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## Getting the Roberts Court Right: A Response to Chemerinsky

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# GETTING THE ROBERTS COURT RIGHT: A RESPONSE TO CHEMERINSKY

JONATHAN H. ADLER<sup>†</sup>

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## I. INTRODUCTION

The Roberts Court is a work in progress. The October 2008 Supreme Court term will be only the third in which both Chief Justice John Roberts and Associate Justice Samuel Alito have sat together for the entire term.<sup>1</sup> Any assessment of the Court at this point is necessarily tentative and somewhat impressionistic. The data from which one can draw conclusions is quite limited and not necessarily representative of the Court's work. A given justice's current behavior on the Court is not necessarily indicative of the future, as some justices "grow" or evolve once on the bench.<sup>2</sup> Changes in personnel can also alter the Court's internal dynamic and with unpredictable effects.<sup>3</sup>

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1. Samuel Alito was sworn in as the 110<sup>th</sup> Associate Justice of the Supreme Court on January 31, 2006, and only participated in part of the October Term 2005. *See* Charles Babington, *Alito Is Sworn in on High Court*, WASH. POST, Feb. 1, 2006, at A01, available at <http://www.washingtonpost.com/wpdyn/content/article/2007/08/14/AR200708140101-5.html> (last visited Mar. 9, 2009).

2. *See* Lee Epstein, et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007) (documenting the frequency of "ideological drift" by Supreme Court Justices). According to one recent study examining the voting patterns of Supreme Court justices from 1937-2005, "ideological drift is pervasive." *Id.* at 1486. The most obvious contemporary example of this would be Justice David Souter, who voted more frequently with the "conservative" justices on the Court in his first few terms on the Court than he does today. *Id.* at 1508-09

Any assessment of the Roberts Court at age three is necessarily tentative and preliminary. Yet there is a tendency toward premature pronouncements and exaggerated assessments. Court commentators exhibit a reflex to cast the Court in a predetermined narrative about its prospects and pronouncements. This same tendency produces overly confident and conclusory assessments that stray beyond the available evidence. Small doctrinal shifts are presented as seismic changes; ripples in the Court's jurisprudence are proclaimed tsunamis. Editorials and pundits proclaim trends and transformations that have yet to manifest themselves.

This tendency was on display at the close of the October Term (OT) 2006 as court commentators proclaimed the arrival of a triumphant conservative majority on the Supreme Court. Jeffrey Toobin wrote of a "dramatically more conservative" Supreme Court with a majority intent on launching a conservative "counterrevolution" in American law.<sup>4</sup> The *Washington Post* reported a "steady and well-documented turn to the right."<sup>5</sup> Ronald Dworkin warned of an "unbreakable phalanx" of conservative justices<sup>6</sup> and *The New York Times*' Linda Greenhouse reported that the confirmations of Roberts and Alito had created the "Court that conservatives had long yearned for and that liberals feared."<sup>7</sup>

Reports of a conservative ascendance are premature. OT 2006 certainly featured numerous 5-4 decisions, many of which produced what could be called "conservative" results.<sup>8</sup> Yet there were also substantial

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(stating that Justice Souter was the median justice on the Court when first appointed but "has grown strikingly more liberal with nearly each passing term"). A similar trend was observed with Justice Sandra Day O'Connor. *Id.* at 1526 (stating that Justice O'Connor "made a slow and gradual move to the left" after her first ten years on the Court).

3. See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS. U. L.J. 569 (2003). As Professor Merrill observed, one characteristic of the later Rehnquist Court was the unprecedented level of continuity in the Court's lineup. *Id.* at 573.

4. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 8, 324 (2007).

5. Robert Barnes, *A Rightward Turn and Dissension Define Court This Term*, WASH. POST, Jul. 1, 2007, at A07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/30/AR2007063000795.html> (last visited Mar. 9, 2009).

6. RONALD DWORKIN, *THE SUPREME COURT PHALANX: THE COURT'S NEW RIGHT-WING BLOC* 47 (2008).

7. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, Jul. 1, 2007, available at <http://www.nytimes.com/2007/07/01/washington/01scotus.html?n=Top/Reference/Times%20Topics/People/S/Stevens,%20John%20Paul> (last visited Mar. 9, 2009).

8. See Lee Epstein, et al., *The Bush Imprint on the Supreme Court: Why Conservatives Should Continue to Yearn and Liberals Should Not Fear*, 43 TULSA L. REV. 651, 652 (2008) (noting that "the 2006 term, in particular, was a good one for

victories for “liberal” positions the proportion of cases in which conservative positions prevailed was not out of line with prior years.<sup>9</sup> More importantly, the Court’s slim docket that term was hardly representative of the full range of issues the Court confronts. Only one year later commentators were forced to reassess as OT 2007 produced fewer ideologically divided decisions in which the conservative justices carried the day.<sup>10</sup> It is difficult to characterize the Court that produced *Kennedy v. Louisiana*<sup>11</sup> and *Boumediene v. Bush*<sup>12</sup> as particularly “conservative” or “right-wing.”

Dean Erwin Chemerinsky makes a substantial contribution to the narrative of conservative ascendancy in *The Roberts Court at Age Three*.<sup>13</sup> Chief Justice Roberts and Justice Alito “have been everything that conservatives could have dreamed of and liberals could have feared,” he writes.<sup>14</sup> The two newest justices are forging “a solid conservative voting majority” on the Court.<sup>15</sup> The result is a Court that is “notably more conservative” than its predecessors on most contentious questions.<sup>16</sup> It is, Dean Chemerinsky claims, “the most conservative Court since the mid-1930s.”<sup>17</sup>

To say Dean Chemerinsky overstates his case is an understatement. Even assuming one can offer a definitive assessment of the Roberts Court’s first three years, there is little support for the claim it is the “most

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conservatives,” but that “empirical scrutiny of the Court’s voting patterns reveals no significant distinctions between the Rehnquist and Roberts Courts”).

9. For instance, the five most conservative justices on the Court in a majority of the term’s 5-4 cases in OT 05 (fifty-five percent), OT 00 (fifty-four percent), and OT 99 (sixty-six percent). Perhaps more notable, in OT 99, the Court’s four most liberal justices only prevailed in one of the term’s twenty-one 5-4 decisions in OT 99. See SCOTUSblog, *End-of-Term “Super StatPack—OT06*, June 28, 2007, at 3, available at <http://www.scotusblog.com/movabletype/archives/SuperStatPack.pdf> (last visited Mar. 9, 2009).

10. This is summarized in Jonathan H. Adler, *What Happened to the “Conservative Court”?*, NATIONAL REVIEW ONLINE (June 30, 2008), available at <http://article.national-review.com/?q=YTM3OGIIMzMMDJkOTdhM2QzZjU2NjBiMjFiMmRhNTM=> (last visited Mar. 9, 2009).

11. 128 S. Ct. 2641 (2008), *petition for reh’g denied* 129 S. Ct. 1 (2008).

12. 128 S. Ct. 2229 (2008).

13. Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947 (2008).

14. See Chemerinsky, *supra* note 13, at 956.

15. *Id.* at 955.

16. *Id.* at 956. Dean Chemerinsky further asserts that: “The one area where the Roberts Court has not been conservative is in its rulings against the Bush Administration’s actions as to the Guantanamo detainees.” *Id.*

17. *Id.* at 962.

conservative” in seven decades, however “conservative” is defined.<sup>18</sup> Even if one evaluates the Court’s ideological orientation solely with the evidence Dean Chemerinsky offers, the claim buckles. Viewed in light of the Roberts Court’s entire record thus far, the charge falls apart.

