

**UNITED STATES SUPREME COURT'S 2006–2007 TERM,
CIVIL RIGHTS AND CIVIL LIBERTIES, AND
A NEW DIRECTION**
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INTRODUCTION

The Supreme Court has created a plot line that it has followed for several years with civil liberties and civil rights cases involving race, culture (and the accompanying culture wars), presidential power in times of controversial war, federalism, and reproductive rights. When these decisions are issued, they are met by alarm, panic, deep relief and reflection, cries of the end of eras, and punditry galore. Many of the more important or controversial cases, particularly in the areas of civil rights and civil liberties are released near the end of the term. Whether this amounts to heightening of the drama on the part of a skillful court/dramatist, or just a coincident result of arbitrary scheduling, or simply that the important cases are also the hardest cases and require more time for resolution, is anybody's guess. Nonetheless, the result of this dramatic plotting is that several, indeed most of this year's most anticipated cases addressing the variety of rights in the Bill of Rights remained undecided as of mid-June.¹ As a result, the final two weeks presented court watchers with almost a full term of drama as First Amendment and Equal Protection cases were decided both in rather controversial fashions.²

The list of cases here reflect what are likely among the most important civil rights/civil liberties cases based on a survey of legal commentary on the 2006–2007 term and commentary on the various subject matters. The

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¹ See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (First Amendment case); *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (First Amendment case); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Fourteenth Amendment case). See also 2006 Term Opinions of the Court, <http://www.supremecourtus.gov/opinions/06slipopinion.html> (last visited July 1, 2008).

² See, e.g., *Parents Involved*, 127 S. Ct. at 2746, 2768 (decided by a 5-4 vote); *Morse*, 127 S. Ct. at 2622, 2629, 2636, 2638 (decided by a 6-3 vote); *Hein*, 127 S. Ct. at 2559 (decided by 3 member plurality).

cases reviewed here include several criminal justice cases involving issues from mitigation, habeas corpus, and penalties for crime classifications. The criminal justice cases implicate rights under the Fourth,³ Fifth,⁴ Sixth,⁵ and Eighth⁶ Amendments.⁷ Also covered here are decisions on the First

³ U.S. CONST. amend. IV states that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

⁴ U.S. CONST. amend. V states that

[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

⁵ U.S. CONST. amend. VI states that

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

⁶ U.S. CONST. amend. VIII states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

⁷ Most of the criminal cases originated in the state court systems. The Bill of Rights amendments to the Constitution were originally not applicable to the states. *See Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Most of the amendments in Bill of Rights became applicable to the states via the Fourteenth Amendment’s Due Process Clause which was added to the Constitution following the Civil War. Under the Incorporation Doctrine, the liberty interest protected by the Due Process Clause is said to have “incorporated” most of the Bill of Rights into the Fourteenth, which is applicable to the states. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). The *criminal rights* provisions *not* incorporated into the Fourteenth Amendment and accordingly not applicable to the states are the Fifth

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Amendment⁸ and the Equal Protection Clause⁹ of the Fourteenth Amendment.¹⁰ It is an understatement to say that the Court did not suddenly become possessed with the ghosts of the 1960s Warren Court—far from it. In fact, using a loose scale and personal scale to determine liberal versus conservative decisions, the Court came up conservative in twelve of the fifteen cases included in this Paper, and liberal in only three. Most of the cases reviewed are criminal justice cases; several dealt with federal habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996,¹¹ which was an issue in six of the cases heard so far and reviewed in this Paper. And it is fair to say that the conservative lead, though frequently the result of 5-4 decisions, was in a few instances the product of odd voting combinations, as was also the case in one of the liberal outcomes. Unanimity, formerly a major goal of the Chief Justice, was reached in only a few of these Bill of Rights decisions, and the spirit of uniformity was clearly undermined in one of the Chief’s opinions, a scathing (and unnecessarily so) rebuke of a foundational value in race and education jurisprudence.¹²

Amendment’s grand jury provision and the Eighth Amendment’s prohibition against excessive bail.

⁸ U.S. CONST. amend. I states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

⁹ The equal protection case, *Parents Involved in Community Schools v. Seattle School District*, 127 S. Ct. 2738 (2007), discussed *infra* Part VI, was the last case decided this term. Though not technically a subject falling under the Bill of Rights, the Court has recognized that the Due Process Clause of the Fifth Amendment includes equal protection values in cases dealing the federal government. Because of the similarity of the issues involved in Bill of Rights cases and the Fourteenth Amendment, the school assignment case was included in these materials.

¹⁰ U.S. CONST. amend. XIV § 1 states that

[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¹¹ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹² See discussion *infra* Part VI.

Disappointingly, however, positions virtually indistinguishable in terms of the quality of argument became opposite poles in several 5-4 decisions, with conservatives taking one side and the liberals the other seemingly solely on the basis of which outcome would be reached under a particular argument. Indeed in several instances the opinions on both ideological sides of the Court sounded more like debate talking points or a game of “gotcha,” than reasoned judicial decision-making. Though earlier Courts suffered from the same tendencies, this Court, and those immediately preceding it, faced more contentious cases that bring out more of the political and social ideology of the members of the Court than any of them will ever admit publicly.

I. CRIMINAL JUSTICE

A. Death Penalty

1. *Lawrence v. Florida*¹³—*Tolling and the Antiterrorism Effective Death Penalty Act.*

In *Lawrence v. Florida*, the Supreme Court found that a Florida death penalty defendant’s time to file a federal habeas corpus¹⁴ action had passed while the defendant was awaiting a ruling on a writ of certiorari before the Supreme Court.

Lawrence, a death penalty defendant, ran afoul of the habeas corpus filing time requirements under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).¹⁵ Under that act, the time requirements for filing a federal habeas corpus action are tolled “pending an application for State post-conviction or other collateral review,”¹⁶ a reference to state

¹³ 127 S. Ct. 1079 (2007).

¹⁴ U.S. CONST. art. I, § 9, cl. 2. The purpose of the writ of habeas corpus is to allow a criminal defendant the opportunity to challenge any violation of constitutional rights during the trial leading to conviction. The rights sought to be vindicated in this case involved Fifth and Sixth Amendment issues. Specifically, Lawrence sought to challenge the claims that (1) “his death sentence was disproportionate to other death penalty cases”; (2) “the murder was not committed in a cold, calculated and premeditated manner”; (3) “the murder was not heinous, atrocious, or cruel”; and (4) the trial court erred in not considering mitigating circumstances, including the fact that the sentence of co-defendant/wife was significantly less harsh. Brief of Petitioner at 4 n.7, *Lawrence*, 127 S. Ct. 1079 (No. 05-8820).

¹⁵ *Id.* at 4; Pub. L. No. 104-132, 110 Stat. 1214 (1996) (relevant sections codified at 28 U.S.C. §§ 2244, 2261–2266 (2000)).

¹⁶ 28 U.S.C. § 2244(d)(2) (2000) (“The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or
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habeas corpus proceedings. Believing the provision included time to pursue U.S. Supreme Court review of state habeas proceedings as part of the tolled period, petitioner found himself out of time when it came time to pursue federal habeas rights because of the time spent pursuing Supreme Court review of the state habeas action.¹⁷ Lawrence’s position in this proceeding was that the tolling of the statute of limitation should have continued through the pendency of the application of the writ of certiorari in the state habeas proceeding.¹⁸

Justice Thomas wrote the opinion, joined by Justices Scalia, Kennedy, Alito, and Chief Justice Roberts.¹⁹ The opinion essentially consisted of reasoning based on the language of the statute and conclusions that could be drawn from the use of certain terms in other parts of the statute when compared to the tolling language at section 2244(d)(2).²⁰

For example, Justice Thomas employed what could be termed plain-meaning analysis of “State post-conviction procedures” in referring to the event which triggers tolling in the federal statute.²¹ By Justice Thomas’ reasoning, a writ of certiorari is not a part of a state’s post-conviction proceedings, and any further tolling of the federal statute of limitations would not be appropriate after the Florida Supreme Court ruling.²² He found support for the reasonableness of the conclusion in the AEDPA’s exhaustion requirement by the reasoning that, if certiorari were part of the state’s post-conviction proceedings, “it is difficult to understand how a state prisoner could exhaust state post conviction remedies without filing a petition for certiorari.”²³

claim is pending shall not be counted toward any period of limitation under this subsection.”).

¹⁷ The AEDPA’s statute of limitations period for habeas petitions is one year. Lawrence did not seek appeal of his state conviction until 364 days after conviction, and 113 days after the Florida Supreme Court decision. While this action tolled the federal limitations period under the AEDPA, the district court ruled that when Lawrence did file his petition, the single day left in the statute of limitations had passed. The petition was denied on these grounds. *Lawrence*, 127 S. Ct. at 1081–82.

¹⁸ Brief of Petitioner, *supra* note 14, at 26–27.

¹⁹ *Lawrence*, 127 S. Ct. at 1081.

²⁰ *See id.* at 1082–85.

²¹ *Id.* at 1083.

²² *Id.*

²³ *Id.* Other uses of analogous reasoning included reference to the fact that another provision of the same section, 28 U.S.C. § 2244(d)(1)(A), set the conclusion of direct

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Justice Ginsburg wrote a dissent which was joined by Justices Souter, Stevens, and Breyer.²⁴ In it, Justice Ginsburg essentially engaged in the same kind of reasoning as Justice Thomas but reached different conclusions. One of the keys to her analysis was 28 U.S.C. § 2263(b)(2), which covers capital cases in states that provide habeas counsel—the “opt in provision.”²⁵ That provision states clearly that the tolling of the limitations ends at “the final State court disposition of such petition [state habeas petition].”²⁶ By Justice Ginsburg’s reasoning, the more specific language indicated a clear intent to limit tolling, a level of clarity missing in the provision under review.²⁷ By contrast, Justice Thomas read the same language to show that both sections 2263(b)(2) and 2244(d)(2) limited tolling to state proceedings by focusing more on the modifier “state,” as opposed to Justice’s Ginsburg focus on the phrase “final state court disposition.”²⁸

Comment

Both opinions address Lawrence’s execution by canons of statutory interpretation yet neither opinion lands a knock-out analysis. Both interpretations of the relevant provisions of the AEDPA are plausible from an interpretive standpoint, and when that happens, this Court, despite attempts at unity on the part of Chief Justice Roberts in past cases,²⁹ falls

review of a conviction as the date when the limitations period would begin to run. The statute reads:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . .

Id. Justice Thomas acknowledged that that *direct review* would include proceedings on appeal to the Supreme Court because the term direct review is not limited by the term “state.” According to Justice Thomas, the difference in language in the two time provisions was significant in treating the triggering events in the two provisions differently. *Lawrence*, 127 S. Ct. at 1084.

²⁴ *Id.* at 1086 (Ginsburg, J., dissenting).

²⁵ 28 U.S.C. § 2263 (2000).

²⁶ *Id.*

²⁷ *Lawrence*, 127 S. Ct. at 1087–88 (Ginsburg, J., dissenting).

²⁸ *Id.* at 1084 (majority opinion).

²⁹ Peter Rutledge, *Looking Ahead: October Term 2006*, 2006 CATO SUP. CT. REV. 361, 362.

back on individual social and political values,³⁰ despite protestations to the contrary by members of the Court in public comments that their opinions do not reflect personal social views.³¹

2. *Death Penalty—Mitigation—Abdul-Kabir v. Quarterman*³² and *Brewer v. Quarterman*³³

The Supreme Court decided several incarceration cases this term, including these involving the death penalty and mitigation. In the companion cases of defendants Kabir and Brewer, the Supreme Court overturned lower court decisions, ruling 5-4 in favor of the defendants.³⁴

Kabir and Brewer argued that special instructions given to sentencing juries in the two cases precluded consideration of mitigating evidence.³⁵ In the cases the juries were given instructions to consider whether the murders were committed deliberately and whether it was probable that the defendants would commit future violent acts.³⁶ Both defendants wanted instructions allowing the juries to consider mitigating circumstances but the trial court declined to issue such instructions, and subsequent appellate courts in direct and habeas appeals agreed on the basis that Supreme Court decisions had sanctioned the use of limited instructions in death penalty cases.³⁷

Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, wrote that its decisions were not quite so definite on the permissibility of limited instructions that exclude mitigating evidence.³⁸ Noting the standard set in *Penry v. Lynaugh*,³⁹ that juries must give meaningful consideration to mitigating circumstances that might be a basis for declining to give death sentences, Justice Stevens wrote that the Texas courts had in effect eliminated such meaningful consideration in limiting

³⁰ Roger Pilon, *The Roberts Court Emerges: Restrained or Active?* 2007 CATO SUP. CT. REV. i, ii.

