Justices favor the defendant while the "conservative" Justices favor the government. In the area of the First Amendment, where the Court as an institution has extended very strong protection to First Amendment rights, there is less of a "liberal"-"conservative" split. To the extent that such a split can be identified, "conservative" Justices are more disposed to hold campaign finance laws unconstitutional, while "liberal" Justices are more disposed to uphold them. Here again, the "conservative" Justices are supporting the individual while the "liberal" Justices are supporting the government. Otherwise, whenever the Court divides on a First Amendment question, the "liberals" are more disposed to uphold the First Amendment claim while the "conservatives" are more disposed to reject it.

15. In the 2007 Term cases of Wisconsin Right to Life v. Federal Election Commission, 127 S. Ct. 2652 (2007), and Davis v. Federal Election Commission, 128 S. Ct. 2759 (2008), Justice Kennedy joined the four conservatives in both cases to strike down aspects of federal campaign finance law. The four liberal justices dissented in both cases. In McConnell v. Federal Election Commission, 540 U.S. 93 (2003), the four liberal Justices on the current Court, joined by former Justice O'Connor, voted to uphold most of the provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), while Justices Scalia, Thomas and Kennedy of the current Court, joined by former Chief Justices Rehnquist, dissented. Id. at 110.
16. See Wis. Right to Life, 127 S. Ct. 2652; Davis, 128 S. Ct. 2759.
17. As in Morse v. Frederick, 127 S. Ct. 2618 (2007), where Justice Kennedy joined the four conservatives to hold that the First Amendment was not violated when a high school student was disciplined for displaying a banner that the principal interpreted as advocating illegal drug use, and in Garcetti v. Ceballos, 547 U.S. 410 (2006), where Justice Kennedy joined the conservative Justices to hold that the First Amendment did not protect the speech of government employees when made in the scope of their employment. The four liberal Justices dissented in both cases.
"liberals" are expected to favor the claimant while the "conservatives" are expected to favor the government.\textsuperscript{18}

In this article, I will be looking at the Roberts Court in a somewhat different way from that of Professor Chemerinsky and will be providing a somewhat different perspective on the Court. I will be looking to the operation of the Court as an institution, to departures by the individual Justices from traditional "liberal" and "conservative" positions, and to what I consider to be the essentially settled nature of American constitutional law at the present time.\textsuperscript{19} I will discuss the high profile cases Professor Chemerinsky identifies in which the Court lined up across traditional liberal-conservative lines. I will also discuss other cases, in some of which the Court lined up along traditional liberal-conservative lines, and in some of which it did not. My conclusion about the Roberts Court may differ to some extent from that of Professor Chemerinsky, and my conclusion would likely be disputed by many constitutional commentators and court watchers. My conclusion is as follows:

\textit{The Roberts Court has moved in a conservative direction, but not by very much. The decisions of the Roberts Court will have some impact on American constitutional law, but not very much.}

\textbf{II. THE OPERATION OF THE COURT AS AN INSTITUTION}

In analyzing the direction of the Court, constitutional commentators tend to focus, as Professor Chemerinsky has done, on the Court's high profile decisions, usually involving a 5-4 split among the Justices.\textsuperscript{20} But those decisions comprise a relatively small part of the Court's work.\textsuperscript{21} The Court operates as an institution. It decides the cases coming before it with reference to the facts of those cases and the applicable constitutional or statutory doctrine. Once a case is fully briefed and argued, the Justices may all arrive at the same conclusion as to the proper decision in the case. As with any decisional body, the Members of the Court try to reach

\begin{itemize}
  \item \textsuperscript{18} See Ledbetter v. Goodyear, 550 U.S. 618 (2007).
  \item \textsuperscript{20} Chemerinsky, \textit{supra} note 1 at 953-55.
\end{itemize}
a consensus, which often results in compromise and a fairly narrow holding.22

Of course, the ideological views of the individual Members of the Court affect the workings of the Court as an institution. And, as Professor Chemerinsky has demonstrated, those ideological differences will most likely appear in high profile constitutional and civil rights cases in which the Court is sharply divided.23 But constitutional cases comprise only a minority of the cases that the Court hears each Term. In the 2007 Term, sixteen of the seventy cases involved constitutional claims.24 In the 2006 Term, it was twenty-one out of seventy-one.25 In the 2005 Term, it was fourteen out of sixty-nine.26 The larger number of cases involve a myriad of federal questions within the Court’s jurisdiction, such as those pertaining to the application of federal statutes and the operation of the federal courts.27 Ideological differences are less likely to appear in these cases, but sometimes the Justices disagree as to the proper result in these cases as well. In any event, looking to both the constitutional and non-constitutional cases, the operation of the Court as an institution means that despite the ideological and other differences among the Justices, by far the largest number of the Court’s decisions every Term are unanimous or near-unanimous.28

This is the result that has obtained in the three Terms of the Roberts Court.29 In the 2007 Term, there were seventy written decisions, including three per curiam.30 Twenty-two decisions, or 30.55%, were unanimous,31 and twenty-four more were decided by votes of 8-1 or 7-2. So, forty-six out of the seventy decisions, or 63.88%, were unanimous or near-unanimous.32 In fifteen decisions, or 21.42%, there were three

22. According to the oft-quoted concurring opinion of Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, it is a rule of constitutional decision-making that “[t]he Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” 297 U.S. 288, 346-47 (1936) (citation omitted). As will be pointed out subsequently, a number of the high profile decisions of the Roberts Court reflect this rule of constitutional decision-making.


28. Id.

29. Id.


31. Id. at 521.

32. Supreme Court Decisions for the 2004 Term, the 2005 Term, the 2006 Term, and 2007 Term (on file with author) [hereinafter “Author’s Statistics”].
dissents. The number of 5-4 decisions in the 2007 Term was twelve out of seventy, or 15.27%.  

In the 2006 Term, the Court was somewhat more divided, but still showed a high level of agreement. There were seventy-one decisions, including four per curiam. Twenty-eight decisions, or 39.4%, were unanimous. Forty-nine decisions, or 69%, were 6-3 or higher. But the number of 5-4 decisions that Term was twenty-two or 31%.  

In the 2005 Term, there were eighty-one decisions. Thirty-six decisions, or 49%, were unanimous. Another twenty-one decisions were 6-3 or higher. Thus, fifty-five decisions, or 79.7%, were 6-3 or higher, while sixteen decisions, or 21.3%, were 5-4 or 5-3. In the 2004 Term, the last Term before the composition of the Court had changed, sixteen of the seventy-four decisions, or 22%, were 5-4. On average, then, we see that typically in one out of five decisions, or 20%, the Court divides 5-4, and not all of the 5-4 decisions are high profile constitutional ones.

The cases in which the Roberts Court has rendered a unanimous or near-unanimous decision include cases raising questions that might be expected to produce an ideological split. In the 2007 Term, the Roberts Court rendered the following decisions that were unanimous or had no more than two dissents. The Court unanimously upheld, against a First Amendment claim, New York’s system of choosing party nominees for the lower courts by primary elections to the party’s nominating conventions. The Court unanimously held that police officers did not violate the Fourth Amendment by arresting a person whom they had probable cause to believe had violated Virginia law by driving with a suspended license, even though as a matter of Virginia law, this misdemeanor offense was one for which the officers should have issued a summons rather than made an arrest. The Court unanimously held that the federal courts had jurisdiction over a habeas corpus petition filed

33. The Statistics (2007 Term), supra note 21, at 522.
35. Id. at 436.
36. Id. at 441.
37. Author’s Statistics, supra note 32.
38. Id.
40. Id. at 377.
41. Author’s Statistics, supra note 32.
42. Id.
43. The Statistics (2005 Term), supra note 21.
on behalf of American citizens held in Iraq in a detainee camp operated by the Multinational Forces-Iraq, but that the federal courts could not exercise jurisdiction to enjoin the United States from transferring individuals alleged to have committed crimes and detained within Iraq to the Iraq government for criminal prosecution. It held 7-1 that the exemption from liability for a disparate impact claim under the Age Discrimination in Employment Act for employer actions based on reasonable factors other than age created an affirmative defense on which the employer bears both the burden of production and the burden of persuasion. It held 8-1 that a criminal defendant's initial appearance before a magistrate judge, where the defendant learns the charge against him and where his liberty is subject to restriction marks the initiation of adversary proceedings that trigger attachment of the Sixth Amendment right to counsel. It held 7-2 that in a Batson challenge, the prosecutor's proffered reason for striking an African-American prospective juror was a pretext for racial discrimination. It held 7-2 that Kentucky's three-drug lethal injection method of capital punishment did not constitute cruel and unusual punishment under the Eighth Amendment. In a 7-2 decision, the Court upheld the State of Washington's blanket primary system under which the candidates for office are identified on the ballot by their designated "party preference," the voters may vote for any candidate, and the two top vote-getters for each office, regardless of "party preference," advance to the general election. Finally, in two 7-2 decisions, the Court upheld the power of Federal District Judges to justify sentences outside the Sentencing Guidelines, including the power to conclude that the Guidelines' 100-1 ratio for crack/powder cocaine was "greater than necessary" in the particular case to achieve the objectives of the Sentencing Guidelines.