The Roberts Court has issued its share of conservative rulings, though most of these have been relatively modest.<sup>19</sup> At the same time, it has issued many decisions that are quite liberal.<sup>20</sup> Among other things, the Roberts Court has: issued the most expansive and permissive standing opinion since the 1970s;<sup>21</sup> invalidated the application of the death penalty based, in part, on appeals to international law;<sup>22</sup> and engaged in the most aggressive exercise of judicial review of wartime measures adopted by the political branches in our nation’s history.<sup>23</sup> Whatever one’s views of the merits of these decisions, they are not the product of the “most conservative” Court in over a generation.<sup>24</sup>

Accepting the limited ability to draw definitive conclusions about the Roberts Court at this point, it is fair to say the Court is moderately more conservative than it had been immediately before. Chief Justice Roberts has not shown himself to be any more conservative than his predecessor and mentor, the late Chief Justice William Rehnquist. If anything, he is slightly more deferential to precedent. Justice Alito, on the other hand, is both more conservative and consistent than was Justice O’Connor. Those

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18. The terms “liberal” and “conservative” are used throughout this paper in accordance with the common vernacular. It should be noted, however, that these labels are often misleading and imprecise when used to describe court decisions and doctrines, particularly insofar as these labels are affixed to the results or practical consequences of decisions rather than to the holdings or interpretive methodologies employed by the Court or individual justices. So, for instance, while judicial decisions unfavorable to criminal defendants are often characterized as “conservative,” some conservative justices have authored opinions quite protective of criminal defendants. *See, e.g.,* *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that the use of a thermal imaging device to detect radiation of heat from a private home is a “search” under the Fourth Amendment) (opinion by Scalia, J.); *United States v. Bajakajian*, 524 U.S. 321 (1998) (holding that criminal forfeiture constituted excessive fine in violation of the Eighth Amendment) (opinion by Thomas, J.).

19. *See infra* notes 65-121 and accompanying text.

20. *See infra* notes 107-121 and accompanying text.

21. *Massachusetts v. Env’tl. Prot. Agency* (EPA), 549 U.S. 497 (2007). The most expansive and permissive standing opinion in the Court’s history was *United States v. Students Challenging Regulatory Agency Problems*, 412 U.S. 669 (1973). *See also Massachusetts*, 549 U.S. at 547 (Roberts, C.J., dissenting) (“Today’s decision is *SCRAP* for a new generation.”).

22. *Kennedy*, 128 S. Ct. 2641.

23. *Boumediene*, 128 S. Ct. 2229.

24. *See* L. Epstein, et al., *Bush Imprint*, *supra* note 8, at 652 (noting similarity between Rehnquist and Roberts Courts).

areas in which the Court has become slightly more conservative are those on which Justice Alito is to Justice O'Connor's right. Nonetheless, the confirmation of Justice Alito has yet to produce anything approaching revolutionary change, in part because Justice Kennedy remains a moderate median justice on many issues. Thus the most we can say at this point is that the Roberts Court appears moderately more conservative than its immediate predecessors, but remains under construction.

The remainder of this essay proceeds as follows. Part I places the current Court and its docket in broader historical and institutional context, with a particular focus on the Court's diminished caseload. Part II challenges Dean Chemerinsky's central claim that the Roberts Court at age three has shown itself to be "the most conservative Court since the mid-1930s." This part demonstrates that Dean Chemerinsky's claim is difficult to maintain even considering alternative potential definitions of what it would mean for this to be the "most conservative" Court. Part III focuses on Dean Chemerinsky's subordinate claim that the Roberts Court is exceedingly or notably "pro-business." This part considers what it would mean to have a "pro-business" court, and whether the current Court fits this definition. Part IV considers Dean Chemerinsky's additional suggestion that the Roberts Court should be known as the "Kennedy Court," and its implications for his broader thesis. This Essay closes with an assessment of what can—and cannot—be said about the Roberts Court at age three, and offers some preliminary thoughts on how the Court may continue to evolve in the future.

## II. THE INCREDIBLE SHRINKING DOCKET

A striking aspect of the Roberts Court is the size of its docket. This was many years in the making. Over the past several decades, the Supreme Court's docket has declined dramatically. During the late Chief Justice Rehnquist's tenure, the number of cases heard and decided by the Court was cut in half, from approximately 150 cases per term in the 1980s to seventy-six in OT 2004.<sup>25</sup> While Chief Justice Roberts indicated he would like the Court to accept more cases for review during his confirmation hearings, it has yet to happen.<sup>26</sup> The Court issued

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25. See David M. O'Brien, *The Rehnquist Court's Shrinking Plenary Docket*, 81 JUDICATURE 58, 58 (1997) ("In the 1995 and 1996 terms, the Court . . . decided just [ninety] cases by written opinions each term, half the number of a decade ago."); SCOTUSblog, *supra* note 9, at 2 ("The number of decisions after argument for previous Terms are . . . [seventy-six] (OT04) . . .").

26. See, e.g., Associated Press, U.S. Supreme Court Accepting Fewer Cases, FOXNews.com (June 3, 2006), available at <http://www.foxnews.com/story/0,2933,-198065,00.html?sPage=fnc/us/supremecourt> (last visited Mar. 9, 2009) ("Chief Justice

opinions after briefing and argument in only sixty-eight and sixty-seven cases in the past two terms.<sup>27</sup>

Any evaluation of the Roberts Court at this point must account for its small docket. As Dean Chemerinsky notes, the number of cases decided by the Court after briefing and argument is at its lowest point in over fifty years.<sup>28</sup> At the time of this writing the Court has accepted significantly more cases than at this point during OT 2006 and OT 2007,<sup>29</sup> and the Court has scheduled afternoon oral arguments for the first time during Chief Justice Roberts' tenure,<sup>30</sup> but it is unclear whether this indicates an increase in the size of the docket or mere frontloading of arguments so as provide more time to craft and revise opinions.

There are several potential explanations for the reduction in cases heard by the Court. Among those Dean Chemerinsky identifies are: increasing ideological congruity between the Supreme Court and the federal courts of appeals,<sup>31</sup> strategic voting by individual justices,<sup>32</sup> a decreased demand for certiorari by the Solicitor General's office,<sup>33</sup> and the reliance of most justices on the certiorari pool.<sup>34</sup> Another factor is Congress' constriction of the Court's appellate jurisdiction in 1988.<sup>35</sup> By making a greater portion of the Court's docket discretionary, Congress virtually ensured that the docket would shrink (though I doubt anyone who supported this revision expected it would shrink quite so much).

Among the causes of the docket's decline, the cert pool is particularly interesting. The pool was created in OT 1972 by Chief

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John Roberts said last fall he would like to see the U.S. Supreme Court take up more cases. So far, however, his arrival has had the opposite effect.”).

27. See SCOTUSblog, *supra* note 9, at 2; Akin Gump Strauss Hauer & Feld, LLP, SCOTUSblog, *Super StatPack—OT07*, June 26, 2008, at 2, available at <http://www.-scotusblog.com/wp/wp-content/uploads/2008/06/superstatpackot07.pdf> (last visited Mar. 9, 2009).

28. See Chemerinsky, *supra* note 13, at 948.

29. See FINDLAW, *Supreme Court Docket: 2008 Term*, available at [http://supreme.lp.-findlaw.com/supreme\\_court/docket/index.html](http://supreme.lp.-findlaw.com/supreme_court/docket/index.html) (last visited Mar. 9, 2009).

30. Marcia Coyle, *High Court, High Stakes*, NAT'L L.J., Sept. 22, 2008, at col. 2 (“Also strikingly different is the return of afternoon oral arguments: four in October and three in November.”).

31. Chemerinsky, *supra* note 13, at 950.

32. *Id.* at 951.

33. *Id.*

34. *Id.*

35. See Pub. Law 100-352, 102 Stat. 662 (1988). See also Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988) (observing that legislative revision “eliminates substantially all the Court’s so-called mandatory or obligatory appeal jurisdiction” such that “[w]ith but the most minor of exceptions, the only path to Supreme Court review of federal and state court decisions is now by way of petitioning for a writ of certiorari”).