³¹ *Court in Transition; The Judge's Only Obligation Is to the Rule of Law*, N.Y. TIMES, Jan. 10, 2006, at A18.

³² 127 S. Ct. 1654 (2007).

³³ 127 S. Ct. 1706 (2007). Because both cases involved the same relevant facts on the common legal issues involved, general references are made to the *Kabir* decision.

³⁴ *Kabir*, 127 S. Ct. at 1659; *Brewer*, 127 S. Ct. at 1710.

³⁵ *Kabir*, 127 S. Ct. at 1662; *Brewer*, 127 S. Ct. at 1710.

³⁶ *Kabir*, 127 S. Ct. at 1660; *Brewer*, 127 S. Ct. at 1710.

³⁷ *Kabir*, 127 S. Ct. at 1664; *Brewer*, 127 S. Ct. at 1711.

³⁸ *Kabir*, 127 S. Ct. at 1664.

³⁹ 492 U.S. 302 (1989).

the scope of the consideration of mitigation evidence unrelated to the special issues before the juries in the two cases.⁴⁰

In dissent Chief Justice Roberts, joined by Justices Alito, Scalia, and Thomas, argued that the Court's jurisprudence in the area is far from clear and wrote that deference to the state courts is in order unless they act in contrast to clearly established federal law.⁴¹ Chief Justice Roberts highlighted the methodology of the majority's reasoning, which included considering a concurrence by Justice O'Connor in the *Franklin v. Lynaugh*⁴² plurality decision, along with the dissenters to argue that a majority of the Court in that decision did not depart from the standard set in *Penry*.⁴³ Chief Justice Roberts claimed that the *Franklin* plurality interpreted another decision, *Jurek v. Texas*,⁴⁴ in a manner that suggested that limited instructions and mitigating evidence did not necessarily conflict.⁴⁵ Justice Stevens had argued in the majority that the later decisions in *Penry* and the "majority" in the *Franklin* plurality had stressed the need for meaningful consideration of mitigating evidence.⁴⁶ By Chief Justice Roberts' reasoning, the majority erred in taking the decision from the state courts because of at least a lack of clarity in the Court's decision.⁴⁷

3. *Death Penalty—Mitigation—Ayers v. Belmontes*⁴⁸

The issue before the Court was California's factor (k), a mitigation instruction given to juries during the penalty phase in capital cases.⁴⁹ The instruction directs the jury to consider "[a]ny . . . circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."⁵⁰ Belmontes, who was challenging the imposition of the death penalty against him, argued in direct appeals, as well as in state and federal habeas appeals, that evidence that his Christian conversion would allow

⁴⁰ *Kabir*, 127 S. Ct. at 1675.

⁴¹ *Kabir*, 127 S. Ct. at 1675–76 (Roberts, C.J., dissenting) (referencing the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (2000)).

⁴² 487 U.S. 164 (1988).

⁴³ *Kabir*, 127 S. Ct. at 1677–78 (Roberts, C.J., dissenting).

⁴⁴ 428 U.S. 262 (1976).

⁴⁵ *Kabir*, 127 S. Ct. at 1677 (Roberts, C.J., dissenting).

⁴⁶ *Id.* at 1669 (majority opinion).

⁴⁷ *Id.* at 1676 (Roberts, C.J., dissenting).

⁴⁸ 127 S. Ct. 469 (2006).

⁴⁹ *Id.* at 472.

⁵⁰ CAL. PENAL CODE § 190.3 (1999).

him to be a constructive force while serving a life sentence was not considered by the jury because of the limitations of the instruction.⁵¹ These limited instructions were deemed to be violations of Belmontes' Eighth Amendment "right to submit all mitigating evidence in capital sentencing proceedings."⁵²

Justice Kennedy, writing for the conservative majority that included Justices Scalia, Thomas, Alito, and Chief Justice Roberts, ruled that the instruction does not *exclude* the kind of future behavior evidence that the Belmontes wanted considered.⁵³ Reviewing previous Supreme Court cases in which factor (k) was considered, Justice Kennedy noted, quoting the majority in *Boyde v. California*,⁵⁴ that the correct inquiry in the case is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."⁵⁵

Justice Kennedy reviewed the instruction, arguments of counsel, and evidence introduced at the sentencing phase (including evidence of Belmontes conversion and good behavior as a Christian).⁵⁶ The prosecuting attorney, in Justice Kennedy's view, was at worst non-committal on the appropriateness of considering the evidence.⁵⁷ Furthermore, Justice Kennedy reasoned that the fact that the evidence was allowed in the first place indicates that the jury would have had to assume that it was to be considered, unless they were to believe that the testimony in Belmontes favor was intended to be no more than a charade.⁵⁸ Based on the *Boyde* standard, Justice Kennedy reasoned that it is unreasonable to assume that the jury applied the instruction in a manner that prevented them from considering the mitigating evidence.⁵⁹ Accordingly, Belmontes' challenge to his sentence of death was turned back.⁶⁰

Justice Stevens, writing in dissent for Justices Souter, Breyer, and Ginsburg, found the circumstances not quite so unreasonable.⁶¹ Justice

⁵¹ *Belmontes*, 127 S. Ct. at 473.

⁵² *Id.* at 472.

⁵³ *Id.* at 477.

⁵⁴ 494 U.S. 370 (1990).

⁵⁵ *Id.* at 380.

⁵⁶ *Belmontes*, 127 S. Ct. at 473.

⁵⁷ *See id.* at 477.

⁵⁸ *Id.* at 46 (citing *Boyde v. Cal.*, 494 U.S. 370, 383 (1990)).

⁵⁹ *Id.* at 478–79.

⁶⁰ *Id.* at 480.

⁶¹ *Id.* at 488 (Stevens, J., dissenting).

Stevens focused on the unease exhibited by the California Supreme Court in a later decision. In *People v. Easley*,⁶² the state high court effectively rewrote factor (k) by requiring trial courts to include an explanation of factor (k) that instructed the jury to consider evidence that “extenuates the gravity of the crime . . . and any other aspect of [the] defendant’s character or record . . . that the defendant proffers as a basis for a sentence less than death.”⁶³ To Justice Stevens and the other liberals, if the California Supreme Court felt that the language of factor (k) was vague, that advice should have been heeded by the Court.⁶⁴ Because the question was whether the instruction met the applicable constitutional standard for clarity and not what the standard was, the Court, to Justice Stevens’ thinking, could have deferred to the state courts on the question of clarity.⁶⁵

Comment

This is another circumstance where the sides square off more on ideology than the persuasiveness of the arguments involved. Given the “likelihood” standard set by the Court in *Boyde* it is hard to make a case of unlikelihood that the jury did not consider and subsequently reject Belmonte’s mitigation evidence. Indeed, the *Boyde* standard does not require a lack of caution in death penalty cases,⁶⁶ and this should dictate a more careful approach to evaluating instructions than what the majority provided. Nevertheless, what is likely or unlikely is more a matter of political and social convictions than hard law.

4. *Death Penalty—Juror Selection—Uttecht v. Brown*⁶⁷

Respondent Cal Brown was convicted of murder and sentenced to death by a jury that did not include one individual referred to as Juror Z.⁶⁸ Juror Z was removed from the panel during voir dire for cause by the prosecution because of what were characterized by the trial judge as unclear and wavering views on the death penalty.⁶⁹ On the issue of whether removal for cause was appropriate under these circumstances, the

⁶² 671 P.2d 813 (Cal. 1983).

⁶³ *Belmontes*, 127 S. Ct. at 482 (Stevens, J., dissenting) (quoting *Easley*, 671 P.2d at 826 n.10).

⁶⁴ *See id.* at 482–83 (Stevens, J., dissenting).

⁶⁵ *See id.*

⁶⁶ *See Boyde v. California*, 494 U.S. 370, 380 (1990).

⁶⁷ 127 S. Ct. 2218 (2007).

⁶⁸ *Id.* at 2221–22.

⁶⁹ *Id.* at 2227.

Supreme Court, on federal habeas corpus review, reversed the Ninth Circuit Court of Appeals.⁷⁰ Instead, the Court decided, in its usual 5-4 count, written by Justice Kennedy and joined by the Court's conservatives, that the removal did not interfere with the respondent's Sixth and Fourteenth Amendment rights to a fair trial.⁷¹

Justice Kennedy set the stage for the decision by laying out four principals to be followed in forming juries in capital cases: (1) defendants have the right to a fair trial; (2) the state has an interest in having jurors who are able to apply the death penalty where the facts and law call for its use; (3) a juror who is impaired in his/her ability to apply the death penalty may be excused for cause; and, (4) the court may make an impairment determination based on demeanor and such a determination is entitled to great deference by reviewing courts.⁷²

The case is governed by the Antiterrorism and Effective Death Penalty Act of 1996,⁷³ which requires reviewing courts to apply deference in such matters.⁷⁴ The majority opinion applied the deference standard to acknowledge that the principles discussed above were followed by the trial judge.⁷⁵ The core principal is that only impairment may be a basis for removing someone from a panel.⁷⁶ In fact, the Court in *Witherspoon v. Illinois*,⁷⁷ a case cited by both the majority and dissent, said that automatic removal of those opposed to the death penalty produces a jury "uncommonly willing to condemn a man to die."⁷⁸ This means that a person's mere opposition to the death penalty shall not be construed as an inability to apply the penalty as the law requires.⁷⁹ On the other hand, impairment, construed as the inability to follow the law on death penalty matters, would suffice for removal for cause.⁸⁰

⁷⁰ *Id.* at 2230.

⁷¹ *Uttecht*, 127 S. Ct. at 2221, 2230.

⁷² *Id.* at 2224.

⁷³ *Id.*; Pub. L. No. 104-132, 110 Stat. 1214 (1996) (relevant section codified at 28 U.S.C. § 2254 (2000)).

⁷⁴ *Uttecht*, 127 S. Ct. at 2224; see 28 U.S.C. § 2254(d)(1)–(2).

⁷⁵ *Id.* at 2228.

⁷⁶ *Id.* at 2224.

⁷⁷ 391 U.S. 510 (1968).

⁷⁸ *Uttecht*, 127 S. Ct. at 2222 (quoting *Witherspoon*, 391 U.S. at 521) (internal quotation marks omitted).

⁷⁹ *Witherspoon*, 391 U.S. at 519.

⁸⁰ *Id.* at 522 n.21.

The Kennedy opinion studied the voir dire closely, noting that it was a long and thorough procedure and that defense counsel was particularly diligent in objecting to requests by the prosecution for exclusion of certain members of the jury pool.⁸¹ The opinion discusses these details as a prelude to a criticism of the defense attorney's decision to go along with the now challenged exclusion, a decision that prevented a thorough discussion of the exclusion decision from appearing in the record, thus forcing the Court to rely on the trial court's observation of Juror Z's demeanor.⁸² The trial judge acknowledged that the reason for the exclusion was impairment,⁸³ a fact noted by the Court. Applying the deference principal from AEDPA, The Court found for the petitioners, the state of Washington.⁸⁴

Justice Stevens, representing the liberal bench, found no such impairment in his review of the record.⁸⁵ Acknowledging AEDPA's prescription for deference, Justice Stevens felt that the record was clear enough to undermine an impairment determination.⁸⁶ According to Justice Stevens's reasoning, the excusal of Juror Z amounted to an elimination based on the candidate's beliefs.⁸⁷ The line of cases that include *Witherspoon* and its progeny make clear that excusal on the basis of belief or non-belief in the death penalty is not appropriate.⁸⁸ Justice Stevens found the voir dire testimony of Juror Z not as equivocal as Justice Kennedy did. Justice Stevens noted that the testimony established that Juror Z "was in no way categorically opposed to it."⁸⁹

Comment

Like several other cases on criminal justice heard this term, this decision falls on the side of the perception of the same facts by jurists with different political/philosophical leanings. Neither side has so definitive a

⁸¹ *Uttecht*, 127 S. Ct. at 2225.

⁸² *Id.* at 2226–27.

⁸³ *Id.* at 2228 (citing *State v. Brown*, 940 P.2d 546, 598, 599 (Wash. 1997)).