In the 2006 Term, the Court rendered the following decisions that were unanimous or had no more than two dissents. The Court

51. Snyder, 128 S. Ct. at 1206.
unanimously held per curiam that police officers enjoyed qualified immunity for a search where the warrant for the premises listed the suspects as African-American, the occupants were Caucasian, and they were made to get out of bed and stand naked for a few minutes while the officers verified that the blanket and the bedding did not have concealed weapons.\textsuperscript{55} It held 8-1 that a police officer enjoyed qualified immunity when the officer tried to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist’s vehicle from behind.\textsuperscript{56} On the other side of the ledger, the Court held unanimously that where a police officer makes a traffic stop, a passenger in the vehicle is seized in the same manner as the driver and, thus, may challenge the constitutionality of the stop.\textsuperscript{57} The Court unanimously rejected two First Amendment claims, holding that it does not violate the First Amendment for a state to require that public sector labor unions receive affirmative authorization from a non-member before spending the non-members agency shop fees to election-related purposes,\textsuperscript{58} or for a state interscholastic athletic association to enforce an anti-recruiting rule, here applied to prohibit a high school coach from sending a letter to middle school students inviting them to attend spring practice sessions.\textsuperscript{59}

In the 2005 Term, when Roberts and Alito joined the Court, the Court rendered unanimous decisions in the following cases. It held that while there must be an emergency exception to a parental notification provision for a minor’s abortion, the lack of such an exception does not make the law unconstitutional, and an injunction can be issued only against the unconstitutional provision in the law.\textsuperscript{60} It upheld against First Amendment challenge the Solomon Amendment requiring universities receiving federal funds to give military recruiters the same access as other employers.\textsuperscript{61} It ruled that under the federal Religious Freedom Restoration Act,\textsuperscript{62} the federal narcotics law would not be applied to prevent a small religious sect from importing a hallucinogenic tea central to its religious worship.\textsuperscript{63} It held that a state could not constitutionally apply an evidentiary rule that prevented a defendant from putting on a

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\textsuperscript{55} Los Angeles County v. Rettele, 550 U.S. 609 (2007).
\textsuperscript{56} Scott v. Harris, 550 U.S. 372 (2007).
\textsuperscript{57} Brendlin v. California, 551 U.S. 249 (2007).
complete defense, here a restriction on introducing evidence of third-party guilt. In applying the Sixth Amendment’s right of confrontation, it held that a crime victim’s emergency 911 call could be introduced even if the victim was not present for a confrontation, but not a crime victim’s statement to police who were investigating the crime. Finally, it held that a Title VII retaliation claim did not require proof of adverse employment consequences due to the filing of the claim.

As the above discussion demonstrates, the Court operates as an institution. All of the Justices operate within the Court’s institutional framework and all are on the same page to the extent that they all are applying or purport to be applying the same constitutional doctrine to the facts of the case before them. They try to achieve consensus, and in order to achieve that consensus, they may agree to a fairly narrow holding. The operation of the Court as an institution serves to limit the extent to which a change in the Court’s composition will bring about a major change in the body of constitutional law.

III. DEPARTURES BY THE INDIVIDUAL JUSTICES FROM TRADITIONAL “LIBERAL” AND “CONSERVATIVE” POSITIONS

The ideological differences among the Members of the Court are tempered by the fact that the individual Justices have different views about the meaning of different constitutional provisions, and these views do not necessarily break down on conventional “liberal”-“conservative” lines. For example, Justice Scalia, who as a “conservative” Justice generally takes a narrow view of the constitutional rights of persons accused of crime, has a different view with respect to the rights guaranteed by the Sixth Amendment. He strongly supports the Sixth Amendment right to a jury trial, the right to confrontation, and the right to be represented by counsel of one’s choice. Similarly, while he

67. See, e.g., Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J. concurring) (discussing the historical basis of the right to trial by jury and its application to prohibit a judge from finding the facts resulting in an increased sentence).
68. See Crawford v. Washington, 541 U.S. 36 (2004). The Court held that playing a tape-recorded statement at a criminal defendant’s trial, in which the defendant’s wife, who because of the state marital privilege did not testify at trial, had described the defendant’s stabbing of the victim to the police, violated the Sixth Amendment’s confrontation clause. Id.
69. In United States v. Gonzalez-Lopez, Justice Scalia joined with the four liberal Justices to hold that the wrongful denial of the Sixth Amendment right to be represented
has come down on the side of the Bush Administration with respect to detaining enemy aliens at Guantanamo and to otherwise limiting the rights of enemy aliens,\textsuperscript{70} and he strongly maintains that the Constitution prohibits detaining an American citizen and that the government must either charge the citizen with a crime or release the citizen from custody.\textsuperscript{71} Likewise when it comes to constitutional limitations on the award of punitive damages, the "liberal"-"conservative" division breaks down completely, with Justices Stevens, Breyer, Souter, and Kennedy of the present Court, maintaining that the due process clause imposes limitations on the power of states to award punitive damages, while Justices Scalia, Ginsburg and Thomas maintain that it does not.\textsuperscript{72}

Moreover, ideological differences do not always come to the fore when the Justices are applying constitutional or statutory doctrine to the facts of a particular case. All of the Justices are applying or purport to be applying the same constitutional doctrine to the facts of the case before them, and, totally apart from ideology, the Justices may disagree with the result that should follow from the application of that doctrine to the facts of particular cases. This disagreement appears in cases where there is both a majority opinion and a dissent, and one or more "liberals" joins the "conservative" majority, or where one of more "conservatives" joins the "liberal" majority.

To illustrate, in the 2007 Term, Chief Justice Roberts, and Justices Stevens, Souter, and Thomas joined Justice Breyer to hold, over the dissents of Justices Kennedy, Scalia, Ginsburg and Alito, that Kentucky's retirement plan for hazardous occupation employees, under which employees who became disabled before standard retirement age

\footnotesize{by counsel of one's choice was a structural error, requiring automatic reversal of a conviction. 548 U.S. 140 (2006).}


\textsuperscript{71} See \textit{Hamdi}, 542 U.S. at 614 (Scalia, J., dissenting).