Justice Burger, who reportedly sought “to cut back on the Court’s work load.”<sup>36</sup> In his view, preparing memoranda on the 4,500 or so petitions for certiorari filed each year was too much work for each justice’s chambers.<sup>37</sup> Most of the current justices must share this sentiment because almost all of the justices partake of the pool.<sup>38</sup> Justice Stevens has declined to participate in the pool for some time and, in 2008, Justice Alito announced that he would get out of the pool as well.<sup>39</sup>

Dean Chemerinsky is almost certainly correct that the pool reduces the number of cert petitions the Court accepts. Having only one clerk read a petition for certiorari and draft a memorandum for multiple chambers reduces the likelihood that any given petition will be accepted. This is particularly true if, as Dean Chemerinsky and others suggest, the Court’s institutional norms discourage clerks from recommending a certiorari grant.<sup>40</sup> It is apparently seen as worse to recommend granting an unworthy case than to pass over one deserving of Supreme Court review.

Dean Chemerinsky may inadvertently identify another reason for fewer certiorari grants when he notes that when a justice does not participate in the cert pool it is easier to select cases with an eye toward a desired outcome.<sup>41</sup> Before the pool was created, Dean Chemerinsky notes, the clerks in each Justice’s chambers may have reviewed petitions in accordance with their Justice’s preferences, as opposed to more neutral criteria.<sup>42</sup> This may have resulted in cert grant recommendations based upon the idiosyncratic (or ideological) preferences of individual justices, and may have increased the potential for strategic behavior in the certiorari process.

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36. BOB WOODWARD AND SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 272 (1979).

37. *Id.* Not all of the justices agreed. Justice Brennan opposed creation of the cert pool and Justice Stewart opted not to participate on the recommendation of his clerks. *Id.* at 272-73.

38. Tony Mauro, *Justice Alito Changes Mind, Gets Out of the Pool*, *LEGAL TIMES*, Sept. 29, 2008.

39. *Id.*

40. Chemerinsky, *supra* note 13, at 951-52; Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, *N.Y. TIMES* (Dec. 6, 2006), available at [http://www.ny-times.com/2006/12/07/washington/07scotus.html?pagewanted=2&\\_r=2](http://www.ny-times.com/2006/12/07/washington/07scotus.html?pagewanted=2&_r=2) (last visited Mar. 9, 2009).

41. See Chemerinsky, *supra* note 13, at 951 (“Justices Stevens, Souter, Ginsburg, and Breyer may decide to vote in favor of certiorari only when they think that they have a reasonable chance at ultimately getting agreement from Justice Kennedy or another member on the Court. The same, of course, could be true for the more conservative Justices.”).

42. *Id.* at 951-52.



With a certiorari pool, worthy cases may get overlooked, but the requirement that each clerk write a memo for multiple justices with different judicial philosophies may depoliticize the certiorari process. The requirement that each clerk write a memo for multiple justices is likely to encourage the drafting of memos that focus on “neutral” criteria for certiorari, and discourage memos recommending cert so as to overturn faulty precedent or change the direction of the law. It seems plausible that memos written for the pool are less likely to be written with an eye toward producing predetermined, desired results.

Dean Chemerinsky decries the Court’s incredible shrinking docket because it means “more major legal questions must wait a longer time before being settled.”<sup>43</sup> He is correct that this “has enormous implications for lawyers, judges, and for the nation,”<sup>44</sup> but not all of them are negative. While the Court’s relative reluctance to grant certiorari means that circuit splits and doctrinal conflicts may persist for a greater period, it also means that legal questions have greater time to percolate. If more circuit courts have the opportunity to consider a question of first impression, there is a greater likelihood of a circuit split developing, but the justices may also benefit from assessing the frequency with which a given question recurs and from having more of their Article III colleagues consider a given question. Delaying a grant of certiorari may also afford the political branches an opportunity to resolve a given controversy, thereby obviating any need for the Court to hear a case.

Downsizing the docket is important for academics and court watchers, too. A shrunken docket, in any given year, provides a less reliable picture of the Court’s jurisprudence. As the Court reviews fewer cases, each individual term provides a less representative snapshot of the Court’s work. Fewer cases mean a smaller, less-representative data sample. As a consequence, a handful of terms are not representative of the wide range of issues that come before the Court.

The shrinking docket should make us particularly reluctant to embrace sweeping judgments about the Court’s trajectory based on any handful of terms. The first three years of the Roberts Court have seen quite a few significant cases,<sup>45</sup> but many important issues were absent. The Roberts Court has not considered enumerated powers cases of the sort that characterized the Rehnquist Court’s “New Federalism,” nor has it had the opportunity to rule on Fifth Amendment takings, the separation

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43. *Id.* at 948.

44. *Id.*

45. See, e.g., *Kennedy*, 128 S. Ct. 2641; *Boumediene*, 128 S. Ct. 2229; *EPA*, 549 U.S. 497.

of church and state, commercial speech, homosexual rights, and a host of other important contemporary issues.

The brief history of the Roberts Court amply illustrates the danger of relying upon a single term to evaluate the Court's trajectory. Viewed in isolation, OT 2006 appeared to present a fiercely divided Court, driven along ideological lines, in which conservatives tended to triumph.<sup>46</sup> Yet the term before, the Court was a model of civility and nearly unprecedented unanimity.<sup>47</sup> And one year later, the Roberts Court defied ideological caricature. OT 2005 may be *sui generis* because Justices O'Connor and Alito split their term.<sup>48</sup> The difference between OT 2006 and OT 2007, however, was not turnover in personnel, but a different mix of cases and associated issues.

Commentators were too quick to draw stark conclusions from the apparent divisions on the Court on display in OT 2006. Only one-in-four decisions was unanimous that term,<sup>49</sup> and one-in-three was decided 5-4.<sup>50</sup> This is hardly an unprecedented level of division, however. Both OT 2004 and OT 2001 saw approximately one-third of the Court's decisions decided 5-4 as well.<sup>51</sup> If anything was unprecedented it was the unusually high percentage of unanimous rulings—forty-five percent<sup>52</sup>—and low number of 5-4 decisions—thirteen percent<sup>53</sup>—during Chief Justice Roberts's first term, OT 2005, that inflated expectations.

This is not to deny the very real doctrinal divisions on the Court. SCOTUSblog's analysis of the "rate of dissension"—a measure of the number of dissents per case—found OT 2006 the most divided in recent years, barely edging out OT 2001, 1.82 dissents per case to 1.81.<sup>54</sup> This and other measures of the Court's may be magnified by the Court's ever-shrinking docket, however. As the Court grants fewer cases, those that remain on the docket may be more difficult, contentious, and closely fought on the margin. The oral statements from Justices Ginsburg and Breyer delivering dissents in high-profile cases in OT 2006 may have been unusual, but they were mild compared to some of the fiery statements from prior years, as when the Court handed down its

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46. See SCOTUSblog, *supra* note 9.