⁸⁴ *Id.* at 2228–29 *see* 28 U.S.C. § 2254.

⁸⁵ *Id.* at 2239 (Stevens, J., dissenting).

⁸⁶ *Id.*

⁸⁷ *Id.* at 2240.

⁸⁸ *Id.* Justice Stevens quotes from *Wainwright v. Witt*, 469 U.S. 412, 420 (1985), when he states that even a person who opposes the death penalty as a general matter "may not be challenged for cause based on his views about capital punishment." *Uttecht*, 127 S. Ct. at 2239 (internal quotations omitted).

⁸⁹ *Id.* at 2240.

set of facts or law that its position is set apart from the other as imminently more reasonable (though one has to question the conservatives' high degree of reliance on demeanor evidence where testimony does not display as much equivocation as claimed). Neither opinion sets out bright lines for applicability or argument (if Justice Stevens' dissent is used in future briefs). But one side would go on with the execution, and the other would delay the execution. With bright lines like that, it is never hard to determine the members of the sides in cases like this.

*B. Criminal Justice and Immigration—Lopez v. Gonzales:*⁹⁰ *When is a Felony a Felony?*

Lopez v. Gonzales dealt with the timely issue of immigration within the context of criminal justice laws. Like the *Lawrence* case, the broader constitutional issue of criminal justice was subsumed by the interpretation of statutes whose facial constitutionality was not in question. The result, like in *Lawrence*, are two opinions, one for the Court and one in dissent, that focus on semantic distinctions. But unlike *Lawrence*, the Court's division was only partially ideological—Justice Thomas' lone dissent conforms to what one comes to expect from the Justice—tough with regard to the repercussions of criminality⁹¹—but the semantic argument was not so convincing that it prevented four of the Court's conservatives from defecting and joining the majority opinion written by Justice Souter.⁹²

The Court held that in order for the negative implications of the commission of an aggravated felony under the Immigration and Nationality Act (INA)⁹³ to apply to an immigrant, the felony must be one under federal law and not simply state law.⁹⁴

Jose Antonio Lopez, an undocumented alien who eventually received resident alien status, was convicted of a felony drug-related crime under South Dakota law.⁹⁵ Under state law, the circumstances of the case made possession—with or without intent to distribute—an aggravated felony.⁹⁶ Under federal law, however, Lopez's crime was not a felony because there was no claim that he intended to distribute (a felony requirement under

⁹⁰ 127 S. Ct. 625 (2006).

⁹¹ *Id.* at 634–36 (Thomas, J., dissenting).

⁹² *Id.* at 627 (majority opinion).

⁹³ 8 U.S.C. § 1101–1525 (2000).

⁹⁴ *Lopez*, 127 S. Ct. at 631, 633.

⁹⁵ *Id.* at 628.

⁹⁶ *Id.*

federal law).⁹⁷ Nonetheless, federal immigration authorities commenced mandatory deportation proceedings based upon Lopez having committed an “aggravated felony”⁹⁸ even though the statute which describes aggravated felony under the INA, 8 U.S.C. § 1101(a)(43), assigns the descriptive “aggravated felony” to drug trafficking crimes defined in 18 U.S.C. § 924(c)(2), which deals with penalties for drug crimes under federal law. Furthermore, the relevant provision of subsection 43 states that the term aggravated felony applies to an offense described in that section whether in violation of federal, state, or in some cases foreign law.⁹⁹ That language raised the question of whether a crime would be treated for INA purposes as a felony if it is such under federal law exclusively, under state law exclusively, or under federal and state law.¹⁰⁰

Hence the issue before the Court dealt with the placement and meaning of the term “felony” in sections 924 and 1101(a)(43) of the INA. The government’s position was that the INA assigns aggravated status to trafficking crimes defined under section 924.¹⁰¹ Section 924 defines drug trafficking crimes as felonies punishable as drug crimes under federal law, the Controlled Substances Act (CSA).¹⁰² To the government, whether or not the crime is a state or federal felony is irrelevant to section 924’s definition of drug trafficking crime, so long as the crime is punishable in any manner under the CSA.¹⁰³ Furthermore, the government argued that that position is strengthened by the language in subsection (43) which extends the aggravated status to state-law crimes as well.¹⁰⁴

Writing for the Court, Justice Souter critiqued several aspects of the government’s case. Among those critiques was Justice Souter’s argument that the government’s reading of the statutory provisions was unnatural.¹⁰⁵ First with regard to section 924, Justice Souter reasoned that the natural reading of “felonies punishable under” the CSA is that the provision refers

⁹⁷ *Id.* at 629. *See also* 21 U.S.C. § 844(a) (2000).

⁹⁸ *Lopez*, 127 S. Ct. at 628.

⁹⁹ 8 U.S.C. § 1101(a)(43) (2000).

¹⁰⁰ *Lopez*, 127 S. Ct. at 630–32. The relevant portion of § 1101(a)(43) reads, “[t]he term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years”

¹⁰¹ *Lopez*, 127 S. Ct. at 629.

¹⁰² *Id.* at 628.

¹⁰³ *Id.* at 629.

¹⁰⁴ *Id.* at 631.

¹⁰⁵ *Id.* at 632.

to felonies categorized under CSA as such, and not felonies under state law that are also punishable under the CSA, but (as in this case) only as misdemeanors.¹⁰⁶

Justice Souter applied a similar semantic logic to the statute’s mandate of applying the aggravated felony status to activities “whether in violation of Federal or State law.”¹⁰⁷ To Justice Souter, this meant that the crimes listed in subsection 43 would qualify as aggravated felonies if the activity would be a felony under state law, regardless of whether there was a federal felony counterpart.¹⁰⁸ In essence, the preferred reading for Justice Souter is that where the federal law speaks to a particular crime, that law governs the categorization of that crime as either misdemeanor or felony.¹⁰⁹

Justice Thomas, as the lone dissenter, viewed the language as incorporating state categories and statuses.¹¹⁰ To Justice Thomas, section 924’s language “felonies punishable” under the CSA neither needed nor indicated any embellishment. Rather, the controlling inquiry is whether the crime is punishable as a felony in any jurisdiction, and if so, is it also punishable under the CSA? If the answer to both questions is yes, Justice Thomas would end the inquiry.¹¹¹ Similarly, Justice Thomas believed that the statute asked one question: is the crime punishable in either state or federal jurisdictions?¹¹² Again, if the answer to either is yes, the South Dakota conviction can be characterized as an aggravated felony under the INA.¹¹³ To Justice Thomas, Justice Souter’s reasoning was essentially dependent upon embellishment of the statutory language. To Justice Souter, and the other seven Justices, the natural reading of the language in the provisions belied the unadorned reading favored by Justice Thomas.

Language aside, both Justices sought convincing policy arguments for their positions. To Justice Souter the likelihood of disparate results arising from the possibility that many states could have different categories of a crime, which could result in mandatory deportation based on the state in which an alien is charged with a crime, undermined the unitary approach to

¹⁰⁶ *Id.* at 631–32.

¹⁰⁷ *Id.* at 632.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 634 (Thomas, J., dissenting).

¹¹¹ *Id.*

¹¹² *Id.* at 634.

¹¹³ *Id.* at 635.

immigration policy that Justice Souter felt the law required.¹¹⁴ To Justice Thomas, the chance of multiple disparities between state and federal laws was, at most, slight.¹¹⁵ However, his rationalization that differences between state and federal law is irrelevant was based on the facile point supported by semantic arguments that as long as the state felony is defined in section 924 Congress intended for the crime to be covered as a felony for purposes of the INA.

Comment

As in *Lawrence*, neither semantic argument is totally convincing, though Justice Souter's natural language argument at least carried the day with four of the conservative Justices. As for the policy argument, it is difficult to fathom a reason why uniformity would not be the preferred value for immigration policy, a federal mandate. Justice Thomas' counter to that argument is ultimately circular, arguing that as long as the state crime falls under the definition of subsection 43 all will be fine. But then, how to apply subsection 43 is the issue in the case. As such, Justice Thomas does not respond to Justice Souter's uniformity argument.

C. *Criminal Justice and Prison Reform*—*Jones v. Bock*¹¹⁶

This decision by the Court actually covers several cases involving prisoner grievance complaints filed in federal courts.¹¹⁷ Pursuant to new legislation by Congress, the Prison Litigation Reform Act of 1995 (PLRA),¹¹⁸ the Sixth Circuit, among other lower courts, promulgated procedural rules that allowed for dismissal of prisoner suits for several reasons in an effort to further the purpose of the legislation—to cut down on the workload of the federal courts inundated with prisoner relief suits.¹¹⁹ The Supreme Court, in a unanimous decision, found that the Sixth Circuit went too far with its punitive dismissal rules which were found not to be authorized by either the new legislation or the Federal Rules of Civil Procedure.¹²⁰

¹¹⁴ *Id.* at 633 (majority opinion).

¹¹⁵ *Id.* at 637 (Thomas, J., dissenting).

¹¹⁶ 127 S. Ct. 910 (2007). The companion case included in this opinion is *Williams v. Overton*.

¹¹⁷ *Id.* at 916–18.

¹¹⁸ 18 U.S.C. § 3626 (2000).

¹¹⁹ *Jones*, 127 S. Ct. at 915–16.

¹²⁰ *Id.* at 921.

The cases involved inmates in the Michigan corrections system.¹²¹ The actions before the Sixth Circuit were dismissed for a variety of reasons having basically to do with the principle of exhaustion of administrative remedies. One question involved whether an action could be dismissed for failure to plead exhaustion in the complaint.¹²² Another question was whether dismissal was appropriate where administrative grievances filed prior to suit did not include all of the defendants sued in the court proceeding.¹²³ A final question in the case was whether actual failure to exhaust some of the claims in a multi-claim action should result in the dismissal of the entire action.¹²⁴ The Court answered each of the questions in the negative.¹²⁵

1. Failure to Plead Exhaustion

Chief Justice Roberts, writing for the Court, did not find any statutory or policy support for the Sixth Circuit's rule allowing dismissal for failure to plead exhaustion.¹²⁶ Chief Justice Roberts noted that typically such a ground is considered appropriate as an affirmative defense which would preserve the claim at least to be heard on the merits.¹²⁷ Several cases were cited by the Chief Justice in which the Court cautioned against departing from usual federal rules practice for policy concerns.¹²⁸ This was supported by the fact that neither the Federal Rules of Civil Procedure nor the PLRA have provisions requiring such procedural treatment of prisoner actions.¹²⁹

2. Failure to Name all Parties in Initial Grievance Filing

Suggesting that grievance filings are not summonses, the Court held that the PLRA does not countenance such an outcome, nor did the procedures for grievances of the Michigan Department of Correction even

¹²¹ *Id.* at 916.

¹²² *Id.* at 914.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 926.

¹²⁶ *Id.* at 921.

¹²⁷ *Id.*

¹²⁸ *Id.* at 919.

¹²⁹ *Id.* at 919–20 (“Specific pleading requirements are mandated by the Federal Rules of Civil Procedure and not, as a general rule, through case-by-case determinations by federal courts.” (quoting *Hill v. McDonough*, 547 U.S. 573, 582 (2006))).

require the naming of particular officials.¹³⁰ The Court, however, did note that it was not ruling on whether the exhaustion requirement was met, but only that specific naming suit parties at the grievance stage was a factor in determining exhaustion.¹³¹

3. *Complete Dismissal of Action for Failure to Exhaust Specific Claims*

The Sixth Circuit dismissed entire actions on the basis that petitioners failed to exhaust each of its claims.¹³² The result was that properly exhausted claims were dismissed as well.¹³³ The Chief Justice acknowledged that while the PLRA does allow for dismissal of unexhausted *claims*, nothing in the act supported the dismissal of an entire *action*.¹³⁴ The opinion surveyed cases that stood for the proposition that, for purposes of dismissal, the terms “action” and “claim” were indeed different.¹³⁵ The Court explained the general rule that where a complaint has both good and bad claims, the typical approach has been simply to dismiss the bad claims while retaining the good.¹³⁶ Michigan, by way of comparison, noted an exception to the typical approach under which habeas corpus petitions are subject to a “total exhaustion” rule.¹³⁷ Chief Justice Roberts explained the inevitability of *that* exception, noting that because claims for habeas corpus relief seek the same remedy, “it makes sense to require exhaustion of all claims in state court before allowing the federal action to proceed.”¹³⁸ On the other hand, since the various relief requested in PLRA actions are often different in the same action, unexhausted claims do not have an effect on exhausted claims for purposes of remedy.¹³⁹ Moreover, even in habeas corpus actions, unexhausted claims are simply severed from the action and the remaining claims are then heard by federal courts.¹⁴⁰

¹³⁰ *Jones*, 127 S. Ct. at 922.