\textsuperscript{72} See the line-up of the Court in \textit{BMW of North America, Inc. v. Gore}, 517 U.S. 559 (1996) and \textit{State Farm Mutual Automobile Ins. Co. v. Campbell}, 538 U.S. 408 (2003). In \textit{Philip Morris USA v. Williams}, the Court held 5-4, with Justice Stevens dissenting, and Justices Ginsburg, Scalia and Thomas writing a separate dissent, that a jury's punitive damages award designed to punish the defendant for harming persons who are not before the court would amount to a "taking of property" from the defendant. 549 U.S. 346 (2007). In \textit{Exxon Shipping Co. v. Baker}, with Justice Alito not participating, the Court affirmed by an equally divided court, the lower court's ruling that a defendant could be liable in punitive damages for the reckless acts of its managerial employees. 128 S. Ct. 2605 (2008). The Court based its decision on maritime law and held that in this case, a 1:1 ratio of punitive to compensatory damages was appropriate. \textit{Id.} at 2634. Concurring and dissenting opinions referred to the positions that the Justices took in the constitutionally-based decisions. \textit{Id.} at 2634-41.
could receive credit for "imputed" years not actually worked, while employees who worked past standard age and then became disabled could not receive such a credit, did not violate the Age Discrimination in Employment Act.\textsuperscript{73} Likewise, Justice Stevens, joined by the four conservatives, with Justices Breyer, Kennedy, Souter and Ginsburg dissenting, wrote the opinion for the Court in a case holding that a rule of criminal procedure requiring notice that the court is contemplating a departure from the recommended guideline sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, was not applicable to a variance from the recommended range.\textsuperscript{74}

In the 2006 Term, Justice Ginsburg, joined by Chief Justice Roberts and Justices Stevens, Scalia, Souter, and Thomas, with Justices Alito, Kennedy, and Breyer dissenting, wrote the opinion for the Court in a case holding that California's determinate sentencing law, which authorized the judge rather than the jury to find the facts exposing the defendant to an elevated upper term sentence, violated the defendant's Sixth Amendment right to trial by jury.\textsuperscript{75} In that Term, there was also a 5-4 decision to the effect that attempt offenses may qualify as predicates for sentencing under the Armed Career Criminal Act\textsuperscript{76} when they involve conduct that presents a serious potential risk of injury, here interpreted as including attempted burglary, as defined by Florida law, which is a violent felony under the Act.\textsuperscript{77} The Court majority consisted of Chief Justice Roberts, and Justices Alito, Kennedy, Souter and Breyer,\textsuperscript{78} with Justices Scalia, Stevens, Ginsburg and Thomas dissenting.\textsuperscript{79}

In the 2005 Term, Chief Justice Roberts joined with the four liberal Justices\textsuperscript{80} to hold that the state's failure to follow-up on a mailed notice to a property owner that was returned "undelivered" violated procedural due process.\textsuperscript{81} In a similar vein, that Term the Court held 5-4 that a

\textsuperscript{73} Ky. Retirement Systems v. E.E.O.C., 128 S. Ct. 2361 (2008). In that connection, the Court also held that in order to state a disparate impact claim under the Act where the employer adopts a pension plan that includes age as a factor and then treats employees differently based on pension status, an employee subject to the plan must present sufficient evidence to show that the differential treatment was actually motivated by age and not by pension status. \textit{Id.} at 2370.

\textsuperscript{74} Irizarry v. United States, 128 S. Ct. 2198 (2008).

\textsuperscript{75} Cunningham v. California, 549 U.S. 270 (2007).

\textsuperscript{76} 18 U.S.C. § 924(e) (2009).


\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.}


\textsuperscript{81} \textit{Id.} at 225.
federal court, on its own initiative, could dismiss a habeas corpus petition as untimely.82 Chief Justice Roberts, and Justices Ginsburg, Kennedy, Souter and Alito were in the majority, and Justices Stevens, Breyer, Scalia, and Thomas dissented.83

As the above discussion demonstrates, the fact that ideological differences do not always come to the fore when the Justices are applying constitutional or statutory doctrine to the facts of a particular case also serves to limit the extent to which a change in the Court’s composition will bring about a major change in the body of constitutional law.

IV. THE HIGH PROFILE DECISIONS OF THE ROBERTS COURT AND THE SETTLED NATURE OF AMERICAN CONSTITUTIONAL LAW

In emphasizing that the Roberts Court has moved in a conservative direction and that Justice Kennedy is the deciding vote on issues that are defined by ideology, Professor Chemerinsky states that, “Each of the most important and high profile cases during the Roberts era has been decided by a 5-4 margin, and in each Anthony Kennedy was in the majority.”84 He lists ten cases falling in this category, and says that there would be “widespread agreement that they were the most important decisions of the Roberts Court.”85 It is my submission that important as these cases may be in demonstrating the movement of the Roberts Court in a conservative direction, they will have relatively little impact on American constitutional law.

This is because, as I have tried to demonstrate more fully elsewhere, at this point in time in the nation’s history, American constitutional law has evolved to a stage where it may be considered essentially settled.86

The statement that American constitutional law is essentially settled may seem heretical at a time when there is continuing academic debate over proper standards of constitutional interpretation,87 when academic commentators are proposing a plethora of theories about the meaning of many constitutional provisions, and when many constitutional cases coming before the Supreme Court are characterized by the media as potential “landmark” decisions. However, in the real world of

83. Id. at 200.
84. Chemerinsky, supra note 1, at 953.
85. Id. at 953-54.
86. Sedler, Settled Nature, supra note 19, at 175-76.
87. See id. (discussing academic and media commentary).
constitutional litigation in which constitutional cases that actually arise are litigated and decided by the Supreme Court, the lower federal courts, and the state courts, the “law of the Constitution” that provides the analytical basis for the resolution of these cases is essentially settled.88

By the “law of the Constitution,” I mean the doctrine and precedent that has emerged from the decisions of the Supreme Court in the different areas of constitutional law over a long period of time.89

Most of the constitutional cases coming before the Supreme Court for decision today, important as some of them may be in terms of public policy and societal impact—including “the most important and high profile cases during the Roberts era”90 that have been identified by Professor Chemerinsky—fall into this category. They involve the application of this doctrine and precedent to particular constitutional questions—some very narrow—arising from new laws and new kinds of governmental action. In these kinds of cases, the Court will sometimes expand or contract existing doctrine and precedent and will occasionally overrule a particular precedent. However, the essential nature of the “law of the Constitution” that has evolved from nearly two centuries of constitutional interpretation remains intact, and such change as there is will occur mostly around the edges. To put it another way, the structure of the “law of the Constitution” has now been established, and constitutional cases are litigated, analyzed, and decided within the framework provided by that structure. The structure does not change, and the doctrine and precedents that comprise that structure are the starting point for the analysis and determination of every question that arises in the real world of constitutional litigation.91

As the Court has decided more and more cases, and has resolved more and more constitutional issues, the Court has narrowed considerably the potential scope of constitutional interpretation.92

A review of the “most important and high profile cases during the Roberts era”93 demonstrates that the Court has decided these cases with reference to the settled nature of American constitutional law. With the exception of its decision in Heller,94 where the Court held that the Second Amendment created a private individual right to possess

88. Id.
89. Id.
90. Chemerinsky, supra note 1, at 953.
92. Id. at 177. While the Court has the power to overrule its prior decisions, a longitudinal analysis indicates that comparatively few decisions have been overruled. See id. at 177-78 (discussing and reviewing overrulings).
93. Chemerinsky, supra note 1, at 953.
94. 128 S. Ct. 2783.
handguns in the home (although making it clear that this newly recognized right was subject to significant governmental regulation), the Court applied settled constitutional doctrine and precedent, although sometimes seemingly contracting a precedent, as it applied that precedent to the facts of a particular case, and other times seemingly expanding a precedent, as it applied it to the facts of a particular case.

The Court’s “politically controversial” decision in *Hamdan v. Rumsfeld*, holding that the military commissions established by the Bush Administration were not authorized by Congress, can be traced back to a Korean War holding that President Truman did not have the power to order the seizure of the steel mills to prevent a labor strike that would curtail steel production, in disregard of federal labor law dealing with this situation. In every case coming before the Court involving the Bush Administration’s assertion that the President has the inherent power under Article II to take any action he considers necessary in the “war on terrorism,” the Court has rejected this assertion of presidential power, insofar as it is inconsistent with the exercise of congressional power.

95. *Id.* at 2821-22.

96. *See Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (holding unconstitutional individual race-based assignments in the public schools designed to further diversity, while contracting the precedent of *Grutter v. Bollinger*, 539 U.S. 306 (2003), where it held that public universities, in order to further diversity, could consider race as one factor in student assignments). *See also Gonzales*, 127 S. Ct. 1610 (upholding, on its face, the constitutionality of the federal Partial Birth Abortion Act, 18 U.S.C. § 1531 (Supp. IV 2000) (hereinafter “the Act”), even though the Act did not contain a “health of the mother” exception, which appeared to contract the precedent of *Stenberg v. Carhart*, 550 U.S. 914, 937 (2000), where one of the grounds for invalidating Nebraska’s partial abortion ban was that it did not include a “health of the mother” exception).


98. 548 U.S. at 611-12.