47. See *id.*

48. See *infra* note 1 and accompanying text.

49. See SCOTUSblog, *supra* note 9, at 3.

50. See *id.* at 2.

51. See *id.*

52. See *id.*

53. See *id.* at 3.

54. Jason Harrow, *Measuring Divisiveness in OT 2006*, SCOTUSblog, July 2, 2007, available at <http://www.scotusblog.com/wp/measuring-divisiveness-in-ot06/> (last visited Mar. 9, 2009).

decisions in two abortion-related cases, *Stenberg v. Carhart*<sup>55</sup> and *Hill v. Colorado*.<sup>56</sup>

OT 2007 was neither particularly conservative nor starkly divided. Approximately one third of the Court's decisions were decided by a 5-4 vote during OT 2006.<sup>57</sup> In OT 2007, however, the Court split 5-4 only seventeen percent of the time.<sup>58</sup> Moreover, only a handful of these decisions yielded ideologically predictable divisions.<sup>59</sup> In cases concerning criminal sentencing,<sup>60</sup> the definition of money laundering,<sup>61</sup> age discrimination,<sup>62</sup> and federal sovereign immunity,<sup>63</sup> the justices split 5-4, but did not divide into "liberal" and "conservative" camps.<sup>64</sup> It is simply too soon to know whether OT 2006 or OT 2007 provides a better picture of the "real" Roberts Court—assuming either is representative of the Court's overall judicial ideology—and there are reasons to lean toward the latter.

### III. "THE MOST CONSERVATIVE COURT SINCE THE MID-1930S"?

Dean Chemerinsky's primary and most provocative claim is that the Roberts Court at age three is "the most conservative Court since the mid-1930s."<sup>65</sup> By way of explanation, he writes:

What does it mean to say that the Court is more conservative than its predecessor Courts, the Rehnquist, Burger, and Warren Courts? It is notably more conservative on the issues that in our society today are often the litmus tests for ideology: abortion and race. I also believe that it will be much more conservative on issues of separation of church and state, but they have not yet been presented to the Roberts Court. Also, it is a Court that, overall, is very pro-business. The one area where the Roberts Court has not been conservative is in its rulings against the Bush

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55. 530 U.S. 914 (2000).

56. 530 U.S. 703 (2000).

57. See SCOTUSblog, *supra* note 9, at 2.

58. *Id.* at 2. This percentage includes the Court's 5-3 decision in *Stoneridge Investment Partners v. Scientific Atlanta*, but excludes the Court's two 4-4 decisions in *Warner-Lambert v. Kent* and *Board of Education of New York v. Tom F. Id.* at 2.

59. *Id.* at 4-5.

60. *Irizarry v. United States*, 128 S. Ct. 2198 (2008).

61. *United States v. Santos*, 128 S. Ct. 2020 (2008).

62. *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*, 128 S. Ct. 2361 (2008).

63. *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008).

64. See *id.* at 10-23.

65. Chemerinsky, *supra* note 13, at 962.

administration's actions as to the Guantanamo detainees. But this is because Justice Kennedy has joined Justices Stevens, Souter, Ginsburg, and Breyer in these cases.<sup>66</sup>

These claims are contestable in almost every particular. The Roberts Court at age three—that is, the Roberts Court we have seen thus far—is not “notably more conservative” on race and abortion than any Court of the past several decades. Nor is it likely that the Court, as currently composed, will be particularly more conservative on the question of church and state, and the Court's rulings on enemy combatants are hardly the only significant example of where “the Roberts Court has not been conservative.” The claim the Roberts Court is “pro-business” is more plausible, as discussed in the next section, but it does not have the clear ideological significance Dean Chemerinsky suggests, nor is the Roberts Court's treatment of business-related cases remotely comparable to the pre-New Deal Court.

The basis for Dean Chemerinsky's claim on abortion is that the Supreme Court upheld the constitutionality of the federal partial birth abortion ban in *Gonzales v. Carhart*.<sup>67</sup> This was the first time the Supreme Court had upheld a ban on a specific abortion procedure. The decision also all-but overturned its 2000 decision in *Stenberg v. Carhart* invalidating a similar state partial-birth abortion ban statute<sup>68</sup> and signaled that the Court would be somewhat more deferential to government restrictions on abortion, at least when confronted with a facial challenge.

*Gonzales v. Carhart* certainly marks a shift in the Court's abortion jurisprudence, but not a seismic one.<sup>69</sup> The decision does not push the Court's abortion jurisprudence back fifty, let alone seventy-plus, years. The Court did not recognize a constitutional right to an abortion until 1973.<sup>70</sup> That right, as subsequently limited in *Planned Parenthood v.*

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66. *Id.* at 956.

67. 127 S. Ct. 1610 (2007).

68. 550 U.S. 914 (2000).

69. One way in which the *Gonzales* decision does appear to be significantly different from its predecessors is in the rhetoric of the opinion particularly the continued reference to the fetus as an “unborn child” in Justice Kennedy's opinion for the Court. See Chemerinsky, *supra* note 13, at 958. At the same time, Justice Kennedy's opinion for the Court in *Gonzales* referred to those who perform abortions as “doctors,” whereas in his *Stenberg v. Carhart* dissent he used the term “abortionist.” Compare *Gonzalez*, 127 S. Ct. at 1622 (“This is an abortion doctor's clinical description.”) with *Stenberg*, 530 U.S. 914, 947 (2000) (Kennedy, J., dissenting) (“The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life.”).

70. 410 U.S. 113 (1973).

*Casey*,<sup>71</sup> is still recognized by a majority of justices on the Court. While there are at least two Justices, Scalia and Thomas, who are prepared to overturn *Casey* and *Roe*, there remain five justices, including two of the three justices who authored the joint opinion in *Casey*, who still embrace a constitutional right to abortion.

Dean Chemerinsky writes that *Gonzales v. Carhart* changed the standard from *Casey* and *Stenberg* for evaluating the constitutionality of abortion restrictions because it held that an abortion restriction is not facially unconstitutional unless it imposes an undue burden on a “large fraction of women.”<sup>72</sup> This is certainly a change from *Stenberg*, in which the Court held that an abortion restriction would be unconstitutional if it placed an undue burden on some women, but it is also broadly consistent with *Casey* (and completely foreshadowed by Justice Kennedy’s *Stenberg* dissent). The “undue burden” test as applied in *Stenberg* was arguably more restrictive of state legislatures than as announced in *Casey*, so a repudiation of *Stenberg* on this point is not tantamount to a rejection of a constitutionally protected abortion right, let alone the reversal of 35 years of progressive abortion jurisprudence.

In *Casey*, the Court upheld the imposition of a 24-hour waiting period against a facial challenge despite the fact that such a restriction could impose an undue burden on some women. The joint opinion signed by Justices Kennedy, O’Connor and Souter explicitly rejected the claim that the particularly burdensome effects of the waiting period on some women rendered the provision facially unconstitutional.<sup>73</sup> The same Court invalidated Pennsylvania’s spousal notification requirement, but not because it placed “an undue burden on *some* women” as Dean Chemerinsky claims.<sup>74</sup> Rather, the Court explained, it concluded that the “spousal notification requirement is . . . likely to prevent a *significant* number of women from obtaining an abortion.”<sup>75</sup> In *Gonzales v. Carhart*, on the other hand, the Court did not find that the federal law would “prevent a significant number of women from obtaining an abortion.”<sup>76</sup> To the contrary, it expressed doubt whether the law in question would bar any women from obtaining an abortion at all, and left

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71. 505 U.S. 833 (1992).

72. *Gonzales*, 127 S. Ct. at 1639.

73. *Casey*, 505 U.S. at 886-87.

74. Chemerinsky, *supra* note 13, at 958 (emphasis added).

75. 505 U.S. at 893 (emphasis added). *See also id.* at 992 (Scalia, J., concurring in the judgment and dissenting in part) (“The joint opinion repeatedly emphasizes that an important factor in the “undue burden” analysis is whether the regulation “prevent[s] a *significant number* of women from obtaining an abortion.”) (emphasis added).

76. *Gonzales*, 550 U.S. at 124.

open the possibility of an as-applied challenge for those women who might be placed at risk if denied the prohibited procedure.