¹³¹ *Id.* at 923.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 924.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 924–25.

*D. Criminal Justice—Right to Confront Witnesses—Whorton v. Bockting*¹⁴¹

In this case, the respondent was convicted of sexual assault on his six-year-old step-daughter, who was unable to testify at trial due to her state of distress.¹⁴² The child’s statements, however, were admitted into evidence via testimony of a police detective and the child’s mother.¹⁴³ Because the Supreme Court had previously overruled precedent that allowed the testimony to be admitted, respondent sought to apply the rule of the more recent case in an effort to have the evidence excluded.¹⁴⁴ In deciding this case, the Supreme Court ruled that the more recent precedent did not apply to the respondent’s case at the habeas corpus stage of the proceedings.¹⁴⁵

In this case, the victim was able to provide details of the sexual attacks during the police interviews, about which the police detective and the victim’s mother were allowed to testify at trial.¹⁴⁶ Under Nevada law, evidence of out-of-court statements is admissible if a child under ten is unavailable and the court finds that there are “sufficient circumstantial guarantees of trustworthiness.”¹⁴⁷ On direct appeal, this offer of testimony was upheld as consistent with the Supreme Court case of *Ohio v. Roberts*,¹⁴⁸ which held that the Confrontation Clause of the Sixth Amendment of the United States Constitution is satisfied if testimony of an unavailable witness is allowed where there are sufficient indicia of reliability.¹⁴⁹

During the habeas proceeding, the Supreme Court decided *Crawford v. Washington*,¹⁵⁰ a decision overruling *Roberts*. The Court in *Crawford* held that “‘testimonial statements of witnesses absent from trial’ are admissible ‘only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine [the witness].’”¹⁵¹ Had *Crawford* been decided at the time of respondent’s trial, the child’s testimony would

¹⁴¹ 127 S. Ct. 1173 (2007).

¹⁴² *Id.* at 1178.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1179.

¹⁴⁵ *Id.* at 1184.

¹⁴⁶ *Id.* at 1177.

¹⁴⁷ *Id.* at 1177–78 n.1 (referencing NEV. REV. STAT. § 51.385(1)(a) (2003)).

¹⁴⁸ 448 U.S. 56 (1980).

¹⁴⁹ *Bockting*, 127 S. Ct. at 1178.

¹⁵⁰ 541 U.S. 36 (2004).

¹⁵¹ *Bockting*, 127 S. Ct. at 1179 (quoting *Crawford*, 541 U.S. at 59).

not have been admitted because the respondent would not have had an opportunity to cross examine her.¹⁵²

Respondent appealed a district court denial of federal habeas corpus to the Ninth Circuit on the basis that *Crawford* should have been applied.¹⁵³ The circuit court held for the respondent on the basis of the so-called *Teague* rule,¹⁵⁴ which addresses the effect that an overruling of case law will have on pending criminal litigation. On appeal to the Supreme Court, the Court, in a unanimous opinion written by Justice Alito, held that under the *Teague* rule the respondent could not prevail and that *Crawford* did not apply.¹⁵⁵

The *Teague* rule is as follows:

An old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review. A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a “watershed rul[e] of criminal procedure” implicating the fundamental fairness and accuracy of the criminal proceeding.”¹⁵⁶

The Court held that the *Crawford* decision announced a new rule because it was not dictated by governing precedent, but by a new look at the Confrontation Clause, with the Court in *Crawford* deciding that the old *Roberts* approach did not accurately convey the Framers’ view of cross examination as integral to the protections of the Clause.¹⁵⁷ Yet, even as a new rule, according to the Alito opinion, it is procedural, and, in order to be applied during the collateral habeas portion of the criminal litigation, must be a watershed rule that implicates fundamental fairness and accuracy of the proceeding. The Court ruled that it was not.¹⁵⁸

¹⁵² *Id.*

¹⁵³ *Id.* at 1179–80.

¹⁵⁴ *Teague v. Lane*, 489 U.S. 288 (1989). Justice Alito also noted that the court below believed that the respondent merited federal habeas relief under the Antiterrorism and Effective Death Penalty Act. *Bockting*, 127 S. Ct. at 1180 n.3 (referring to the Ninth Circuit opinion, *Bockting v. Bayer*, 399 F. 3d 1010, 1021–22 (9th Cir. 2005)).

¹⁵⁵ *Bockting*, 127 S. Ct. at 1184.

¹⁵⁶ *Id.* at 1180 (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)) (internal citations omitted).

¹⁵⁷ *Id.* at 1181.

¹⁵⁸ *Id.* at 1184.

The Court's reasoning essentially was that a change in the law that required confrontation of unavailable witnesses whose statements would be used at trial did not rise to the level of fundamental fairness to the point that it remedied an impermissibly large risk of inaccurate conviction.¹⁵⁹ Justice Alito used the case of *Gideon v. Wainwright*¹⁶⁰ to make the comparative point about the magnitude of fundamental fairness involved in the two decisions. Denial of the right to counsel in a criminal matter raises the risk of an inaccurate verdict to an intolerable level.¹⁶¹ On the other hand, the relationship to the accuracy of a verdict where an unavailable witness has or has not been subject to direct cross examination by a defendant is not nearly so fundamental especially where the safeguards available under the old *Roberts* rule are in place.¹⁶² In fact, Justice Alito noted that the change to the *Crawford* standard reflected that rule's consistency with the original understanding of the Confrontation Clause, and not a belief on the part of the Court that the *Roberts* rule produced inaccurate verdicts at intolerable levels.¹⁶³ Accordingly, the Court declined to apply the new rule to respondent's case, and the statement of the unavailable child witness was allowed to stand under the old *Roberts* rule.¹⁶⁴

*E. Criminal Justice—Sentencing and Right to Trial by Jury—Cunningham v. California*¹⁶⁵

The petitioner was convicted of sexual abuse of a child and given an enhanced sentence under California's determinate sentencing law (DSL).¹⁶⁶ Sentencing for that crime is divided into three categories having to do with length of time to be served in prison—a lower term, a middle term, and an upper term.¹⁶⁷ Under the DSL, the judge had to sentence petitioner to the middle term of twelve years absent facts indicating aggravation.¹⁶⁸ If aggravating facts existed, the sentence could have been enhanced to the

¹⁵⁹ *Id.*

¹⁶⁰ 372 U.S. 335 (1963).

¹⁶¹ *Bockting*, 127 S. Ct. at 1182.

¹⁶² *Id.* at 1183.

¹⁶³ *Id.* at 1182–83.

¹⁶⁴ *Id.* at 1178, 1184.

¹⁶⁵ 127 S. Ct. 856 (2007).

¹⁶⁶ *Id.* at 860.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

next term, which in this case would have been sixteen years.¹⁶⁹ The judge found by a preponderance of the evidence that the petitioner's crime should be classified as an aggravated crime and enhanced the sentence to the upper term of sixteen years.¹⁷⁰ Petitioner claimed that this procedure violated his Sixth Amendment right to a trial by jury, a claim that was rejected by the state appellate court.¹⁷¹ The California Supreme Court denied review, but held in a case decided days earlier, *People v. Black*,¹⁷² that the DSL did not violate the Sixth Amendment.¹⁷³ In *Cunningham*, the Supreme Court reversed the California courts' approach while sending a sharp rebuke of the California Supreme Court's *Black* decision.¹⁷⁴

The Court's majority, whose opinion was authored by Justice Ginsburg, was made up of one of the oddest lineups of the year in civil liberties matters: Chief Justice Roberts, and Justices Scalia, Thomas, Stevens, and Souter.¹⁷⁵ The Court referred to several cases involving state sentencing laws and federal sentencing guidelines to reiterate points made in those decisions that sentencing based on the determination of facts outside of jury deliberation (*i.e.*, by a judge) is a violation of the right to a jury trial under the Sixth Amendment.¹⁷⁶ The key case cited in the Ginsburg opinion is *Apprendi v. New Jersey*,¹⁷⁷ in which the Court held that the "Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by a defendant."¹⁷⁸ Even in the case of the federal sentencing guidelines, which were previously mandatory, the Court found in *United States v. Booker*,¹⁷⁹ that judicial discretion to enhance sentencing based on facts determined by a judge violated the Sixth Amendment.¹⁸⁰

The *Cunningham* Court was particularly interested in the California Supreme Court's holding in *People v. Black*, on which the California court

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 860–61.

¹⁷¹ *Id.* at 860.

¹⁷² 113 P.3d 534, 536 (Cal. 2005).

¹⁷³ *Id.*

¹⁷⁴ *Cunningham*, 127 S. Ct. at 871.

¹⁷⁵ *Id.* at 859.

¹⁷⁶ *Id.* at 863–68.

¹⁷⁷ 530 U.S. 466 (2000).

¹⁷⁸ *Cunningham*, 127 S. Ct. at 860.

¹⁷⁹ 543 U.S. 220 (2005).

¹⁸⁰ *Id.* at 226–27.

based its denial of review of the petitioner’s sentencing appeal. The *Cunningham* opinion critiqued the California Supreme Court’s reasoning that broad discretion given to judges to determine aggravating facts warranting enhancement did not amount to a shifting of the fact-finding burden away from juries to judges.¹⁸¹ The Supreme Court disagreed, stating that any rationalization of the overall fairness of a sentencing system does not override the bright line rule in *Apprendi*—that factual determinations are constitutionally the province of a jury.¹⁸²

The Court noted that the *Booker* decision, which addressed the federal sentencing guidelines, authorized a judge to exercise discretion in sentencing where the ranges are not mandatory.¹⁸³ In *Booker*, the Court found the prior system of federally mandated sentencing, which allowed judicial enhancement based on aggravating facts, to be unconstitutional.¹⁸⁴ It did allow for judicial discretion if the sentences were not mandatory, or simply advisory, “[f]or when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”¹⁸⁵

Justices Kennedy and Alito wrote dissents to *Cunningham*.¹⁸⁶ Justice Alito’s dissent was joined by both of the other dissenting Justices, Kennedy and Breyer.¹⁸⁷ Justice Alito’s dissent focused on the apparent flaw in the majority’s distinction between a mandatory sentencing system, such as the DSL, and an advisory one, as in the post-*Booker* federal system.¹⁸⁸ In each case, Justice Alito noted, facts were determined by a judge to inform sentencing decisions—the fact that in the DSL a judge may skip from one level of punishment to another statutory level “is not meaningfully different from the federal scheme upheld in *Booker*,”¹⁸⁹ where the judge has sentencing discretion and may use facts determined judicially to determine sentencing within a range.

¹⁸¹ *Cunningham*, 127 S. Ct. at 868–69.

¹⁸² *Id.* at 870.

¹⁸³ *Id.* at 866. *See also Booker*, 543 U.S. at 233.

¹⁸⁴ *Booker*, 543 U.S. at 226–27, 233–34.

¹⁸⁵ *Id.* at 233.

¹⁸⁶ *Cunningham*, 127 S. Ct. at 872 (Kennedy, J., dissenting); *id.* at 873 (Alito, J., dissenting).

¹⁸⁷ *Id.* at 873 (Alito, J., dissenting).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 876.

*F. Criminal Justice—Search and Seizure**I. Scott v. Harris*¹⁹⁰

In this case, a Georgia law enforcement officer terminated a high speed chase of respondent in this case by bumping the fleeing automobile in the rear and forcing it off the road resulting in a crash.¹⁹¹ The respondent suffered injuries that caused him to be a quadriplegic.¹⁹² The respondent's suit against the deputy law enforcement officer was based on the claim that his Fourth Amendment¹⁹³ protection against excessive force was violated, resulting in an unreasonable seizure.¹⁹⁴ The case was before the Supreme Court on appeal from the Court of Appeals for the Eleventh Circuit.¹⁹⁵

Justice Scalia wrote the opinion for an eight Justice majority.¹⁹⁶ Because the officer argued that he had qualified immunity in the matter, the Court examined the basic threshold question of whether constitutional rights were violated.¹⁹⁷ Absent such a violation, qualified immunity would protect the officer from suit.¹⁹⁸

The Court relied on video footage of the chase, which was later uploaded onto the Supreme Court website.¹⁹⁹ The Court concluded that the respondent's flight posed a danger to others.²⁰⁰ Accordingly, the Court examined the reasonableness of the action by the officer.²⁰¹ Precedent has established that a "Fourth Amendment seizure [occurs] . . . when there is a governmental termination of freedom of movement through means intentionally applied."²⁰² The Court determined that the reasonableness of

¹⁹⁰ 127 S. Ct. 1769 (2007).