100. In *Hamdan*, the Court noted in a footnote that: “Whether or not the President has independent power, absent Congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its
Finally, in *Boumediene v. Bush*, the Court’s decision was based on an interpretation of the “suspension” clause of Article I, sec. 9, which allows Congress to suspend the writ of habeas corpus in times of rebellion or invasion. The Court, held 5-4, with Justice Kennedy, joining the four liberals and writing the majority opinion, that Congress’ barring non-citizens held as unlawful enemy combatants from access to the federal courts by means of a writ of habeas corpus was not a proper exercise of Congressional power under the “suspension” clause. The Court held that there was no “rebellion” or “invasion” within the meaning of the “suspension” clause, and that the remedy of limited review in the United States Court of Appeals for the District of Columbia was not an adequate substitute for the writ of habeas corpus.

Professor Chemerinsky discusses these cases at length and points out that they are cases where Justice Kennedy joined the four liberals to own war powers, placed on his powers. The Government does not argue otherwise.” *Hamdan*, 548 U.S. at 593 n.23 (citing *Youngstown*, 343 U.S. at 637). In regard to the assertion of presidential power in the “war on terrorism,” the Court has also held that the Guantanamo detainees were entitled to file a writ of habeas corpus in the federal courts to challenge the legality of their detention, *Rasul v. Bush*, 542 U.S. 466, 483 (2004), and that while Congress had authorized the President to detain, as an “enemy combatant,” an American citizen captured on the battlefield in Afghanistan, due process required that he be given a meaningful opportunity to challenge the legality of that detention before a neutral decision-maker. *Hamdi*, 542 U.S. at 533. In *Ex parte Milligan*, the Court held that it was unconstitutional to try an American civilian before a military commission for crimes relating to aiding the Confederacy during the Civil War. 71 U.S. 2, 135-36 (1866). The Court emphasized that Milligan was a non-belligerent, and that the acts took place in Indiana, where the civil courts were open and functioning. *Id.* During the Civil War, President Lincoln suspended the writ of habeas corpus. In *Ex parte Merryman*, the military commander of Fort McHenry arrested an American citizen residing in Maryland and ordered him confined at Fort McHenry. 17 F. Cas. 144, 147 (C.C.Md. 1861). He brought an application for a writ of habeas corpus in a federal court in Maryland, where Roger Taney, the Chief Justice of the United States, was sitting as a Circuit Justice. *Id.* President Lincoln had suspended the writ of habeas corpus, and Taney held that only Congress, and not the President, had the power to suspend the writ of habeas corpus. *Id.* at 152-53. Congress subsequently enacted legislation suspending the writ. See Comment, *Obstructing Justice: The Rise and Fall of the AEDPA*, 41 SAN DIEGO L. REV. 839, 883 n.204 (2004). As Justice Scalia explained in his dissenting opinion in *Hamdi*, in *Merryman*, Taney rejected Lincoln’s unauthorized suspension of the writ, and this decision, along with the English practice, as well as the Suspension’s Clause placement in Article I, supports the general understanding that only Congress can suspend the writ. *Hamdi*, 542 U.S. at 562-63 (Scalia, J., dissenting).

102. *Id.* at 2240.
103. *Id.* at 2262.
104. *Id.* at 2269-70.
provide a majority, over the dissents of the conservative Justices.\textsuperscript{105} As the decisions in these cases and the other 5-4 decisions in the high profile cases demonstrate, Justice Kennedy is indeed, as Professor Chemerinsky maintains, the "swing" Justice in the ideologically based 5-4 decisions of the Court.\textsuperscript{106} In terms of the development of constitutional doctrine and a possible departure from what I consider to be the settled nature of American constitutional law, these cases provided the opportunity for the conservative Justices to change considerably existing constitutional doctrine with respect to the existence of presidential power in military matters. Instead, because of the influence of Justice Kennedy, the Court adhered to what I consider to be existing constitutional doctrine in this area, and also rendered an important decision as to the meaning of the suspension clause. As Professor Chemerinsky points out, these cases were the "most important disappointments for conservatives,"\textsuperscript{107} and the Court's decisions in these cases support my contention that the Roberts Court's move in a conservative direction was "not by very much."\textsuperscript{108} In these cases, because of the influence of Justice Kennedy, it did not move in a conservative direction at all.

Similarly, and again I believe because of the influence of Justice Kennedy, the Court's decision in \textit{District of Columbia v. Heller},\textsuperscript{109} was a move in the conservative direction, but "not by very much." In \textit{Heller}, the Court considered a Second Amendment challenge to a District of Columbia law that virtually prohibited any possession of a firearm in the home and that required that any firearm that could be possessed in the home had to be locked.\textsuperscript{110} The Court held 5-4, in an opinion by Justice Scalia, that the Second Amendment created a private individual right to possess a loaded handgun in the home for self-defense.\textsuperscript{111} In his opinion, Justice Scalia relied on historical interpretation (a method of constitutional analysis that he strongly favors) to establish the proposition that the Second Amendment was intended to create a private individual right to keep and bear arms and was not limited to the possession of weapons in connection with service in the militia.\textsuperscript{112} He

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105. Chemerinsky, \textit{supra} note 1, at 953-55. The holding in \textit{Hamdan} was 5-3, since Justice Roberts, who participated in the case when it was before the United States Court of Appeals for the District of Columbia and who ruled against Hamdan, recused himself when the case came before the Supreme Court. \textit{Hamdan}, 548 U.S. at 557.

106. Chemerinsky, \textit{supra} note 1, at 953.

107. \textit{Id.}

108. \textit{Id.} at 972-73.


111. \textit{Id.} at 2821-22.

112. \textit{Id.} at 2788-17.
\end{flushright}
then went on to say (albeit in a footnote) that since the right to keep and bear arms was an enumerated right, heightened scrutiny, as opposed to rational basis, applied to determine the constitutionality of laws prohibiting or regulating gun ownership. He concluded that, "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation' to 'keep and use for protection of one's home and family,' would fail constitutional muster." 

Since the only issue before the Court in *Heller* was the constitutionality of the sweeping District of Columbia ban on the possession of an unlocked handgun in the home for purposes of self-defense, the opinion could have stopped there. The specific holding of *Heller* was that a complete ban on the possession of an unlocked handgun in the home for purposes of self-defense violated the Second Amendment, and the rationale of the Court's opinion in *Heller* would be applied by lower courts and ultimately by the Court itself in future cases to determine the constitutionality of any prohibitions or restrictions on gun ownership. If this was all that the *Heller* opinion said, the case would represent a significant victory for advocates of gun ownership and would provide a constitutional basis for challenging all federal, state and local laws that in any way prohibited or restricted gun ownership.

Instead, the Scalia opinion went on to limit significantly the scope of the enumerated constitutional right that the Court had just recognized. The Scalia opinion emphasized that the right to keep and bear arms applied only to law-abiding citizens and did not apply to "dangerous and unusual weapons" not "in common use at the time of the adoption of the Second Amendment." He also indicated that under the historical analysis he had employed, prohibitions on carrying concealed weapons would not violate the Second Amendment. He then stated: "[n]othing in our opinion should be taken to cast doubt on longstanding prohibitions

113. *Id.* at 2817 n.27.
114. *Id.* at 2817-18 (citations omitted).
115. *Id.* at 2787-88.
116. *Heller*, 128 S. Ct. at 2821. Justice Scalia observed that, "since this case represents the Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field...." *Id.*
117. *Id.* at 2821-22.
118. *Id.* at 2821-22.
119. *Id.* at 2816-17.
120. *Id.* at 2817.
121. *Heller*, 128 S. Ct. at 2816 ("The majority of the 19th century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.").
on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”122

I view the Scalia opinion in *Heller* as having the effect of upholding most gun control laws. To be sure, it prevents the government from absolutely prohibiting the possession of a loaded handgun in the home.123 But beyond that it is difficult to see how most gun control legislation could be successfully challenged as violating the newly recognized enumerated right to keep and bear arms. Courts faced with challenges to gun control legislation will look to the Scalia opinion to determine the scope of permissible regulation, and any regulation stopping short of an absolute ban on gun ownership of handguns and rifles by law abiding, mentally competent citizens is likely to be upheld. So, while the decision is an important legal victory for proponents of gun ownership, the victory is a limited one, and the decision will provide guidance to Congress and state and local governments when considering whether to enact gun control laws. If anything, the decision is a signal that most gun control legislation is likely to be upheld.124