More broadly, there is no indication the current Court is prepared to further limit the abortion right as recognized in *Casey* and *Roe*, nor is there any evidence that the Court is prepared to curtail other rights to sexual autonomy recognized by the Court in the past several decades. The Roberts Court has given no indication that it would adopt a more restrictive test for the recognition of fundamental rights protected by the Due Process Clause than was announced in *Washington v. Glucksberg*.<sup>77</sup> Furthermore, there are at least five justices on the Court who support the holding of *Lawrence v. Texas*,<sup>78</sup> arguably the most liberal opinion on sexual liberty in the Court's history, let alone the last seventy years. That the current Court is unlikely to plow new ground in this area is not sufficient to make it "notably more conservative" than those that have come before.

Dean Chemerinsky's assertion that the Roberts Court at age three is the "most conservative" Court since before *Brown v. Board of Education*<sup>79</sup> does not hold up in the context of race either. Nor does his more modest claim that the current Court is "notably more conservative" than "the Rehnquist, Burger, and Warren Courts."<sup>80</sup> As with abortion, it is reasonable to maintain that the replacement of Justice O'Connor with Justice Alito has made the Supreme Court modestly more conservative, but not to maintain that the current Court has signaled its intent—let alone already effectuated—a dramatic turn to the right.

In assessing this claim, it is important to clarify what it means for a justice (or the Court) to be "conservative" on the question of race. According to Dean Chemerinsky, the conservative position on race is that which was embraced by Chief Justice Roberts' plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>81</sup> Specifically, the conservative position is that "the government must be colorblind in its decisions,"<sup>82</sup> and that all race-conscious government policies, including those intended to benefit historically disadvantaged

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77. 521 U.S. 707 (1997) (holding that there is no a fundamental right to doctor-assisted suicide under the Due Process Clause of the Fourteenth Amendment).

78. 539 U.S. 558 (2003) (holding that a Texas statute which rendered certain sexual acts between members of the same sex a crime was unconstitutional).

79. 347 U.S. 483 (1954). Note that in claiming that the Roberts Court is the "most conservative" Court since the 1930s, he implicitly—if perhaps unintentionally—suggests that the current Court is more "conservative" on the question of race than the New Deal Court that accepted "separate but equal" and upheld Japanese internment.

80. Chemerinsky, *supra* note 13 at 956.

81. 127 S. Ct. 2738 (2007).

82. Chemerinsky, *supra* note 13, at 962.

racial minorities, must be subject to the most exacting scrutiny. To sustain his claim, Dean Chemerinsky must show that the Roberts Court has shown itself to be more conservative in this regard than its predecessors, and this is something he fails to do.

In *Parents Involved*, the Supreme Court held 5-4 that two school districts' voluntary attempts to achieve greater racial balance throughout their jurisdictions were unconstitutional insofar as they relied upon a student's race when making school assignment decisions. Four justices, led by Chief Justice Roberts, suggested that this was an easy case: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>83</sup> Justice Kennedy concurred in the Court's judgment that the school assignment plans at issue should be subject to strict scrutiny and, as implemented, were unconstitutional. Yet Justice Kennedy was not willing to embrace colorblindness as "a universal constitutional principle," thereby forfeiting the possibility that school districts could profitably consider race in order to encourage more diverse student bodies.<sup>84</sup> Along with the dissenters, Justice Kennedy explicitly accepted that combating "racial isolation" and achieving a racially diverse student population is a "compelling interest" that could justify narrowly tailored race conscious policies.<sup>85</sup>

At least superficially, *Parents Involved* echoes the result in *Regents of the University of California v. Bakke*.<sup>86</sup> Four justices embraced strict colorblindness;<sup>87</sup> four justices sought to impose a relaxed version of heightened scrutiny to race-conscious policies designed to overcome the legacy of segregation; and one justice split the difference. In each case, the median justice—Justice Powell in *Bakke*, Justice Kennedy in *Parents Involved*—accepted the dissenters' view that diversity in education could be a compelling governmental interest, but rejected the specific educational policy at issue for being excessively blunt or crude in its use of race.

*Parents Involved* is arguably more "conservative" than *Bakke* insofar as Justice Kennedy's concurring opinion is less permissive than Justice Powell's. At the very least, Justice Kennedy's rejection of the University of Michigan Law School's affirmative action plan in *Grutter v.*

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83. *Parents Involved*, 127 S. Ct. at 2768 (Roberts, C.J., plurality opinion).

84. *Parents Involved*, 127 S. Ct. at 2820-21 (Kennedy, J., concurring in part and concurring in the judgment).

85. *Id.*

86. 438 U.S. 265

87. It should be noted that the four justice plurality in *Bakke* would have invalidated the challenged admissions plan on statutory, as opposed to constitutional grounds.

*Bollinger*<sup>88</sup> shows that he embraces a less permissive understanding of the Equal Protection Clause than did Justice O'Connor in the latter part of her career.<sup>89</sup> As a consequence, Dean Chemerinsky may be correct to predict that the Roberts Court would decide *Grutter* differently than did the Rehnquist Court.<sup>90</sup> Yet more is required for Chemerinsky to validate his larger claim.

Even accepting that *Parents Involved* represents a rightward shift from *Grutter* does not establish that the Roberts Court is more conservative on race than the Rehnquist, Burger, and Warren Courts. Due to Justice Kennedy, it is reasonable to view *Parents Involved* as more accommodating of race-based remedial measures than either *City of Richmond v. Croson*<sup>91</sup> or *Adarand Constructors, Inc. v. Peña*.<sup>92</sup> These opinions, taken together, could support an argument that at least the pre-*Grutter* Rehnquist Court was as conservative on race as the Roberts Court has shown itself to be thus far.

Dean Chemerinsky suspects the Roberts Court will be “particularly more conservative on the question of church and state” once it is presented with a significant Establishment Clause case. He may well be right, at least with regard to the approval of religious displays, but he offers no evidence in support of this claim. Even if one assumes that Justice Alito will adopt a more permissive approach to the Establishment Clause than did Justice O'Connor, Justice Kennedy's continued presence as the swing vote in Establishment Clause cases suggests that any doctrinal change will be relatively modest.

In a pair of 2005 cases, *Van Orden v. Perry*<sup>93</sup> and *McCreary County v. ACLU of Kentucky*,<sup>94</sup> Justice Kennedy showed himself to be more tolerant of public displays of religious symbols than was Justice O'Connor. As a consequence, the Roberts Court may approve religious displays that would have been invalidated by the late Rehnquist Court. Yet there is reason to doubt that there will be any more significant changes in Establishment Clause jurisprudence. Among other things,

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88. 539 U.S. 306 (2003) (holding that the University of Michigan Law School had a compelling interest in attaining a diverse student body and that its admissions program was narrowly tailored to achieve this objective).

89. Epstein, *Ideological Drift*, *supra* note 2, at 1535 (noting Justice O'Connor's shift to the left and suggesting Justice O'Connor would have been less likely to support the University of Michigan Law School earlier in her career).

90. *But see* Epstein, *Bush Imprint*, *supra* note 8, at 666-67 (casting doubt on claim Justice O'Connor would have supported school districts in *Parents Involved* cases).

91. 488 U.S. 469 (1989).

92. 515 U.S. 200 (1995).

93. 545 U.S. 677 (2005).

94. 545 U.S. 844 (2005).