¹⁹¹ *Id.* at 1773.

¹⁹² *Id.*

¹⁹³ See U.S. CONST. amend. IV. The relevant section is available at *supra* note 3.

¹⁹⁴ *Scott*, 127 S. Ct. at 1773.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1772.

¹⁹⁷ *Id.* at 1774.

¹⁹⁸ *Id.* at n.4.

¹⁹⁹ See Police Dash-camera Video (scott_v_harris.rmvb), available at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb (last visited July, 1 2008).

²⁰⁰ *Scott*, 127 S. Ct. at 1778.

²⁰¹ *Id.*

²⁰² *Id.* at 1776 (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989)).

the “seizure” on the part of the officer determines whether a violation of the Fourth Amendment exists.²⁰³

The Court declined to use “rigid preconditions” garnered from *Tennessee v. Garner*²⁰⁴ to determine if the force used was “deadly force” that amounted to an unreasonable search and seizure, instead stating that *Garner* was basically an application of the Fourth Amendment reasonableness test, and not an announcement of a list of elements to be applied in all cases.²⁰⁵ Nonetheless, the Court found that the respondent’s getaway posed a threat to the public, even though the speed at which the respondent traveled was to avoid pursuit by the officer and other law enforcement officials in chase.²⁰⁶ The Court declined to ameliorate the threat of high speed chases by requiring police officers to cease pursuit because suspect is driving recklessly.²⁰⁷ “The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness.”²⁰⁸

Justice Stevens’ dissent took issue with the majority’s use of the videotape despite conflicts with the facts established in the lower courts. Justice Stevens’ view of the videotape was consistent with the lower court’s analysis, as the Justice saw far less recklessness than the majority.²⁰⁹ Accordingly, as the majority’s view of the reasonableness of the officer’s conduct was based on the degree of perceived recklessness on the part of the respondent, Justice Stevens would have allowed the case to go the jury without qualified immunity for the officer involved.

2. *Los Angeles County, California v. Max Rettele*²¹⁰

This per curiam decision, with a concurrence by Justices Stevens and Ginsburg, addressed whether the Fourth Amendment was violated by police officers when they mistakenly entered and searched an innocent family’s home and subjected the adult couple to embarrassment and humiliation because they were in bed and undressed at the time of the entry.²¹¹ The Court held that despite the unfortunate circumstances resulting in embarrassment and humiliation, the officers did not violate the

²⁰³ *Id.*

²⁰⁴ *Id.* at 1777 (citing *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1778.

²⁰⁷ *Id.* at 1779.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1781–83 (Stevens, J., dissenting).

²¹⁰ 127 S. Ct. 1989 (2007).

²¹¹ *Id.* at 1990.

family's Fourth Amendment protection against unlawful search and seizure.²¹²

The Court ruled that police officers may take reasonable action to secure premises to ensure their own safety and that none of the officers' actions in the present case went beyond that.²¹³ The Court also ruled that the "Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty."²¹⁴ The fact that mistakes are made does not render a search unreasonable. "Valid warrants will issue to search the innocent, and people like [the respondents] unfortunately bear the cost."²¹⁵

II. RIGHT TO PRIVACY—DILATION AND EXTRACTION ABORTIONS—*GONZALES V. CARHART*²¹⁶

This case is, of sorts, the sequel to the 2000 case of *Stenberg v. Carhart*.²¹⁷ Both cases dealt with the "dilation and extraction" (D&E) abortion procedure, frequently referred to as "partial birth abortions." *Stenberg* involved a Nebraska state law rendering the procedure illegal.²¹⁸ In that decision the Supreme Court held the Nebraska law unconstitutional because it did not include a health exception, which in essence would act as a waiver of the prohibition where medically necessary to protect the health of the mother.²¹⁹ In 2003 the United States Congress passed legislation similar to the Nebraska statute, banning the D&E procedure, but different in ways designed to address the constitutional infirmities in the Nebraska law that led to declaring the Nebraska law unconstitutional.²²⁰ The congressional legislation is the subject of *Gonzales v. Carhart* and the companion case of *Gonzales v. Planned Parenthood*.

The federal law differed from the Nebraska statute in two crucial ways. First, Congress rejected the findings of the district court in *Stenberg* that a health exception is necessary in legislation banning D&E, noting that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is

²¹² *Id.* at 1993–94.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 1993.

²¹⁶ 127 S. Ct. 1610 (2007).

²¹⁷ 530 U.S. 914 (2000).

²¹⁸ *Id.* at 921.

²¹⁹ *Id.* at 934–38.

²²⁰ 18 U.S.C. § 1531(a) (Supp. V 2005).

never medically necessary and should be prohibited.”²²¹ Congress then proceeded to ban a much narrower set of abortion procedures, known generally as dilation and extraction abortions, than were addressed in the unconstitutional Nebraska law.²²² The law only prohibited the procedure known as intact D&E abortions (euphemistically called “partial birth abortions”) entailing the total extraction of a live fetus and the destruction of that fetus outside of the womb.²²³ The federal law did not prohibit second trimester abortions involving the killing of the living fetus within the womb, the extraction by dismemberment within the womb, and other procedures involving the dilation of the womb and extraction of a dead fetus.²²⁴ Also not prohibited was the killing of the fetus upon partial extraction up to the navel, or, in the case of head first delivery, abortions involving only partial extraction of the head.²²⁵

By limiting the scope of the D&E abortions prohibited, Congress was able to avoid the basic problems of the Nebraska statute—the need for an exception for mother’s health. Essentially, by leaving the option open for other kinds of D&E procedures, Congress sought to eliminate any claim that the prohibited procedure would ever be necessary to protect a mother’s health or life.

The majority opinion written by Justice Kennedy, and joined by Justices Thomas, Scalia, Alito, and Chief Justice Roberts,²²⁶ began its analysis by focusing on language in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²²⁷ Noting that *Casey* is the standard by which abortion laws are measured, Justice Kennedy referred to a key part of the opinion’s essential holding, that the state had a legitimate interest in protecting the health of a mother and the life of the fetus that may become a child.²²⁸ From this foundation the Court characterized the federal law as an exercise of a legitimate state interest. The federal government, by this reasoning, may pass legislation prohibiting the intact D&E procedure because, in light of alternative D&E methods not circumscribed by the law,

²²¹ 18 U.S.C. § 1531 (quoting Pub. L. No. 108-105, § 2(1), 117 Stat. 1201, 1201 (2003)).

²²² 18 U.S.C. § 1531.

²²³ *Gonzales*, 127 S. Ct. at 1627.

²²⁴ For the Court’s description of the various procedures, see *id.* at 1620–23. The definition of the prohibited procedure is found at 18 U.S.C. § 1531(b)(1) (Supp. V 2005).

²²⁵ 18 U.S.C. § 1531(b)(1).

²²⁶ *Gonzales*, 127 S. Ct. at 1618.

²²⁷ 505 U.S. 833 (1992).

²²⁸ *Gonzales*, 127 S. Ct. at 1626 (quoting *Casey*, 505 U.S. at 846).

the prohibition does not unduly burden the right to an abortion.²²⁹ Furthermore, any claim that limiting physicians' choices forces them to choose D&E that does not involve extracting the fetus intact is simply a misreading of the statute. Doctors preferring to extract the fetus without dismemberment or without killing it in the womb may do so by killing the fetus before extraction reaches the law's anatomical landmarks.²³⁰

However, respondents made the argument that the restriction imposed upon medical judgments during the abortion procedure.²³¹ Essentially, many doctors prefer the intact extraction method because they consider it safer.²³² Justice Kennedy noted that alternative views were available from the medical community that D&E not performed intact are just as safe.²³³ But the issue to be addressed was whether Congress should take sides in a dual of medical judgments. Justice Kennedy found no problem with Congress basing its findings on the issue even with the medical uncertainty that exists in the field.²³⁴ In fact, the Court acknowledged that the congressional findings of an existing consensus among medical professionals that the prohibited procedure is never medically necessary were factually incorrect.²³⁵ Nonetheless, the Court focused not on the possibility that a medical emergency might occur necessitating the intact D&E, but on the issue of whether Congress' findings had to be accurate and whether disagreement in the medical profession on the necessity of the procedure should invalidate the legislation. The Court held that such disagreement need not have so punitive an impact on abortion prohibitions.²³⁶ Furthermore, as this litigation was based on a facial attack on the statute, a consensus on the key findings need not exist. If a medical emergency did arise requiring the intact D&E procedure, an as applied analysis could be used to determine the Act's constitutionality *under those circumstances*.²³⁷

Nor, according to the Court's reasoning, could the law be characterized as vague inasmuch as the law defines with particularity those anatomical

²²⁹ *Id.* at 1629–31.

²³⁰ *Id.* at 1631–33.

²³¹ *Id.* at 1635.

²³² *Id.*

²³³ *Id.* at 1636.

²³⁴ *Id.* at 1637. The Court states: “[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context anymore than it does in other contexts.” *Id.*

²³⁵ *Id.* at 1638.

²³⁶ *Id.*

²³⁷ *Id.* at 1638–39.

landmarks beyond which the killing of the fetus may not be accomplished. A more nuanced objection to the Act is that Congress' purpose was to create a substantial obstacle to abortion which is prohibited by the *Casey* decision. The Court found no such purpose or reality.²³⁸ As for purpose, the Court reiterated that legitimacy of the state's interest in the life of a fetus that could become a child.²³⁹ It further relied on *Washington v. Glucksberg*²⁴⁰ for the proposition that the state has a legitimate interest in the ethics and reputation of the medical profession.²⁴¹ Leveraging that interest to ban what the legislation called "a gruesome and inhumane procedure that is never medically necessary and should be prohibited."²⁴² Congress passed legislation to protect the ethics of the medical profession.²⁴³ Justice Kennedy found no purpose to create an obstacle to the D&E procedure.²⁴⁴

Comment

The Court maintained the barrier erected by the *Casey* decision that no undue burden be placed before a women's abortion right and that the state may not create substantial obstacles.²⁴⁵ The Court's approach to the undue burden issue was fairly straightforward: other means of D&E remain legal

²³⁸ *Id.* at 1635.

²³⁹ *Id.* at 1626.

²⁴⁰ 521 U.S. 702 (1997).

²⁴¹ 127 S. Ct. at 1633.

²⁴² 18 U.S.C. § 1531 (Supp. V 2005) (quoting Pub. L. No. 108-105, § 2(1), 117 Stat. 1201, 1201 (2003)). Congress' findings included the following language:

A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion—an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the baby's brains) that the person knows will kill the partially delivered infant, performs this act, and then completes delivery of the dead infant—is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

Id.

²⁴³ Gonzales, 127 S. Ct. at 1633.

²⁴⁴ *Id.* at 1635.

²⁴⁵ *Id.* at 1626–27.

under the Act and may be chosen in the abortion decision. However, on the issue of whether Congress intended to or otherwise did erect a substantial obstacle to the abortion decision, Justice Kennedy applied a bit of finesse that seemed to open the door for a variety of rationalizations in future cases. That finesse included a rather detached assertion of Congress' interest in medical ethics, and the remarkable position that lawyers may break the tie when doctors disagree.²⁴⁶ Nonetheless, the basic structure of *Casey* remained intact.

III. CIVIL RIGHTS LEGISLATION—ATTORNEY COMPENSATION—
*SOLE V. WYNER*²⁴⁷

Justice Ginsburg wrote for a unanimous Court in this case involving an exception to the American Rule of attorney compensation in private actions.²⁴⁸ Under the American Rule, “a prevailing litigant is ordinarily not entitled to collect counsel fees from the loser.”²⁴⁹ An exception to the rule involving federal civil rights cases allows a prevailing party to collect attorneys fees under 42 U.S.C. § 1988(b).²⁵⁰ The reasoning behind this policy is to encourage “private attorneys general” to enforce civil rights legislation.²⁵¹

²⁴⁶ Consider the language of the Court in *Stenberg*:

[T]he division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence. That division here involves highly qualified knowledgeable experts on both sides of the issue. Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.