It may be asked why the Scalia opinion, after engaging in a lengthy historical analysis to establish that the Second Amendment creates a private individual right to bear and keep arms, went on to limit significantly the scope of the newly created right. This may be pure speculation, but I suspect that Scalia needed to limit the right to keep and bear arms in order to obtain Justice Kennedy’s vote. If Scalia had not so limited this right, it is possible that Kennedy would not have joined the Scalia opinion, but would have concurred in a separate opinion containing these limitations. If he had done so, his opinion would have set forth the holding of the Court, as constituting the narrowest ground of agreement among the Justices joining in the majority.125 This would have meant that Justice Scalia’s historical analysis would have been contained in a plurality opinion rather than in the opinion of the Court, and so would not have served as a precedent for historical constitutional interpretation. In any event, *Heller*, the most important decision of the

122. *Id.* at 2816-17.
123. *Id.* at 2821-22.
125. Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).
Roberts Court in terms of recognizing a new individual right, turns out to limit significantly the scope of this right and to serve as a precedent for upholding most gun control legislation.

We turn now to the Roberts Court’s decisions on abortion and race. Here Professor Chemerinsky states as follows:

No issues in contemporary American society more define who is liberal and who is conservative than abortion and race. The Roberts Court has decided one major case as to each and in both the Court decided 5-4 in favor of the conservative position and in each the Court signaled a major shift in the law that is likely to have significant long-term consequences.\(^1\)

With all due respect, I must disagree with Professor Chemerinsky’s conclusion as to the effect of these decisions. In my opinion, neither decision brought about a major shift in the law that is likely to have long term consequences.

In the area of abortion, the Court decided *Gonzales*,\(^2\) where it upheld on its face the constitutionality of the federal Partial Abortion Ban Act of 2003,\(^3\) which has no exception for the use of this procedure when it is necessary for the mother’s health, and which, according to Professor Chemerinsky, is more broadly written than the Court said it would allow in *Stenberg v. Carhart*,\(^4\) when it struck down Nebraska’s partial abortion ban law.\(^5\) Professor Chemerinsky maintains, and I agree, that the difference in result was not due to the different wording of the law, but to the fact that Justice Alito had replaced Justice O’Connor.\(^6\) Professor Chemerinsky says that in *Gonzales*, the Court changed the standard for evaluating the constitutionality of laws regulating abortion from that set forth in *Planned Parenthood v. Casey*,\(^7\) in that it held that the law was constitutional because it was not an undue burden for a “large fraction of women,” as opposed to finding an abortion regulation unconstitutional if it was an “undue burden for some women.”\(^8\) He says that, “many state legislatures will see this

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2. 127 S. Ct. 1610.
4. 129. 550 U.S. at 937.
5. 130. Chemerinsky, *supra* note 1, at 957.
6. 131. *Id.*
decision as a signal that they can adopt much greater restrictions of abortion so long as they do not ban all abortions.”

It is my submission that Gonzales does not change in any way the essential holding of Roe v. Wade, reaffirmed in Casey, that the state cannot prohibit any woman from having an abortion prior to viability, that after viability the state must allow an abortion where necessary to protect a woman’s life or health, and that while the state may regulate the abortion procedure (after Casey, even to the extent of trying to discourage a woman from having an abortion), it may not regulate in such a way that would impose an undue burden on the ability of some women to obtain an abortion. Gonzales is a very limited decision in that it dealt only with a particular procedure used in some late-term abortions. It did not restrict at all the ability of any woman to have an abortion. Thus, in terms of doctrine and precedent, it did not affect in any way the holding in Casey that it was unconstitutional for Pennsylvania to require a married woman to notify her husband before obtaining an abortion. The holding was based on the finding that a requirement for spousal notification would be an undue burden on some women in abusive relationships, because it would prevent them from obtaining an abortion due to fear of violence on the part of their husband. In my view, the Casey standard of undue burden on “some women” applies to laws that would deter women from having an abortion as opposed to laws that regulate only the particular way that an abortion can be performed. And, as Professor Chemerinsky notes, the Court in Gonzales left open the possibility of an “as applied” challenge to the law, where a woman and her doctor could argue that in her case the law was an undue burden on her right to have an abortion by prohibiting what for her was the safest form of abortion.”

134. Id. at 959.
136. 505 U.S. at 857.
137. See id. at 871 (reaffirming the viability principal); id. at 877 (reaffirming the undue burden limitation on the state’s interest).
139. Any woman is entitled to the right to have a previability abortion after Gonzales, which framed the issue as “whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to the late-term, but previability abortions.” Id. at 1632 (emphasis added).
140. Casey, 505 U.S. at 895.
141. Id. at 893-95.
142. Chemerinsky, supra note 1, at 959. To the best of my knowledge, no doctor has been prosecuted for a violation of the federal Partial Birth Abortion Act, and it is difficult to see a United States Attorney, particularly one appointed by President Obama, prosecuting a doctor for a violation of the Act where the doctor uses the prohibited
The significance of *Casey* was that it reaffirmed the essential holding of *Roe v. Wade*, protecting a woman's choice to have an abortion, while allowing the states greater latitude in regulating the abortion procedure and in trying to persuade a woman not to have an abortion. It is my submission that the Court, no matter how constituted, will never overrule *Roe v. Wade*, because to do so would have a cataclysmic effect on American society. In American society today, for large numbers of American women, abortion has become a fully acceptable way of ending an unwanted pregnancy. Approximately 1.3 million abortions are performed in the United States each year. Almost 90% of the abortions are performed during the first 12 weeks, with most being performed during the first 9 weeks. Less than 1% of these abortions are performed after 24 weeks, when the federal partial abortion ban could be applicable. Despite the seeming controversy over abortion, the reality is that a woman's right to choose to have an abortion is a part of the value acceptances of American society today. Since the Supreme Court will not overrule *Roe v. Wade*, cases like *Gonzales*, involving the constitutionality of abortion regulation, will have no significant impact on a woman's constitutional right to have a safe and legal abortion. Moreover, because *Gonzales* only involved the constitutionality of a ban on the use of a particular abortion procedure that will be employed in only a very small number of cases, it will not have significant precedential effect when relied on to support an abortion regulation, like the spousal notification rule invalidated in *Casey*, that could actually prevent some women from having an abortion. For these reasons, I must disagree with Professor Chemerinsky's assertion that the decision in
Gonzales "signaled a major shift in the law that is likely to have significant long-term consequences." 151

In the area of race, the Supreme Court’s decisions in the last thirty years have not been favorable to the efforts of African-Americans and other racial minorities to implement the constitutional value of racial equality. The most important of these decisions was Washington v. Davis, 152 where the Court held that the Equal Protection Clause renders unconstitutional only express racial discrimination, and that a facially neutral law is not violative of Equal Protection despite the fact that it may have a “disproportionate impact” or “discriminatory effect” on racial minorities. 153 Thus, in order to challenge a facially neutral law or governmental action because of its racially discriminatory effect, it is necessary to show that this discriminatory effect was intended by the governmental body enacting the law or by the government officials administering it. 154 Because of the present consequences of a long and tragic history of racial discrimination in American society, the application of facially neutral laws or governmental action will often disadvantage racial minorities in comparison with whites, but this will not render the law or governmental action subject to constitutional challenge unless the assailant can surmount the very onerous burden of showing discriminatory intent. 155 As a result of the intent to discriminate requirement, the ability of African-Americans and other racial minorities to challenge a law or governmental action reinforcing the present consequences of the long and tragic history of racial discrimination in this nation has been severely impaired.