Justice Kennedy authored the opinion for the Court in *Lee v. Weisman*, in which the Court held prayers delivered by clergy at a public high school graduation unconstitutional.<sup>95</sup> There are almost certainly at least five justices on the Court who would support that result today, as well as that from *Santa Fe Independent School District v. Doe*, in which the Court likewise held unconstitutional student-delivered prayers at public high school football games.<sup>96</sup>

The Roberts Court has indicated a willingness to enforce strict limitations on taxpayer standing in Establishment Clause cases, but this has not resulted in a shift in the Court's underlying constitutional jurisprudence. In *Hein v. Freedom From Religion Foundation, Inc.*, the Court held that denying taxpayer standing to a group alleging that activities of the President's "faith-based initiative" violated the establishment clause.<sup>97</sup> In doing so the Court reaffirmed the general rule that an individual's status as a taxpayer, without more, is insufficient to establish Article III standing. At the same time, the Court reaffirmed the slight exception to this rule established in *Flast v. Cohen* that allows for taxpayer standing to challenge legislative enactments that allegedly violate the Establishment Clause.<sup>98</sup> The Court's holding reaffirmed a distinction between such challenges to legislative and executive actions articulated in *Valley Forge Christian College v. Americans United for the Separation of Church and State*,<sup>99</sup> and other post-*Flast* cases.<sup>100</sup> While most of the justices acknowledged that *Flast* is an anomaly in the Court's standing jurisprudence, the Court left *Flast* standing.<sup>101</sup> So not only is there no evidence to suggest the Court is prepared to lurch rightward on Establishment clause issues, there has been no change in the Court's willingness to hear Establishment Clause challenges to government conduct.

Abortion, race, and religion are certainly questions of constitutional law that divide contemporary conservatives and liberals. So too do the questions of executive power and the extent to which constitutional protections, such as the writ of habeas corpus, apply to alleged enemy

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95. 505 U.S. 577 (1992).

96. 530 U.S. 290 (2000).

97. 127 S. Ct. 2553 (2007).

98. 392 U.S. 83 (1968).

99. 454 U.S. 464 (1982).

100. See Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 628 (2004) ("In the years following *Flast*, the Court embarked on a process of limiting the federal taxpayer standing doctrine.").

101. For some discussion of the problems with the *Flast* exception reaffirmed in *Hein* see Jonathan H. Adler, *God, Gaia, the Taxpayer and the Lorax*, 20 REG. U L. REV. 175 (2008).

combatants detained in the war on terror. As a general rule, judicial conservatives are more deferential to assertions of Presidential prerogative in military and foreign affairs, while judicial liberals are more responsive to habeas claims or constraints on military power. On these issues, the Roberts Court has not been conservative at all. To the contrary, it has arguably been the most liberal or progressive Court ever.

Throughout the nation's history, the Supreme Court has been reluctant to impose constitutional constraints on national security measures.<sup>102</sup> As Chief Justice Rehnquist chronicled in *All the Laws But One*, the timing of judicial consideration has tended to influence the treatment of civil liberties during wartime.<sup>103</sup> As a descriptive matter, courts are more likely to constrain federal authority and defend civil liberties after the cessation of hostilities than during the pendency of armed conflict or a perceived emergency.<sup>104</sup> Throughout the Civil War, World War I, and World War II, in addition to lesser conflicts, few constitutional constraints were imposed on the political branches.<sup>105</sup> Indeed, this may help explain (though not excuse) some of the federal government's grossest excesses, and the Supreme Court's most shameful examples of judicial passivity.<sup>106</sup>

Given the history of judicial deference to wartime assertions of federal power, *Hamdan v. Rumsfeld*<sup>107</sup> and *Boumediene v. Bush*<sup>108</sup> are remarkable opinions, particularly the latter. While Dean Chemerinsky frames these cases in terms of judicial oversight of executive authority and notes each was a rebuke to the Bush Administration,<sup>109</sup> they were much more. *Boumediene* in particular represents a judicial rebuke to both political branches as the Court invalidated Congress' attempt to authorize the Bush Administration's with regard to the detention and trial of enemy combatants detained at Guantanamo Bay. Never before had a Congressionally authorized assertion of the war power been held to be unconstitutional during a time of armed conflict. Right or wrong, this was a dramatic legal development that few would characterize as conservative.

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102. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 221 (1998) (noting "the reluctance of courts to decide a case against the government on an issue of national security during a war").

103. *Id.* at 224.

104. *Id.*

105. *Id.* at 223 ("The Constitution has not greatly bothered any wartime President.").

106. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944).

107. 548 U.S. 557 (2006).

108. 128 S. Ct. 2229 (2008).

109. Chemerinsky, *supra* note 13, at 972-73.

The enemy combatant cases are hardly the sole example of the Court adopting “liberal” positions.<sup>110</sup> In a series of decisions over the past three years a five justice majority has continued to chip away at the imposition of the death penalty.<sup>111</sup> Most notably among these has been *Kennedy v. Louisiana*, in which the Court declared it unconstitutional to impose the death penalty for a crime, such as child rape, that did not result in the death of the victim.<sup>112</sup> As originally issued, the opinion purported to be based, in part, on the existence of an emerging national consensus against the use of capital punishment in such circumstances.<sup>113</sup> Yet when revealed that part of the Court’s analysis rested on an erroneous claim, specifically the majority opinion’s assertion that no federal law authorized the imposition of the death penalty, Justice Kennedy made clear that his, and the Court’s, judgment rested on its determination that executing a brutal child rapist was unwise, inhuman, and unjust—and therefore must be unconstitutional.<sup>114</sup>

As important as *Boumediene*, *Kennedy*, and other cases in which the Court deviated from its conservative reputation, arguably the most consequential decision of the OT 2006—albeit one curiously omitted from Dean Chemerinsky’s list of important cases<sup>115</sup>—was *Massachusetts v. EPA*.<sup>116</sup> In this case, the Court loosened the constitutional requirements for standing under Article III and altered other long-standing administrative law doctrines en route to authorizing (and in effect mandating) the most expansive environmental regulatory undertaking of all time.<sup>117</sup>

The *Massachusetts* majority announced a new doctrine of “special solicitude” to standing claims by sovereign states and a dramatically

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110. Dean Chemerinsky acknowledges that the Court has embraced liberal positions in other cases as well. See Chemerinsky, *supra* note 13, at 972.

111. See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), *modified* 129 S. Ct. 1 (2008); *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007); *Abdul-Kabir v. Quarterman*, 530 U.S. 233 (2007); *Brewer v. Quarterman*, 530 U.S. 286 (2007); *Smith v. Texas*, 550 U.S. 297 (2007).

112. *Kennedy*, 128 S. Ct. at 2645-46.

113. *Id.* at 2651-58.

114. *Id.* 2658-65.

115. See Chemerinsky, *supra* note 953-55.

116. 549 U.S. 497 (2007).

117. For one account of how broadly *Massachusetts v. EPA* may have altered administrative law doctrine, see Ronald Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 75 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf> (last visited Mar. 9, 2009). For this author’s view, see Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf> (last visited Mar. 9, 2009).

relaxed application of standing requirements in citizen suit claims filed against federal regulatory agencies.<sup>118</sup> The Court also adopted an expansive reading of what constitutes an “air pollutant” under the Clean Air Act so as to authorize the regulation of greenhouse gas emissions, despite the agency’s disclaimer of any such authority, and rejected the agency’s decision not to initiate regulation.<sup>119</sup> As a consequence, the Environmental Protection Agency is now obligated to regulate greenhouse gas emissions from motor vehicles, and will inevitably be forced to regulate other greenhouse gas emissions as well. In both practical and doctrinal terms, *Massachusetts v. EPA* was a monumental decision, and it was not the work of a “conservative” court.

If the Court is not notably more conservative than its predecessors, is it at least notably conservative in comparison to the nation? Not particularly. On the major issues of the day, the Court’s holdings are at the center, if not slightly to the left, of the American public. During the 2008 presidential campaign, *both* major party candidates criticized the Court’s decision in *Kennedy v. Louisiana* invalidating the death penalty for the crime of child rape and embraced the Court’s holding that the Second Amendment protects an individual right to keep and bear arms. As Stuart Taylor observes:

To locate the Court’s current doctrines on the spectrum of public opinion, consider six of the most contentious subjects that come before the justices on a recurring basis: abortion; race; religion; the death penalty; gay rights; and presidential war powers. On every one of them, the Court’s precedents are to the left of, or very close to the center.<sup>120</sup>

Any purported conservatism in each of these areas, save affirmative action, comes from the Court’s unwillingness to invalidate policies adopted through the Democratic process. Thus whatever the merits of the Court’s decisions in these areas, they do not show the Court to be out of

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118. *Massachusetts*, 549 U.S. at 520.