Stenberg v. Carhart, 530 U.S. 913, 937 (2000).

²⁴⁷ 127 S. Ct. 2188 (2007).

²⁴⁸ *Id.* at 2191.

²⁴⁹ *Id.*

²⁵⁰ *Id.*; see also 42 U.S.C. § 1988(b) (2000).

²⁵¹ Randal S. Jeffrey, *Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees to Work*, 69 BROOK. L. REV. 281, 283 (2003).

In this case, the respondent, Wyner, a performance artist, sought an injunction against a Florida law that would have prevented her from staging an anti-war protest with nude persons forming a peace sign at a Florida beach.²⁵² Wyner was denied permission for the protest and sought an injunction against the enforcement of Florida's bathing suit rule that required at least a thong and, in the case of women, a bathing suit top in public displays.²⁵³ Wyner, claiming a violation of her First Amendment rights,²⁵⁴ was granted a temporary injunction, and the following day the nude protest was staged.²⁵⁵ Soon thereafter, coincident with the planning of a subsequent nude protest, a hearing on the permanent injunction enjoining the operation of the law was held.²⁵⁶ On the merits of the case, the state prevailed, though the court awarded attorney's fees to Wyner for the temporary injunction phase of the proceeding.²⁵⁷ Florida appealed this ruling to the Eleventh Circuit, which affirmed the award of attorney's fees, and the Supreme Court granted certiorari.²⁵⁸

The Court's opinion was basic and simple. The preliminary injunction phase was simply a phase of the larger proceeding. "Wyner is not a prevailing party, we conclude, for her initial victory was ephemeral. A plaintiff who 'secures a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against her,' has 'won a battle but lost the war.'"²⁵⁹

Comment

Civil rights and civil liberties cases are very dependent for their success, or for that matter the likelihood of judicial resolution of such matters, on the ability of challengers to state power to have access to attorney's fees, as the exception to the American Rule embodied in the civil rights laws recognizes. This case carves out of that exception the area of injunctive relief since judges are likely to temporarily enjoin state conduct where civil rights or civil liberties are at stake. The Court is

²⁵² *Sole*, 127 S. Ct. at 2192.

²⁵³ *Id.*

²⁵⁴ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

²⁵⁵ *Sole*, 127 S. Ct. at 2192–93.

²⁵⁶ *Id.* at 2193.

²⁵⁷ *Id.* at 2193–94.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 2196 (alterations omitted) (quoting *Watson v. Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002)).

essentially saying that victory at this stage does not really say much about the merits of the case and hence the policy behind the financing of the victor in civil rights litigation would not be furthered. Yet that logic could go both ways—if litigants get stuck with costs at preliminary stages of litigation, plaintiffs with winnable cases (making them effective private attorney generals) will also be discouraged from litigating, an outcome not desired by Congress.

IV. FIRST AMENDMENT

A. *Freedom of Speech in Schools—Morse v. Frederick*²⁶⁰—the “Bong Hits for Jesus” Case

The Chief Justice wrote the opinion of the Court which was supported by three concurrences and accompanied by a three Justice dissent, and one opinion concurring in the judgment in part and dissenting in part.²⁶¹ In the decision, the infamous “Bong Hits for Jesus” case (a case many might believe would have been best settled with an appropriate amount of parental authority and discipline, factors apparently lacking here), Frederick, a Juneau, Alaska high school student, took part in the unfurling of a banner along the parade route of the Olympic torch as it passed the school.²⁶² The group of students, not on school grounds, unfurled the banner with the language “BONG HiTS 4 JESUS” on it just in time for television cameras to capture the image.²⁶³ The school principal took the banner from the students and suspended one student, Frederick, for ten days.²⁶⁴ Frederick sued Principal Morse and the district after his administrative appeals failed.²⁶⁵ Following a successful appeal by Frederick to the Ninth Circuit, the Supreme Court accepted certiorari.²⁶⁶ The Court reversed the circuit court’s decision finding that the principal did not violate Frederick’s First Amendment Rights by suspending him for taking part in the display.²⁶⁷

²⁶⁰ 127 S. Ct. 2618 (2007).

²⁶¹ *Id.* at 2621.

²⁶² *Id.* at 2622.

²⁶³ *Id.*; see also David G. Savage, *Free Speech on Campus is Debated*, L.A. TIMES, Mar. 20, 2007, at A9.

²⁶⁴ *Morse*, 127 S. Ct. at 2622–23.

²⁶⁵ *Id.* at 2623.

²⁶⁶ *Id.* at 2623–24.

²⁶⁷ *Id.* at 2625, 2629.

The Chief Justice reviewed the relevant case law governing student speech from *Tinker v. Des Moines Independent Community School District*,²⁶⁸ to *Bethel School Dist. No. 403 v. Fraser*,²⁶⁹ and *Hazelwood School Dist. v. Kuhlmeier*.²⁷⁰ The case law, which treats student speech differently from general speech because of the special nature of the educational environment, viewed “material[] and substantial[]”²⁷¹ disruption of school activities as a justification for limiting free debate in the context of public schools (*Tinker*),²⁷² authorized school officials to restrict lewd sexual speech without any showing of material and substantial disruption, (*Fraser*)²⁷³ and permitted speech regulations “so long as their actions are reasonably related to legitimate pedagogical concerns” (*Kuhlmeier*).²⁷⁴

After determining that the activity was school-sanctioned and thus fell under the school speech cases, even though the unfurling was not on school grounds, the Chief Justice applied the relevant law to the facts of the case.²⁷⁵ Acknowledging the most likely meaning of “bong hits” to refer to the use of marijuana, an illegal drug, the opinion examined data on the level of illegal drug use in schools, as well as the effect that apparent tolerance has on teenage drug activity,²⁷⁶ and the appropriateness of the role of schools in deterring that use (calling the school’s interest as important, and “perhaps compelling” interest in deterring drug use).²⁷⁷

²⁶⁸ 393 U.S. 503 (1969).

²⁶⁹ 478 U.S. 675 (1986).

²⁷⁰ 484 U.S. 260 (1988).

²⁷¹ *Morse*, 127 S. Ct. at 2625–27 (quoting *Tinker*, 393 U.S. at 506); *id.* at 2626 (citing *Tinker*, 393 U.S. at 513); *id.* (citing *Fraser*, 478 U.S. at 683).

²⁷² *Id.* at 2626 (citing *Tinker*, 393 U.S. at 513).

²⁷³ *Id.* (quoting *Fraser*, 478 U.S. at 685); *id.* at 2626–27 (quoting *Tinker*, 393 U.S. at 506, 514; *Kuhlmeier*, 484 U.S. at 271 n.4).

²⁷⁴ *Kuhlmeier*, 484 U.S. at 273.

²⁷⁵ *Morse*, 127 S. Ct. at 2624.

²⁷⁶ *Id.* at 2628.

²⁷⁷ Under constitutional standards of scrutiny of state actions limiting speech, the most severe judicial scrutiny, strict scrutiny, requires compelling state interests as a prerequisite for limiting speech. *See Turner Broadcasting System v. F.C.C.*, 512 U.S. 622 (1994). Typically this scrutiny has applied to content based restrictions, with the strict scrutiny standard being satisfied by, among other factors, imminent threat of certain harm. *See id.*; *see also* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (supporting the idea that some content-based restrictions are unprotected categories of speech, thus not subject to strict scrutiny. *Brandenburg* highlighted that the imminent threat of incitement to illegal activity, fearful of producing harm, was unprotected). Previous decisions in the student speech area have not

(continued)

Justice Thomas, in concurrence, argued that historical context does not establish that the First Amendment was ever meant to apply to schools.²⁷⁸ Justice Alito, in a concurrence joined by Justice Kennedy, sought to establish the parameters of the Chief Justice's opinion, opining that it only stood for the proposition that a school may restrict speech advocating drug use and not for restrictions of any kind having to do with political or social issues having to do with drug enforcement policy.²⁷⁹

It was because of the perils associated with judicial review of the nature of speech, drawing closer to content speech restrictions and the heightened judicial scrutiny traditionally afforded such speech categories, that Justice Breyer, in a concurring and dissenting opinion urged caution. Justice Breyer preferred to rule that Principal Morse retained only qualified immunity (and was thus not liable for damages), and that the Court should leave the speech issue alone.²⁸⁰ He would have found for the Principal, sparing her damage liability, but would not have ruled that language suggestive of drug use was unprotected speech.²⁸¹

Similarly Justice Stevens in a dissent not very different from Justice Breyer's mixed opinion acknowledged that student speech is treated differently, and that perhaps something less than an imminent threat of drug use would suffice to allow the state to restrict the speech at issue.²⁸² Justice Stevens, however, was not so certain that the phrase "Bong Hits 4 Jesus" is anything more than obscure, vague, and nonsensical—hardly an advocacy for drug use.²⁸³ Justice Stevens' dissent stripped the state of its rationale for the restriction. As such Justice Stevens, joined by Justices

elevated judicial scrutiny to this level. The Court in *Morse*, 127 S. Ct. at 2629, appears to maintain a lower reasonableness standard of scrutiny when it states that, in response to the urgings of the principal and the school district to allow the restrictions on the basis of the offensiveness of the speech, the problem with the student's speech was not its offensiveness, but that it was reasonably viewed as promoting illegal drug use. By using language indicating that the interest in discouraging drug use would be important or compelling seems to be an acknowledgment by the Chief Justice that this case could pass strict scrutiny if it needed to.

²⁷⁸ *Morse*, 127 S. Ct. at 2630 (Thomas, J., concurring).

²⁷⁹ *Id.* at 2636, 2638 (Alito, J., concurring).

²⁸⁰ *Id.* at 2641 (Breyer, J., concurring in part and dissenting in part).

²⁸¹ *Id.* at 2643.

²⁸² *Id.* at 2646, 2650–51 (Stevens, J., dissenting).

²⁸³ *Id.* at 2649.

Souter and Ginsburg, rejected the school’s restriction as a violation of the First Amendment, but would not rule the principal liable for damages.²⁸⁴

*B. Freedom of Speech—Political Campaigns—Federal Election Commission v. Wisconsin Right to Life, Inc.*²⁸⁵ and *Senator John McCain v. Wisconsin Right to Life, Inc.*²⁸⁶

This case comes at the end of the term, on the Monday prior to the last sitting of the Court, a time usually reserved for the most dramatic and socially impacting cases. Whether this case is such a case is a matter of personal impression and time. The case addresses the ability of a right to life organization to insert itself into a political campaign under federal election law.²⁸⁷ Yet, the legal issue here is not abortion and due process, the issue is simply a First Amendment matter.²⁸⁸ This point is made not to minimize the importance of the case for constitutional law scholars, but to suggest that the case is not one that will have a particularly perceptible social impact.

The issue dealt with whether Wisconsin Right to Life’s (WRTL) political advertisements violated the Bipartisan Campaign Reform Act of 2002 (BCRA).²⁸⁹ The ad in question challenged slowdowns in judicial confirmations by the Senate and urged viewers to contact the offices of Wisconsin Senators Feingold and Kohl to urge speed in the judicial confirmations.²⁹⁰ Because the BCRA made it illegal to air “electioneering” communications within thirty days of an election (in this case the Wisconsin Primary), WRTL did not run the ads during that period.²⁹¹ It did, however, believe that it had a First Amendment right run the ads and sought resolution of the matter before the federal courts.²⁹²

²⁸⁴ *Id.* at 2643.

²⁸⁵ 127 S. Ct. 2652 (2007).

²⁸⁶ *Id.* This case, slip opinion No. 06-970, was joined with *Federal Election Commission v. Wisconsin Right to Life, Inc.*

²⁸⁷ *Id.* at 2659 (considering the case under issue and express advocacy of a political commercial under the Bipartisan Campaign Reform Act).

²⁸⁸ *Id.* at 2659 (referring to *McConnell v. Federal Election Commission*, 540 U.S. 93 which first held that political campaigning and issue ads fall under the First Amendment).

²⁸⁹ 2 U.S.C. § 441b(b)(2) (Supp. V 2005).

²⁹⁰ *Wisc. Right to Life, Inc.*, 127 S. Ct. at 2660–61.

²⁹¹ *Id.* at 2661.