The intent to discriminate requirement, doctrinally embodied in the concept of de jure segregation, resulted in the undoing of court-ordered desegregation plans designed to remedy what had been de jure segregation on the part of school districts in the south and elsewhere. The

151. Chemerinsky, supra note 1, at 956.
152. 426 U.S. 229 (1976).
153. Id. at 239.
154. Id. at 242.
155. See e.g., United States v. Armstrong, 517 U.S. 456, 470 (1996) (regarding African-American defendant who showed that all of the defendants in “crack cocaine” cases defended by the federal Public Defender in the previous year were African-American, but the Court held that this was insufficient to establish intentional racial discrimination in “crack cocaine” prosecutions in the absence of a showing that whites had also been involved in the sale or use of “crack cocaine” and were not prosecuted); City of Cuyahoga Falls v. Buckeye Cmty. Hope Foundation, 538 U.S. 188, 195-96 (2003) (holding that the actions of a city in submitting to the voters a referendum calling for the repeal of an ordinance authorizing construction of a low-income housing project was not shown to have been motivated by an intent to discriminate against minority residents).
Court held that the courts could not order inter-district desegregation remedies to include predominantly white suburban school districts that had not engaged in de jure segregation, even though a decree applicable only to the urban district that had engaged in de jure segregation would not be effective to desegregate that district.\textsuperscript{156} It went on to hold that once court-ordered desegregation plans had been effective to convert a formerly de jure segregated school district into a unitary one, the school district could be relieved of compliance with the decree, and could return to “neighborhood school” assignment, even though this would result in a large number of racially identifiable schools.\textsuperscript{157} And, of course, under the de jure segregation doctrine, districts that had not engaged in de jure segregation were free to use “neighborhood school” assignment with the resultant large number of racially identifiable schools.\textsuperscript{158} As a result of the Court’s application of the de jure segregation doctrine and the unwillingness of most school districts to try to achieve desegregated schools, a large number of minority students in the nation’s schools today are attending racially identifiable schools.\textsuperscript{159}

Beginning with its decision in \textit{Regents of University of California v. Bakke},\textsuperscript{160} the Court has sharply restricted the ability of governmental bodies to undertake “affirmative action” programs benefiting racial minorities and designed to enable them to achieve full and equal participation in important areas of American life.\textsuperscript{161} It has done so by refusing to hold in \textit{Bakke} and subsequent cases, that overcoming the present consequences of societal discrimination against African-Americans and other racial minorities was a compelling governmental interest, justifying the precisely-tailored use of race-conscious criteria to achieve this objective.\textsuperscript{162} The only two governmental interests that the Court has recognized as compelling to justify the affirmative use of race-conscious criteria benefiting racial minorities are the interest in remediating the present consequences of identified past discrimination for which the governmental body is responsible,\textsuperscript{163} and achieving a

\textsuperscript{160} 438 U.S. 265 (1978).
\textsuperscript{161} \textit{Id.} at 307, 319-20.
racially diverse student body in a public university.\textsuperscript{164} Even here, the Court has limited the use of race-conscious criteria. In order to rely on past governmental discrimination as the basis for a race-based affirmative action program, there must be a “strong showing in evidence” that the government had engaged in past discrimination.\textsuperscript{165} And the permissible use of race in student admissions in order to achieve a racially diverse student body is limited to the situation where the university takes race into account as only one of the factors in determining admission.\textsuperscript{166} The Court has held that the use of a racial quota, even though reasonable in terms of numbers, is not a precisely tailored means of achieving the diversity objective.\textsuperscript{167}

My point here is that constitutional doctrine relating to racial equality is well-settled and the racial cases now coming before the Court for the most part involve the application of this doctrine to particular uses of race-conscious criteria by the government. In \textit{Grutter v. Bollinger},\textsuperscript{168} the Court reconsidered the use of race-conscious admissions programs by a public university and reaffirmed the holding of \textit{Bakke} that achieving a racially diverse student body was a compelling governmental interest and that taking race into account as one factor in the admissions process was a precisely tailored means of advancing that interest.\textsuperscript{169} In \textit{Parents Involved in Community Schools v. Seattle School District No. 1},\textsuperscript{170} the Court considered a different issue relating to the use of race by a governmental body: whether a public school district could use race as a factor in assigning students to particular high schools within the district.\textsuperscript{171} The case was an important one, in that the Court’s decision would determine the constitutional permissibility of efforts by school

\textsuperscript{166} \textit{Bakke}, 438 U.S. at 314.
\textsuperscript{167} \textit{Bakke}, 438 U.S. at 299. \textit{See also} \textit{Gratz v. Bollinger}, 539 U.S. 244, 270-71 (2003) (invalidating a university’s undergraduate race-conscious admissions program that mechanically assigned a large number of points to an applicant’s minority race and that did not provide for individual consideration of each applicant).
\textsuperscript{168} 539 U.S. 306.
\textsuperscript{169} \textit{Id.} at 343. Despite the widespread public debate in advance of the decision over its societal impact and despite the media’s advance characterization of the case as a “landmark,” the constitutional issue in the case was quite narrow. \textit{See} Robert A. Sedler, Op-Ed, \textit{U-M Cases Won’t Reach Beyond Schools}, \textit{Detroit Free Press}, June 23, 2003, at 9A; Robert A. Sedler, Commentator in “\textit{What Do U-M Court Rulings Mean? Legal Experts Debate Whether Diversity is Compelling State Interest},” \textit{Detroit News}, June 24, 2003, at 11A.
\textsuperscript{170} 127 S. Ct. 2738.
\textsuperscript{171} \textit{Id.} at 2746.
districts to achieve school desegregation against the backdrop of extensive racial residential segregation and concentration. The Seattle School District had never practiced de jure racial segregation in the schools, while the Louisville-Jefferson Country School District had practiced de jure racial segregation, but had long been declared a unitary district and had been released from judicial supervision. Both districts had voluntary chosen to try to operate desegregated schools by drawing attendance zones in such a way as to maximize actual desegregation and by using a race-conscious transfer program designed to achieve a degree of racial balance in the different schools.

In a 5-4 decision, the Court held that both desegregation programs were unconstitutional. The plurality opinion by Chief Justice Roberts, joined by Justices Scalia, Thomas and Alito, strongly indicated that achieving desegregated public schools was not a compelling governmental interest, so that any effort to use race-conscious criteria in assigning students was unconstitutional. Here again, Justice Kennedy supplied the deciding vote, but his opinion diverged sharply from the plurality opinion of Chief Justice Roberts. Justice Kennedy found that assigning individual students to particular schools on the basis of race, as was done for a small number of students under the transfer provisions of both programs, was unconstitutional, and to this extent, agreed with the Roberts plurality in striking down this feature of the desegregation programs. But more importantly, Justice Kennedy disagreed with the Roberts plurality and agreed with the four liberal Justices in dissent that achieving desegregated public schools was a compelling governmental

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172. Id. at 2755.
173. Id. at 2747.
174. Id. at 2749. The author, while a Professor at the University of Kentucky College of Law, was the lead counsel in the litigation involving the Louisville and Jefferson County School Districts. Both districts had practiced de jure segregation, and the Sixth Circuit held that, in view of the historic interrelationship between the two districts for segregative and other purposes, the courts could order a desegregation plan that crossed school district lines and could order the merger of the two districts. The Louisville-Jefferson County school district litigation is discussed fully, with citations to the court decisions, in Robert A. Sedler, The Louisville-Jefferson County School Desegregation Case: A Lawyer's Retrospective, 105 THE REGISTER OF THE KENTUCKY HISTORICAL SOCIETY 3 (Winter, 2007).
175. Seattle Sch. Dist. No. 1, 127 S. Ct. at 2746.
176. Id.
177. Id. at 2755-59 (plurality opinion).
178. Id. at 2791 (Kennedy, J., concurring).
179. Id.
interest. Thus, there were five votes and so a holding of the Court on this issue.

Justice Kennedy went on to discuss the permissible means that school districts could use to achieve desegregated public schools. Here, he stated as follows:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student that he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.

The Kennedy opinion represents the holding of the Court in Seattle School District No. 1, and will serve as a guide to school districts seeking to achieve racially desegregated schools.