119. *Id.* at 528-32.

120. Stuart Taylor Jr., *Barbarians on the Bench?*, NAT’L J., July 12, 2008, at 16, available at [http://www.nationaljournal.com/njmagazine/or\\_20080712\\_9445.php](http://www.nationaljournal.com/njmagazine/or_20080712_9445.php) (last visited Mar. 9, 2009). Senator and Democratic presidential nominee Barack Obama’s criticism of the Supreme Court’s decision in *Kennedy v. Louisiana* holding the death penalty for child rape unconstitutional and his embrace of *District of Columbia v. Heller*’s, 128 S. Ct. 2783 (2008), central holding that the Second Amendment protects an individual right to keep and bear arms is further evidence that, on the most contentious issues of the day, the Court is not to the right of American politics.

step with the American public, nor are they the product of a “far-right” court.<sup>121</sup>

#### IV. A “PRO-BUSINESS” COURT?

Another component of Dean Chemerinsky’s argument is that the current Court is “pro-business,” particularly in comparison to its predecessors. Specifically, Dean Chemerinsky claims “the Roberts Court is the most pro-business Court of any since the mid-1930s.”<sup>122</sup> Dean Chemerinsky is not alone in suggesting the Roberts Court is “pro-business” or drawing comparisons to the pre-New Deal Court.<sup>123</sup> To support his claim, Dean Chemerinsky points to the Court’s decisions in the areas of punitive damages, employment discrimination, and preemption.<sup>124</sup> Elsewhere Dean Chemerinsky has suggested decisions in other areas, such as antitrust, conform to the same pattern.<sup>125</sup> He largely ignores other areas of business-related law, such as environmental regulation, that would post a distinct challenge to his thesis.<sup>126</sup>

Dean Chemerinsky is likely correct that, in important respects, the Roberts Court could be seen as “pro-business.” But this is not because the Court has been particularly aggressive in striking down government regulation or erecting constitutional barriers to economic regulation. This is no pre-New Deal Court. Nor is the Court’s apparent solicitude for business concerns particularly rigid or ideological. To the contrary, the results in most business law cases are quite lopsided, and rarely the result of an ideological division on the Court.<sup>127</sup> In this area, 5-4 cases are the

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121. Taylor, *supra* note 84, at 16 (“The point here is not that the public is always right; . . . The point is that it’s misleading to brand as “far-right” and “radical” positions that in fact are more liberal than, or near the center of, mainstream public opinion.”).

122. Chemerinsky, *supra* note 13, at 962.

123. See, e.g., Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG. (Mar. 16, 2008), available at <http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html> (last visited Mar. 9, 2009).

124. Chemerinsky, *supra* note 13, at 962-72.

125. See Erwin Chemerinsky, *The Supreme Court: Sharp Turn to the Right*, CAL. B. J., Aug. 2007, available at [http://www.calbar.ca.gov/state/calbar/calbar\\_cbj.jsp?sCategory-Path=/Home/Attorney%20Resources/California%20Bar%20Journal/August2007&sCatHtmlPath=cbj/2007-08\\_TH\\_01\\_supremecourt.html&sCatHtmlTitle=Top%20Headlines](http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategory-Path=/Home/Attorney%20Resources/California%20Bar%20Journal/August2007&sCatHtmlPath=cbj/2007-08_TH_01_supremecourt.html&sCatHtmlTitle=Top%20Headlines) (last visited Mar. 9, 2009).

126. See *infra* notes 127-175 and discussion therein. See also *Env’tl. Def. v. Duke Energy, Corp.*, 549 U.S. 561 (2007); Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Examination*, — SANTA CLARA L. REV. — (forthcoming 2009).

127. Michael Greve, *Does the Court Mean Business?*, FEDERALIST OUTLOOK, Sept. 20, 2007, at 1, available at [http://www.aei.org/publications/pubID.26834/pub\\_detail.asp](http://www.aei.org/publications/pubID.26834/pub_detail.asp) (last visited Mar. 9, 2009) (“The Court’s business cases are *not* the products of an

exception, not the rule.<sup>128</sup> As a consequence, Dean Chemerinsky's "pro-business" charge fits uneasily as part of his broader argument that the confirmation of Justices Roberts and Alito have forged a working conservative majority.

Business-related cases appear to occupy a major share of the Roberts Court's shrunken docket—over one-third of the cases accepted and argued in each of the past three terms.<sup>129</sup> It also appears that business advocates have had a relatively successful run of late. In OT 2006, for example, the litigation arm of the U.S. Chamber of Commerce filed briefs in fifteen cases, winning thirteen.<sup>130</sup> This may be evidence that the business community has tremendous influence on the Court. Or it may indicate that its attorneys are particularly good at picking winners and marshalling the organization's resources for those cases in which it can have the greatest impact.

Some call the Court "pro-business" because there is no crusading liberal or "progressive" justice on the Court. There is no justice ready to follow William O. Douglas' counsel to "bend the law in favor of the environment and against the corporations."<sup>131</sup> But this, in itself, does not make the Court pro-business, particularly as there are no justices on the Court ready to do the opposite. Rather, most justices appear to approach the majority of business law cases as legal questions deserving of careful legal analysis and resolution in accordance with the dictates of law.<sup>132</sup>

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ideologically divided, bloc- and swing-vote-driven Court. To the contrary, they display a remarkable degree of judicial consensus. Even when the consensus breaks, the fault line rarely follows ideological expectations.") (emphasis added).

128. Even in OT 2006, the Court's business-related docket was relatively free of narrow divisions. Of the twenty-five business-related cases the Court heard that term, ten were decided unanimously, eight were decided 8-1 or 7-2, and only three were split 5-4. *Id.* at 3. If the net is cast more broadly, the results are the same. *See* Rosen, *supra* note 123. ("Of the [thirty] business cases last term, [twenty-two] were decided unanimously, or with only one or two dissenting votes.").

129. There is some ambiguity as to what constitutes a "business" case, and different commentators have counted the cases differently. *See, e.g.,* Rosen, *supra* note 123 ("Forty percent of the cases the court heard last term involved business interests, up from around 30 percent in recent years"); Greve, *Does the Court Mean Business?*, *supra* note 127, at 1 ("In the 2006 term, twenty-five of sixty-seven cases dealt with business-related issues."). Whatever approach one uses, however, it is clear that the business-related docket is a significant portion of the whole.

130. Rosen, *supra* note 123. The Chamber's Robin Conrad called it their "best Supreme Court term ever." *See* Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST, June 22, 2007, at D01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/21/AR2007062100803.html> (last visited Mar. 9, 2009).

131. Rosen, *supra* note 123.

132. *See* Greve, *supra* note 127.