²⁹² *Id.* WRTL filed for declaratory judgment and injunctive relief against the Federal Election Commission. *Id.*

The district court denied injunctive relief based on its reading of *McConnell v. Federal Election Commission*²⁹³ as eliminating as-applied challenges to the election law, and accordingly, WRTL did not run ads during the election season.²⁹⁴ The Supreme Court reviewed this holding, clarified that *McConnell* did not eliminate future as-applied challenges, and remanded the matter back to the lower court.²⁹⁵

The issue before the Court on its return was whether the ads fell under the BCRA's proscriptions against express advocacy in corporate advertising.²⁹⁶ The subsequent issue was whether BCRA's provision banning electioneering communications passed the strict scrutiny analysis used in First Amendment cases even if those ads did not reach the level of express advocacy.²⁹⁷

The Court ruled against the Federal Elections Commission (FEC) in a decision that included opinions written by the Chief Justice, Justice Alito, and Justice Scalia (who concurred in part and in the judgment).²⁹⁸

The principal opinion written by the Chief Justice, after holding that jurisdiction was proper before the Court despite the fact that the election had passed, expressed the position that the ads were not express advocacy, and settled on a standard for determining express advocacy (or its functional equivalent) "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a particular candidate."²⁹⁹ Arguing for an application very cognizant of the high level of protection afforded political speech, the Chief Justice took into consideration several context oriented arguments by the FEC and concluded that these factors³⁰⁰ did not move the challenged speech into the express advocacy (or functional equivalent) category.³⁰¹

²⁹³ 540 U.S. 93 (2003).

²⁹⁴ In the district court's view, apparently the *McConnell* opinion clearly stood for the proposition that issue oriented advertisements, to the extent that they were the functional equivalent of so-called express campaign speech, are a category to which it apparently assumed included the speech making up the case's controversy. See *Wisc. Right to Life, Inc.*, 127 S. Ct. at 2661; see also *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 2004 WL 3622736, at *3-4 (D.D.C. Aug. 8, 2004).

²⁹⁵ *Wisc. Right to Life, Inc.*, 127 S. Ct., at 2652, 2661.

²⁹⁶ *Id.* at 2659.

²⁹⁷ *Id.* at 2663-64.

²⁹⁸ *Id.* at 2673.

²⁹⁹ *Id.* at 2667.

³⁰⁰ See *id.* at 2668-69. Factors raised included timing, the message calling for citizens to contact their senators, directorial skill in avoiding language that would place the ad in the
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Having determined that the speech was not in the above categories, the Court looked to see even if this non-express advocacy could still be prohibited under the provision banning electioneering by applying strict scrutiny analysis.³⁰² The first question then was whether the government has a compelling interest in prohibiting the speech at issue.³⁰³ The Chief Justice’s opinion did not dispute the interest in eliminating corruption in election campaigns.³⁰⁴ But to prohibit speech beyond express advocacy would require stretching the standard to cover speech without the troublesome features of express advocacy (in essence to cover speech that is neither express advocacy nor the functional equivalent of it).³⁰⁵ “Enough is enough” stated the Chief Justice, making the point that the ads in question should not be equated to illicit contributions and that to do so would be to ignore their value as political speech.³⁰⁶ Essentially, in the Chief Justice’s view, the compelling interest of preventing corruption cannot justify regulating mere political speech, and there was no other compelling interest at stake with this particular kind of speech (*i.e.*, political speech).³⁰⁷

V. STANDING, CASE OR CONTROVERSY, AND ARTICLE III—*HEIN V. FREEDOM FROM RELIGION FOUNDATION*³⁰⁸

Justice Alito wrote for a plurality of the Court in this 5-4 decision, pitting conservatives against liberals in a standard alignment for the Court. Justice Alito’s opinion was joined by the Chief Justice, and Justice Kennedy.³⁰⁹ Justice Scalia concurred in the judgment and wrote a

express advocacy category, WRTL’s past activism against the candidacies of Senator Feingold, and information referring viewers to the Senator’s website. *Id.*

³⁰¹ *Id.* at 2668.

³⁰² *Id.* at 2671.

³⁰³ *Id.* at 2672.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* Justice Scalia, in an opinion joined by Justices Thomas and Kennedy, would find BCRA unconstitutional as void for vagueness, and in doing so, would have overturned *McConnell*. *Id.* at 2680, 2687 (Scalia, J., concurring). The principal opinion’s attempt to interpret the *McConnell* standard as “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a particular candidate” was not convincing to these Justices. *Id.* at 2680.

³⁰⁸ 127 S. Ct. 2553 (2007).

³⁰⁹ *Id.* at 2559.

conurrence which was joined by Justice Thomas.³¹⁰ The Court denied standing to respondents who sought standing as taxpayers to challenge alleged violations of the Establishment Clause by members of the Bush Administration in the administration of Faith Based Initiative programs.³¹¹ In the case at issue, funds used in the Faith Based Initiatives program were general funds appropriated by Congress to the Executive Branch.³¹²

The plurality utilized the precedent of *Flast v. Cohen*,³¹³ which allowed taxpayer standing in cases involving funds *specifically* appropriated by Congress for activities deemed violative of the Establishment Clause.³¹⁴ Justice Alito argued in the *Hein* opinion that *Flast* is limited to challenges of congressional enactments that fund activities that violate the Establishment Clause.³¹⁵ Justice Alito made that point that *Flast* does not cover the kind of general appropriations for Executive Branch activity which is the source of the funding for the activities complained of in this case.³¹⁶ Denying standing in this case limits *Flast* to specific enactments, a place beyond which the majority declined to go.

The plurality is an exercise in damage control. The *Flast* decision is a problematic decision that carved out a standing exception to the general rule limiting standing to cases where actual harm is more than a mere generalized grievance, common to all taxpayers. To fully understand the issue here, a little background is in order. Long ago the Court established a system for determining whether parties had standing to sue in federal court. Two sets of standards were devised. First, there are the standards derived from Article III of the Constitution: (1) Injury in fact; (2) causation; and (3) redressibility.³¹⁷

And then there are the prudential rules of standing which are basically established to pursue various judicial policies. These rules, stated in the negative, can be summarized as (1) no third party standing;(2) no generalized grievances; and (3) not outside the zone of interests.³¹⁸ Of

³¹⁰ *Id.* at 2573 (Scalia, J., concurring).

³¹¹ *Id.* at 2559 (plurality opinion).

³¹² *Id.* at 2560.

³¹³ 392 U.S. 83 (1968).

³¹⁴ *Id.* at 102.

³¹⁵ *Hein*, 127 S. Ct. at 2566.

³¹⁶ *Id.*

³¹⁷ *Valley Forge Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

³¹⁸ The third party and generalized grievance prohibitions can be traced to Justice Powell's opinion in *Warth v. Selden*, 422 U.S. 490, 499 (1975). Justice Alito, following

(continued)

interest here is the generalized grievance category of the prudential rules of standing.

In the 1920s the Supreme Court held in *Massachusetts v. Mellon*,³¹⁹ (although, for purposes of this subject matter, the companion case of *Frothingham v. Mellon*³²⁰ is the subject of most references) that for those suing the federal government for policy actions, relying on their status as taxpayers to gain standing, the harm is too remote and diluted to be managed as a legitimate cause of action.³²¹ Furthermore, a policy of allowing standing, even though the harm does exist, would be to open the floodgates for taxpayer suits of persons with only diluted and possibly hypothetical harms. For the Court to adjudicate such cases would be to undermine the system of checks and balances.

The *Frothingham* barrier was breached, however, when it came to the Establishment and Free Exercise Clauses of the Constitution. In *Flast v. Cohen*,³²² the Court upheld a challenge to government appropriations of monetary aid to religious schools.³²³ This standing exception was subsequently shown to be a narrow one.³²⁴

language in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74, characterizes the generalized grievance prohibition as one based upon the Article III case or controversy requirement. *Hein*, 127 S. Ct. at 2562–63. This appears to be in contrast with the characterization of the requirement as a prudential one in *Warth*. Justice Scalia, the author of *Defenders of Wildlife* reiterated his position that generalized grievance prohibition was a constitutional standing requirement in his concurring opinion. *Id.* at 2582 (Scalia, J., concurring).

If the generalized grievance is truly a constitutional barrier to standing, the opinion in *Flast* would be in error as constitutional prohibitions may not be altered, in which case, Justice Scalia's position calling for *Flast* to be overturned would be more correct than Justice Alito's plurality maintaining though refusing to extend *Flast* while acknowledging that the prohibition is a constitutional one.

The Court in *Association of Data Processing Serv. v. Camp*, 397 U.S. 150, 152 (1970), listed the requirement that an interest to be litigated must be within the “zone of interests” contemplated by the legislature. This post-constitutional requirement was again mentioned in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990). See also, MARTIN LEVY, CONSTITUTIONAL LAW 223–68 (4th ed. 2006).

³¹⁹ 262 U.S. 447 (1923).

³²⁰ *Id.*

³²¹ *Id.* at 487.

³²² 392 U.S. 83 (1968).

³²³ *Id.* at 105–06.

³²⁴ *Flast* requires that a court ask two questions: First, is there a nexus between the status of the plaintiff (*i.e.*, the taxpayer) and the type of legislative enactment complained
(*continued*)

On the other hand, in *Valley Forge Christian College v. Americans United for Separation of Church and State*,³²⁵ a 1982 decision authored by Justice Rehnquist, the Court held that because the complained of action was the passing of property from federal government to a religious school, the passing came under the Property Clause, not the Taxing and Spending Clause, and there was thus no nexus between the type of status and the type of congressional action complained of in *Flast*.³²⁶ The lesson learned from that decision was simple if not strained: tax does not equal property.

The plurality in *Hein* did not attempt to extend *Flast*, nor did it attempt to dismiss it by overruling the decision (an option that Justices Scalia and Thomas, who concurred in the judgment, but did not join Justice Alito's opinion, would have exercised). The plurality simply looked at the four corners of the decision in *Flast* and concluded that the facts in *Hein* were not identical.³²⁷ The factual differences—general appropriations versus specific appropriation—served as the basis for the ruling that general spending dollars do not provide the basis for taxpayer standing. Accordingly, three of the five Justices who denied standing here followed past Courts that declined to extend *Flast* on the basis of the manner of the congressional appropriation. In light of the fact that previous decisions

of? *Flast*, 392 U.S. at 102. The Court said yes. *Id.* at 106. “Thus a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.” *Id.* at 102. Next, a court must ask if the taxpayer has established “a nexus between that status and the precise nature of constitutional infringement alleged?” *Id.* The Court said yes. *Id.* at 106.

The Court noted that the Establishment Clause limits Congress' taxing and spending power in this area. *Id.* In other words, the bar will be lowered to allow suits against congressional tax and spend actions specifically limited by the Constitution. The Court also noted that whether other provisions of the Constitution were similarly limiting, that was for determination in future cases. *Id.*

Through the *Flast* decision the Court had lowered the prudential limitations for a strong constitutional standing position. The argument is that the Court proceeded, after that, to get into the habit of raising the prudential standing requirement when the constitutional hurdle (as defined in *Flast*) is passed, (*Valley Forge*) and raising the constitutional requirements when the prudential requirements are passed (*United States v. Richardson*, 418 U.S. 166 (1974)). See also LEVY, *supra* note 318, at 250–51.

³²⁵ 454 U.S. 464 (1982).

³²⁶ *Id.* at 479–80.

³²⁷ *Hein*, 127 S. Ct. at 2566.

have declined to extend the subject matter of the alleged governmental violation the Court's decision continued this peculiar approach.³²⁸

Justice Alito also noted the dangerous effects that extending *Flast* would have on the doctrine of separation of powers.³²⁹ Because the generalized grievance rule was designed to limit access to the federal courts, opening that access beyond *Flast* would, in the majority's opinion, threaten to create litigation that would put the judiciary in the position of overseeing a multitude of executive branch matters, in contradiction to the policies behind the doctrine of separation of powers.³³⁰

Justice Kennedy, in concurrence, provided a justification for the Establishment Clause exception to the standing requirement found in *Flast*.³³¹ Yet Justice Kennedy supported the majority's decision not to extend *Flast* beyond specific congressional appropriations.³³² Justice Scalia was less sanguine about the precedential state of affairs in his concurring opinion and would overrule *Flast*.³³³

VI. EQUAL PROTECTION, SCHOOLS AND AFFIRMATIVE ACTION—
*PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1*³³⁴ AND *MEREDITH V. JEFFERSON COUNTY BOARD OF EDUCATION*³³⁵

In one of the most anticipated cases of this term, the Supreme Court, in a majority decision, held that voluntary diversity plans of public schools that use race as a deciding factor in school assignments are unconstitutional as violative of the Equal Protection Clause of the United States Constitution.³³⁶ The cases at issue were based on plans in Seattle,

³²⁸ *Id.* at 2564–65. (*Flast* is a decision based on a rationale that is applicable to a variety of constitutional provisions that conceivably could be violated by specific appropriations by Congress).