In my opinion, the holding in Seattle School District No. 1, based on the Kennedy concurring opinion, is actually a victory, though less than a complete one, for voluntary school desegregation in the public schools. The opinion holds that the school district’s interest in achieving racially desegregated public schools is a compelling governmental interest, and that school districts can use racially conscious assignment methods to achieve this objective so long as they stop short of assigning individual students to particular schools on the basis of race. Thus, it is my

180. Id. at 2789.
181. Seattle Sch. Dist. No. 1, 127 S. Ct. at 2788. Justice Kennedy stated as follows:

The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. . . . The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent that the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Id. at 2791.
183. Id. at 2753-54. I must disagree with Professor Chemerinsky’s assertion that it is questionable whether these methods will be effective in achieving meaningful desegregation. Chemerinsky, supra note 1, at 959. These were the primary methods used
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submission that insofar as the Court in Seattle School District No. 1 decided a new issue as to the permissible use of race by governmental bodies, it came down on the side of such use, so that the decision in Seattle School District No. 1, thanks to Justice Kennedy, is actually a decision favorable to school desegregation and is more in accord with the views of the liberal Members of the Court than with the conservative ones. 184

Turning briefly to the other high-profile decisions of the Roberts Court identified by Professor Chemerinsky, we see that in Kennedy v. Louisiana, 185 Justice Kennedy joined the four liberals to hold that the imposition of the death penalty for child rape constituted cruel and unusual punishment, in violation of the Eighth Amendment. 186 This decision reaffirmed existing death penalty doctrine that the death penalty can be imposed only for the crime of murder, and in fact continues a trend of limiting the circumstances in which the death penalty can be imposed. 187

Professor Chemerinsky has identified four First Amendment cases, where he says that the Court divided on liberal-conservative lines and where Justice Kennedy cast the deciding vote on the conservative side. 188 Two of these were cases where the Court upheld First Amendment challenges to federal campaign finance laws, 189 and in this area, the conservative Justices are more disposed to find unconstitutional campaign finance laws, while the liberal justices are more disposed to uphold them. The development of constitutional doctrine in this area by both schools districts, and the race-based assignment under the transfer provisions were only a small part of the overall program, 3% in Louisville. I made a presentation on the Seattle School District No. 1 decision at the University of Louisville in April, 2008, and was informed at that time that the Louisville-Jefferson County School Board was continuing to operate the voluntary school desegregation program, with modifications to conform to the Supreme Court’s decision in Seattle School District No. 1.

184. It will be recalled that the decision in Bakke, while invalidating the particular quota-type race-conscious admissions program in that case, provided guidelines for the permissible use of race-conscious admissions programs by public universities. See Robert A. Sedler, Beyond Bakke: The Constitution and Redressing the Social History of Racism, 14 Harv. C.R.-C.L. L. Rev. 134, 141-45 (1979) (regarding the contemporary discussion of the Bakke decision).
186. Id. at 2646.
187. See Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits imposing the death penalty on a juvenile); See also Atkins v. Virginia, 536 U.S. 304 (2005) (holding that the Eighth Amendment prohibits imposing the death penalty on a mentally retarded person).
188. See Chemerinsky, supra note 1, at 954-55.
189. Wis. Right to Life, 127 S. Ct. 2652; see also Davis, 128 S. Ct. 2759.
begins with the Court’s landmark decision in *Buckley v. Valeo*, superscript 190 holding that money is “speech” for purposes of the First Amendment, so that governmental regulation of campaign financing is subject to First Amendment limitations. Following *Buckley*, the Court has rendered a series of fact-specific decisions, sometimes upholding particular restrictions on campaign finance, superscript 192 and sometimes, as in these two cases, invalidating them. The results in these two cases do not work any significant change in First Amendment doctrine relating to the constitutionality of campaign finance laws. In a third First Amendment case, the Court held that the First Amendment did not apply to public statements made by a government employee in the course of the employee’s official duties. That decision is in accord with other decisions in this area that limit to some extent the First Amendment protection afforded to the speech of government employees.

190. 424 U.S. 1.
191. Id.
192. See e.g., *Beaumont*, 539 U.S. 146 (holding that the ban on direct contributions by corporations can constitutionally be applied to ban such contributions by nonprofit advocacy corporations); *McConnell*, 540 U.S. 93 (upholding most of the “soft money” restrictions contained in the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 431 et seq. (2009)).
193. In *Wisconsin Right to Life*, the Court held that the prohibition of section 203(a) of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b(b)(2) (2009), prohibiting the use of corporate or funds to finance “electioneering communications” violated the First Amendment rights of a not-for-profit corporation when applied to its issue-advocacy communications, here an ad naming a Senator running for re-election and urging voters to contact the Senator and urge the Senator to oppose the filibustering of judicial nominees. *Wis. Right to Life*, 127 S. Ct. at 2652. In *Davis*, the Court held unconstitutional the “millionaires” amendment to the Bipartisan Campaign Finance Act, 2 U.S.C. § 441a-1 (2009), relaxing the limits on the ability of an opponent of a self-financed House of Representatives candidate to raise money from donors and to coordinate campaign spending with party committees. *Davis*, 128 S. Ct. at 2759. The Court found that the amendment effectively penalized the self-financed candidate’s ability to use personal funds to finance campaign speech, and produced fundraising advantages for the opponent, without any compelling governmental interest in doing so. Id.
194. Since my own view is that restrictions on campaign finance raise serious First Amendment questions, a view shared by some civil liberties organizations, such as the American Civil Liberties Union, I am supportive of these decisions. See Robert A. Sedler, Op-Ed, *McCain Bill Imperils Free Speech*, DETROIT NEWS, April 18, 2001.
196. The most important limitation is that the employee’s speech is protected only when the employee is speaking as a citizen upon matters of public concern, as opposed to matters of personal interest. See *Connick v. Myers*, 461 U.S. 138 (1983) (discussing questionnaire distributed by assistant district attorney to other assistant district attorneys concerning office transfer policy and other questions relating to the conduct of the office by the district attorney was not speech upon a matter of public concern).
The most interesting First Amendment case identified by Professor Chemerinsky is *Morse v. Frederick*, where the Court held that the First Amendment was not violated when a high school student was disciplined for displaying a banner at a school assembly reading, "Bong Hits 4 Jesus." The Opinion of the Court, authored by Chief Justice Roberts, and joined in by Justices Scalia, Kennedy, Thomas and Alito, agreed that the principal could reasonably view the message on the banner as promoting illegal drug use. Justice Breyer concurred on the ground that in this action for damages the principal could properly assert qualified immunity. Justice Stevens, joined by Justices Souter and Ginsburg dissented, expressing a concern that the opinion could be interpreted as authorizing school officials to prohibit students from commenting on "the wisdom of the war on drugs or of legalizing marijuana for medicinal use." This concern should be alleviated by the concurring opinion of Justices Alito and Kennedy, saying that the Court's opinion was limited to the advocacy of illegal conduct, and that the opinion "provides no support for any restriction on speech that plausibly could be interpreted as commenting on any political or social issue," and here quoting from the Stevens dissent, speech commenting on "the wisdom of the war on drugs or of legalizing marijuana for medicinal use." The concurring opinion strongly disagreed with the position advanced by the school officials, supported by the United States as amicus curiae, that the First Amendment permits school officials to center any student speech that interferes with the school's "educational mission." It turns out then that, based on the Alito and Kennedy concurrence, the decision is limited to prohibiting the advocacy of illegal conduct by students, and that the difference between the Alito-Kennedy concurrence and the Stevens dissent was over whether the principal could reasonably conclude that the banner advocated illegal drug use. Thus, the decision is a very limited restriction on the free speech rights of public school students, and is not inconsistent with other restrictions that

197. 127 S. Ct. 2618.
198. Id. at 2621-22.
199. Id. at 2625.
200. Id. at 2638-42 (Breyer, J., concurring).
201. Id. at 2649 (Stevens, J., dissenting).
202. Id. at 2636-38 (Alito, J., concurring).
203. Morse, 127 S. Ct. at 2636.
204. Kennedy and Alito said that the principal could reasonably conclude that the banner advocated illegal drug use. Id. at 2636. Justice Stevens, in his dissent, said that this conclusion "practically refutes itself." Id. at 2649 (Stevens, J., dissenting).
the Court has upheld.205 What is most important as regards the free speech rights of public school students is that, because of the Alito-Kennedy concurrence,206 public school officials cannot prohibit speech that they deem "politically incorrect," such as a student's expression opposition to homosexuality, on the ground that such speech is inconsistent with the school's "educational mission."207

Although, as I maintain, the "law of the Constitution" is relatively settled at this time in the Nation's history, it is not static. The "law of the Constitution" can change in significant respects as a result of Supreme Court decisions applying the "law of the Constitution" in cases presenting new issues and as a result of the Court's contraction or expansion of existing precedents. While the Court is reluctant to overrule particular precedents, it can contract or expand them in such a way as to significantly undercut their precedential authority. The cases that can produce significant change in the "law of the Constitution" are those where the issues in the case are defined by ideology, and where the result in the case is not clearly determined by the application of settled doctrine. And there are other cases where the Court's decision, although not departing in a major way from settled constitutional doctrine, can have an important impact on public policy. It is in these kinds of cases where the changed composition of the Court can make a major difference.