³²⁹ *Id.* at 2570.

³³⁰ *Id.* at 2569–70.

³³¹ *Id.* at 2572 (Kennedy, J., concurring) (suggesting that the special role that freedom of conscience has in the nation's democracy, and how that should never be compromised by taxing and spending in support of religion).

³³² *Id.*

³³³ *Id.* at 2573–74 (Scalia, J., concurring).

³³⁴ 127 S. Ct. 2738 (2007).

³³⁵ This case, slip opinion No. 05-915, was joined with *Parents Involved in Community Schools v. Seattle School District No. 1*.

³³⁶ *Id.* at 2746.

Washington and Jefferson County, Kentucky, dealing on one hand with school integration and, on the other hand, affirmative action.

At issue in both cases were plans that, among other methods, used race as a factor in deciding placement in local schools.³³⁷ One may be lead to ask, haven't we been down this road before? Certainly one cannot challenge a school integration plan because it is based on race, that's what school integration plans are—plans based on race.³³⁸ However, the desegregation cases of history dealt with school districts found to be in violation of the Equal Protection Clause of the Fourteenth Amendment.³³⁹ The issues before the Court in this case were not about school districts under court order to remediate past discrimination, but just the opposite. Both of the cases were about school districts voluntarily operating plans to maximize the racial diversity in their schools. Without a court order or any finding of discrimination, the voluntary race-based plans at issue here begin to look awfully like affirmative action (the use of race to encourage diversity) as the term is presently constitutionally described. As such, comparisons to the latest pro-affirmative action decision, the *Grutter v. Bollinger*, are inevitable.

At least in the case of the Jefferson County School District, the district had been released from a court ordered desegregation plan.³⁴⁰ The district sought to continue the results of the plan by its school selection program, and strove to maintain a desegregated school district and alleviate racial concentrations in any of its schools.³⁴¹ Similarly, the Seattle School District determined that it had an interest in diversity as well.³⁴² Both cases employed plans that factored race into school assignments, using race as one of several factors considered. Jefferson County had a range goal of 15 to 50% Black enrollment in each school,³⁴³ and the Seattle School District sought to roughly seek 41% to 61% white to minority ratio (within 10% of the 41% white enrollment in the district).³⁴⁴ Residence and the presence of a sibling were additional factors in Seattle,³⁴⁵ and residence was included

³³⁷ *Id.*

³³⁸ See BLACK'S LAW DICTIONARY 368 (3d Pocket 2001).

³³⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

³⁴⁰ *Parents Involved*, 127 S. Ct. at 2749.

³⁴¹ *Id.*

³⁴² *Id.* at 2747.

³⁴³ *Id.* at 2755.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 2747.

in the Jefferson County plan.³⁴⁶ Both plans were attempts to counter de facto residential segregation in the makeup of the schools, which were never found to be in violation of the Equal Protection Clause of the Fourteenth Amendment during the era of the desegregation cases.³⁴⁷

A majority of the Court agreed that the plans were in one respect not narrowly tailored to achieve a compelling purpose.³⁴⁸ On another issue having to do with the effectiveness of the plans, only a plurality held against the districts.³⁴⁹

In the majority opinion, the Court noted that strict scrutiny was the appropriate standard to apply and that the districts would have to establish that their plans were necessary and narrowly tailored to achieve a compelling goal.³⁵⁰ With that in mind, the Court decided, in an opinion written by Chief Justice Roberts, that the decision in the *Grutter v. Bollinger* where diversity was found to be a compelling interest of the state within the setting of *higher education*,³⁵¹ did not apply to the secondary and primary school setting.³⁵² But to the extent that diversity might have value to a public school system, the Chief Justice's majority opinion raised questions of the veracity of plans that resulted in minimal transfers as being necessary to achieve educational benefits. In establishing the lack of narrow tailoring, the Court quoted the lower court's panel which stated that "[t]he District has not met its burden of proving these marginal changes . . . outweigh the cost of subjecting hundreds of students to disparate treatment based solely on the color of their skin."³⁵³

The Chief Justice, in the portion of the opinion that carried only three other joiners, declined to address the issue of whether diversity has educational benefits such as to be a compelling goal for the districts at this level because the data presented did not persuade the plurality that the kind of diversity achieved by the districts was anything other than racial balancing.³⁵⁴ The plurality, focusing on the imprecision of the various plans, concluded that the plans were not narrowly tailored and that the only

³⁴⁶ *Id.* at 2749–50.

³⁴⁷ *Id.* at 2761.

³⁴⁸ *Id.* at 2755.

³⁴⁹ *Id.* at 2755–56.

³⁵⁰ *Id.* at 2751.

³⁵¹ *Id.* at 2754.

³⁵² *Id.* at 2754–55.

³⁵³ *Id.* at 2760 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 984–85 (9th Cir. 2004)).

³⁵⁴ *Id.* at 2755.

proven effect of the plans was to produce racial balancing, which alone is not an acceptable goal under prior precedent. Stated another way, the plurality opinion did not accept any of the districts' attempts to link their wide band of percentages to their claims of compelling educational benefits.³⁵⁵

While joining the Chief Justice to form a majority in that portion of the opinion that questioned the effectiveness of the plans considering the minimal number of students actually transferred, Justice Kennedy declined to join the conservatives on the part of the opinion that raised questions about diversity as a tool for achieving compelling state interests.³⁵⁶

The Chief Justice's opinion essentially took a skeptical position on the value of diversity, demanding point-for-point proof that each level of diversity that the districts were able to achieve resulted in some compelling goal. Justice Kennedy argued in his concurring opinion that the Chief Justice was too willing to accept the effects of de facto re-segregation.³⁵⁷ Justice Kennedy quoted Justice Harlan's dissent in *Plessy v. Ferguson*³⁵⁸ that "[o]ur Constitution is color-blind"³⁵⁹ to show that while an appropriate aspirational statement for its time "[i]n the real world . . . cannot be a universal constitutional principle."³⁶⁰ Justice Kennedy would allow race conscious policies which could include line drawing, new school placement, and the recruitment of students and faculty without resorting to strict scrutiny as long as individual students were not subjected to different treatment on account of race.³⁶¹

Justice Breyer's dissent, joined by Justices Souter, Ginsburg, and Stevens³⁶² (who wrote a separate dissent) picks up on some of Justice Kennedy's concurrence that the plurality is far too skeptical about diversity in the public school setting. While criticized by the plurality for using desegregation cases to support the position that would find the plans constitutional,³⁶³ Justice Breyer in his opinion argued that even though the desegregation cases involved court ordered desegregation of de jure

³⁵⁵ *Id.* at 2756–57.

³⁵⁶ *Id.* at 2788 (Kennedy, J., concurring).

³⁵⁷ *Id.* at 2791.

³⁵⁸ 163 U.S. 537 (1896).

³⁵⁹ *Parents Involved*, at 2791 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)) (internal quotations omitted).

³⁶⁰ *Id.* at 2792.

³⁶¹ *Id.*

³⁶² *Id.* at 2800 (Breyer, J., dissenting).

³⁶³ *See id.* at 2761–66 (plurality opinion).

systems, and the present case did not, it amounted to a distinction without a difference as numerous districts in the South desegregated without a court order.³⁶⁴ He was critical of the plurality's efforts to dismiss all diversity efforts outside of the court ordered cases, as suspicious attempts to avoid strict scrutiny. Justice Breyer, referring to language in *Swann v. Charlotte-Mecklenburg Board of Education*³⁶⁵ expressed the view that school districts can still be motivated by the same educational goals that motivated desegregation court orders even if districts are technically in compliance with the order.³⁶⁶ To the plurality, the motivation ended with the lifting of the desegregation order (as in the case of the Jefferson County School District), or never existed where there was no such order (as in the case of Seattle).³⁶⁷ Justice Breyer rejected this reasoning.³⁶⁸

Comment:

The plurality declined to pass on the benefits of integrated education other than to distinguish *Grutter's* higher education context and to state that the districts had not narrowly tailored their plans. To the plurality, it appears that school diversity has no use other than to bring the state into compliance with the Constitution as a result of past Equal Protection Clause violations. Though the plurality couches its skepticism in terms that are critical of the imprecisions of the plans before it, the conservatives do not recognize that the voluntary plans are not demonstrably less precise than plans followed in desegregation cases for years throughout the country. This implies that the conservatives do not see an independent value for school diversity other than as a means of bringing a district into constitutional compliance. Educational benefits are at best questionable absent precise point-for-point proof by the districts. This is an essentially sterile legalistic approach to the problem—mechanically sound, perhaps, but devoid of the policy considerations that have driven race and education cases in the past. This approach is captured in the Chief Justice's closing statement: "The only way to stop discrimination on the basis of race is to stop discriminating on the basis of race."³⁶⁹

The blogs and listservs are active with comment on the impact the decision will have on minority education, with most of the comment from

³⁶⁴ *Id.* at 2816 (Breyer J., dissenting).

³⁶⁵ 402 U.S. 1, 16 (1971).

³⁶⁶ *Parents Involved*, 127 S. Ct. at 2801, 2811–16 (Breyer, J., dissenting).

³⁶⁷ *Id.* at 2752 (plurality opinion).

³⁶⁸ *Id.* at 2811–12 (Breyer, J., dissenting).

³⁶⁹ *Id.* at 2768 (plurality opinion).

liberal to moderate bloggers and commentators being negative.³⁷⁰ The negativism may be premature. The districts in this case, and similarly situated school districts, could perhaps put money into their schools, without regard to race, thus providing equal facilities across the board; unfortunately, a circumstance that has not yet occurred in many places. To do this would be meaningful because the central issue of minority urban education is that the school districts serving them are mostly minority and poor. In the cases before the Court today the litigants were individual—and apparently racially diverse—school districts. If the school districts could demonstrate, using empirical studies, that school children perform better in diverse environments and return to the Court with some narrow tailoring demonstrating that all race neutral means had been attempted (including upgrading schools) without achieving the diversity results desired (empirically linked to quality education) the Court would then have to address the issue of whether there is a compelling interest in diversity for the sake of student performance, and it would also have to address the fact that the districts did all that they could to achieve the diversity using race-neutral means.

Of course, the Court's conservatives would likely find another way, but such an opinion would be a telling and interesting statement about the Court's jurisprudence. As for intensely segregated school districts—minority inner-city districts—it is not clear that a positive decision in these cases would have helped at all. Marginal diversity seems unlikely to achieve the educational goals being sought for minority children.

CONCLUSION—TERM RIGHT

It is not as easy as the pundits will argue to say definitively that this is *the* extreme rightward turn of the Court that has been awaited since the end of the Warren years. Time will be needed to determine whether this year's score card of rightward versus leftward decisions (with the rightward decisions in civil liberties winning) holds up, or whether this year was a mere circumstance of the peculiarities of the cases submitted for review. The 2007–2008 docket included cases involving capital punishment in

³⁷⁰ See, e.g., Reintegrating the Supreme Court's Desegregation Policy, <http://www.acsblog.org/equal-protection-and-due-process-reintegrating-the-supreme-courts-desegregation-policy.html> (last visited July 1, 2008); BREAKING: Supreme Court Strikes Down Public School Desegregation Law, <http://thinkprogress.org/2007/06/28/breaking-supreme-court-limits-use-of-race-for-assigning-students-in-public-schools/> (last visited July 1, 2008), and A Supreme Court Conversation, <http://www.slate.com/id/2168856/entry/2169406/> (last visited July 1, 2008).

which minority defendants claim that their rights under international law (*Medellín v. Texas*)³⁷¹ and their rights under the jury trial guarantee (*Snyder v. Louisiana*)³⁷² were violated. It is the nature of the Court's 2006–2007 jurisprudence that makes these two decisions easy to predict. That the Court has pointed in this direction, or, better yet, painted itself into this corner by virtue of its ideologically based decisions, is not an encouraging development for the Roberts Court, even if the phenomenon is not new.

³⁷¹ 128 S. Ct. 1346 (2008).

³⁷² 128 S. Ct. 1203 (2008).