It is my submission that looking to the cases identified by Professor Chemerinsky as the most important decisions of the Roberts Court, we do not see, for the most part, any significant change in the "law of the Constitution," nor do we see any decisions that when viewed carefully in terms of their specific holding, will have an important public policy impact. And, as Professor Chemerinsky has demonstrated, and as I have explained further, this is due to the influence of Justice Kennedy on the Court.

205. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding that school officials may discipline a student for delivering a speech at a student assembly that contained a number of sexual innuendos); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding that where the publication of a school newspaper is a part of a regular course for which academic credit is given, the faculty advisor could exercise editorial control over the content of the student work that would be published in the newspaper).

206. Morse, 127 S. Ct. at 2636 (Alito, J., concurring).

207. In this sense, the decision is a reaffirmation of the right to student speech on political issues that was first recognized in Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969). See Morse, 127 S. Ct. at 2636-38 (Alito, J. concurring).
The one decision making a significant change in the "law of the Constitution" is District of Columbia v. Heller,\(^{208}\) since in that case, the Court for the first time held that the Second Amendment creates an individual right to keep and bear arms.\(^{209}\) However, as I have tried to demonstrate, the Scalia opinion for the Court in Heller, influenced in my view by a concern with avoiding a Kennedy concurrence that would limit significantly the scope of the enumerated constitutional right that the Court had just recognized, went on itself to limit significantly the scope of that right.\(^{210}\) So, while the decision does make a significant doctrinal change in the "law of the Constitution," that change likely will not invalidate most gun control laws. It thus may be a decision that is important doctrinally, but that is not likely to have a significant public policy impact.

The Court did have an opportunity to make an important change in constitutional doctrine relating to the imposition of the death penalty in Kennedy v. Louisiana,\(^{211}\) where it could have departed from existing precedent and held that the death penalty could be imposed for crimes other than murder.\(^{212}\) It did not do so, because Justice Kennedy joined the four liberal Justices to hold that the imposition of the death penalty for child rape constituted cruel and unusual punishment, in violation of the Eighth Amendment.\(^{213}\)

Similarly, because of Justice Kennedy's voting with the four liberals in Hamdan v. Rumsfeld,\(^{214}\) the Court continued to reject the assertion of Presidential power over Congressional power "in time of war,"\(^{215}\) and in Boumediene v. Bush,\(^{216}\) again because of Justice Kennedy's voting with the four liberals, the Court narrowly interpreted Congress's power to suspend the writ of habeas corpus. As Professor Chemerinsky notes, "the most important disappointments for conservatives have been in the two cases ruling against the Bush Administration with regard to the Guantanamo detainees, [where] Justice Kennedy joined with Justices Stevens, Souter, Breyer and Ginsburg to create the majority."\(^{217}\)

Parents Involved is a case where the Court's decision could have had an important impact on governmental policy in that it dealt with

\(^{208}\) 128 S. Ct. 2783.
\(^{209}\) Id. at 2817-18.
\(^{210}\) Id. at 2816-17.
\(^{211}\) Id. at 2641.
\(^{212}\) Id. at 2651-54.
\(^{213}\) Id. at 2646.
\(^{214}\) 548 U.S. at 557.
\(^{215}\) Id. at 611-12.
\(^{216}\) 128 S. Ct. 2229.
\(^{217}\) Chemerinsky, supra note 1, at 973.
constitutional limitations on the power of school districts to achieve school desegregation against the backdrop of extensive racial residential segregation and concentration. The plurality opinion of Chief Justice Roberts strongly indicated that achieving desegregated public schools was not a compelling governmental interest, so that any effort to use race-conscious criteria in assigning students was unconstitutional. But here again, Justice Kennedy stepped in and prevented the Roberts Court from rendering such a sweeping holding. Instead, Justice Kennedy agreed with the four liberal Justices in dissent that achieving desegregated public schools was a compelling governmental interest, thus providing a holding of the Court on this important issue. His concurring opinion, representing the holding of the Court on the issue of permissible means of achieving such desegregation, held that the school districts could use racially-conscious assignment methods so long as they stop short of assigning individual students to particular schools on the basis of race. For these reason, it is my submission that the decision in Seattle School District No. 1, as per the Justice Kennedy concurrence, will have the effect of enabling school districts to take a wide range of actions, short of individual race-based assignment, to achieve desegregated schools.

Finally, the decision in Gonzales v. Carhart, is a decision supporting the conservative position favoring greater regulation of abortion. However, the law in question only dealt with a ban on the use of a particular procedure that will be employed in only a very small number of cases. The decision will not have significant precedential effect when relied on to support an abortion regulation that could actually prevent some women from having an abortion. And, of course, it does nothing to alter the essential holding of Roe v. Wade, protecting a woman's right to have a safe and legal abortion. Thus, the decision has virtually no effect on constitutional doctrine relating to abortion rights and will not in any way interfere with the ability of American women to have a safe and legal abortion.

My review of the "most important and high profile cases during the Roberts era" thus leads me to the conclusion that, as I believe I have demonstrated, while the Roberts Court may have moved in a conservative direction, it has not done so by very much, and that the

218. Seattle Sch. Dist. No. 1, 127 S. Ct. at 2755-59 (plurality opinion).
219. See id. at 2788 (Kennedy, J., concurring).
220. Id. at 2791.
221. See discussion and accompanying text, supra notes 179-183.
222. 550 U.S. at 124.
decisions of the Roberts Court may have some impact on American constitutional law, but not very much.

V. A CONCLUDING NOTE: THE FUTURE OF THE ROBERTS COURT

As Professor Chemerinsky has stated, and as we have seen in our review of what Professor Chemerinsky has identified as the most important decisions of the Roberts Court, "The bottom line is that when the Court is divided 5-4 on issues where there are clear liberal and conservative positions, Justice Kennedy is the swing vote." And, as we have seen, Justice Kennedy's deciding vote has prevented the Roberts Court from moving very far in a conservative direction and has brought about the result that the Court's decisions have not had very much impact on American constitutional law. In the 5-4 decisions where he joined with the liberal Justices, the Court rejected the assertion of Presidential power over Congressional power "in time of war," narrowly interpreted Congress's power to suspend the writ of habeas corpus, and refused to extend the circumstances in which the death penalty can be imposed.

In Seattle School District No. 1, his concurring opinion set forth the holding of the Court on the issue of the power of school districts to use race-conscious admissions criteria in order to achieve desegregated schools, and he upheld such use so long as it fell short of assigning individual students to particular schools on the basis of race. And I strongly suspect that the Scalia opinion in Heller was influenced by a concern with avoiding a Kennedy concurrence that would limit significantly the scope of the enumerated constitutional right that the Court had just recognized, so that the opinion went on itself to limit significantly the scope of that right.

For these reasons, it is indeed proper, as Professor Chemerinsky maintains, to refer to the Roberts Court as the Anthony Kennedy Court. Now that we know that for the next four years any vacancies on the Court will be filled by liberal appointees of President Obama, for the next four years at least, to quote Professor Chemerinsky, "[t]he Court will likely stay the same as it is now—a Court where when it matters most, is the Anthony Kennedy Court." And, I would submit, if the Court does move in a conservative direction, it will not be by very much,

224. Chemerinsky, supra note 1, at 953.
225. See discussion and accompanying text, supra notes 98-108.
226. See discussion and accompanying text, supra notes 186-188.
227. See discussion and accompanying text, supra notes 179-185.
228. Chemerinsky, supra note 1, at 981.
and that if these decisions do have some impact on American constitutional law, it will not be very much.