With the exception of the punitive damages cases, the Court's business docket focuses on statutory matters in which Congress retains the upper hand. Most cases require the Court to interpret or apply and enforce legislative accommodations, and leave Congress ample room to correct course. Had the Roberts Court invalidated the federal partial-birth abortion ban, no legislature could have reenacted an equivalent measure. Yet after the Court rejected Lily Ledbetter's pay discrimination claim,<sup>133</sup> Congress retained the ability to revise the statute so subsequent claims could go forward—as it did in early 2009.<sup>134</sup>

It is difficult to know what constitutes "pro-business" in a given case, as many (if not most) business-related cases pit one business against another. The Roberts Court's antitrust decisions, for instance, have certainly sided with the defendants, all of which have been businesses.<sup>135</sup> Yet the plaintiffs in all but one of the Roberts Court's antitrust cases have been businesses as well.<sup>136</sup> These cases are not so much "pro-business" as they are "pro-market" or "pro-consumer welfare" and embody a Chicago School approach to antitrust analysis.<sup>137</sup> Large portions of the business community may favor this approach, but it does not necessarily represent a business-oriented jurisprudence. Further, because the Supreme Court's antitrust cases are not a representative sample of antitrust cases generally, it is a mistake to conflate plaintiff or defendant win rates with a pro-plaintiff or pro-defendant bias.<sup>138</sup>

The Roberts Court, as a whole, has shown itself no more enamored of large punitive damage awards than had been the Rehnquist Court. In two decisions, *Philip Morris USA v. Williams*<sup>139</sup> and *Exxon Shipping Co.*

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133. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

134. See Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009.

135. See Josh Wright, *Are the Roberts Court Antitrust Decisions Really Pro-Business?*, TRUTH ON THE MARKET, Mar. 20, 2008, available at <http://www.truthonthemarket.com/2008/03/20/are-the-roberts-court-antitrust-decisions-really-pro-business/> (last visited Mar. 9, 2009).

136. See *id.* The one exception is *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). There is some dispute over whether this case is all that significant. See Einer Elhauge, *Twombly—The New Supreme Court Antitrust Conspiracy Case*, THE VOLOKH CONSPIRACY (May 11, 2007), available at <http://volokh.com/posts/1179785703.shtml> (noting author's disagreement with those who believe *Twombly* is "the most practically significant case" of OT 2006) (last visited Mar. 9, 2009).

137. See Wright, *supra* note 135.

138. See Josh Wright, *Abuse of Plaintiff Win Rates as Evidence that Antitrust Law Is Too Lenient*, TRUTH ON THE MARKET (Oct. 14, 2008), <http://www.truthonthemarket.com/2008/10/14/abuse-of-plaintiff-win-rates-as-evidence-that-antitrust-law-is-too-lenient/> (last visited Mar. 9, 2009).

139. 548 U.S. 346 (2007).

*v. Baker*,<sup>140</sup> a divided Court struck down punitive damages awards as excessive.<sup>141</sup> These decisions are certainly “pro-business,” insofar as the business community has actively sought to reduce punitive damages in civil litigation, yet they are not evidence of an increasing conservative tilt on the Court.

The Supreme Court first held that “grossly excessive” punitive damage awards violate the Due Process Clause of the Fourteenth Amendment in 1996 in *BMW of North America v. Gore*.<sup>142</sup> This prohibition is in addition to the procedural safeguards state and federal courts must follow before allowing the award of punitive damages.<sup>143</sup> Since *BMW*, the Court has continued to police the award of “excessive” punitive damages.<sup>144</sup>

Given the Court’s commitment to enforcing both procedural and substantive limits on the award of punitive damages under the Due Process Clause, its decision to reject a \$79.5 million punitive damage award on top of \$821,000 in compensatory damages in *Philip Morris* did not represent a major shift in the Court’s jurisprudence.<sup>145</sup> Nor did it represent a particularly conservative result. Both Justices Scalia and Thomas dissented in *Philip Morris*,<sup>146</sup> as they had in *BMW*.<sup>147</sup> Whatever their views of punitive damage awards generally, neither believes such awards are meaningfully restrained by the Due Process Clause. This is no less a “conservative” view than the more business-friendly hostility to large punitive awards embraced by Justice Breyer’s majority opinion.<sup>148</sup>

The decision in *Exxon Shipping Co. v. Baker* presented a slightly more traditional right-left split on the Court—Justice Souter wrote the majority opinion and was joined by the Chief Justice and Justices Kennedy, Scalia, and Thomas—but involved a much narrower question of law.<sup>149</sup> Here, the Court rejected a multi-billion-dollar punitive damage award that was several times the compensatory damages found.<sup>150</sup> Yet

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140. 128 S. Ct. 2605 (2008).

141. *Id.*

142. 517 U.S. 559 (1996).

143. *See, e.g., Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (holding punitive damage awards must be subject to appellate review).

144. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

145. *See Philip Morris*, 549 U.S. 346.

146. *Id.* at 361-64.

147. *BMW of N. America*, 517 U.S. at 598-607.

148. *Philip Morris*, 549 U.S. at 348. The other justices in the majority were the Chief Justice and Justices Souter, Kennedy, and Alito.

149. 128 S. Ct. 2605 (2008).

150. *Id.* The Court also split 4-4 over whether a corporate defendant could be liable for punitive damages for the acts of its managerial employees and unanimously rejected



the Court did not rest its judgment on the Due Process Clause. Indeed, the Court did not even consider whether the award was “grossly excessive” under *BMW*.<sup>151</sup> Rather, the Court only considered the narrow question of whether, under the federal common law, such a punitive award was excessive in a maritime case.<sup>152</sup> As a consequence, the import of the Court’s holding is quite limited.

In the context of employment discrimination law, the evidence for a conservative, pro-business swing in the Court’s jurisprudence is even weaker. Dean Chemerinsky focuses his discussion on the case of *Ledbetter v. Goodyear Tire and Co.*,<sup>153</sup> in which a conservative, five-justice majority held that a civil rights plaintiff’s pay discrimination claims were precluded by the relevant statute of limitations.<sup>154</sup> Specifically, the Court rejected the plaintiff’s argument that each separate paycheck represented a stand-alone violation of the Civil Rights Act from which the statute of limitations should run.<sup>155</sup> Rather, the Court held, the statute of limitations began to run when the initial “discrete discriminatory act” occurred.<sup>156</sup>

The *Ledbetter* decision could have made it more difficult for victims of prior pay discrimination to file claims under the Civil Rights Act. Yet as Dean Chemerinsky notes, the extent of the impact will be dependent upon whether the statute of limitations is tolled if an employee is unaware the pay discrimination has occurred, and the Court did not address this question.<sup>157</sup> Further, the decision does not affect pay discrimination claims filed under other federal statutes, such as the Equal Pay Act of 1963, and in early 2009 Congress passed legislation to reverse the Court’s decision.<sup>158</sup>

Even assuming that *Ledbetter* was a radically conservative, pro-business decision that altered long-standing employment discrimination legal doctrines, it was not the only employment discrimination case the Roberts Court decided in its first three years. As Dean Chemerinsky notes, the Supreme Court decided three other employment discrimination cases in OT 2007, and in each case ruled in favor of the employee and

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Exxon’s claims that punitive damages under maritime law were preempted by the Clean Water Act.

151. See *id.* Justices Scalia and Thomas also continued to note their disagreement with *BMW* and its progeny. See *Exxon Shipping*, 128 S. Ct. at 2634-38 (Scalia, J., concurring).

152. *Id.* at 2619-34.

153. Chemerinsky, *supra* note 965.

154. *Ledbetter*, 127 S. Ct. 2162.

155. *Id.* at 2172-76.

156. *Id.* at 2177.

157. Chemerinsky, *supra* note 13, at 967.

158. See Stolberg *supra* note 134.

against the employer.<sup>159</sup> These three cases, each of which concerned the Age Discrimination in Employment Act, are potentially important cases, and undermine the claim that the Roberts Court is reflexively pro-business.

The third area of business-related cases Dean Chemerinsky examines involve preemption. As a general matter, the business community generally urges federal courts to find that state regulations and tort liability are preempted by federal law, and such claims have been quite successful in the Roberts Court thus far. “Every preemption case decided so far by the Roberts Court has been decided in favor of finding preemption,” Chemerinsky notes.<sup>160</sup> This was true when Dean Chemerinsky wrote it. Since then, however, the Court rejected the tobacco industry’s claims that some state law deceptive practice claims are preempted by the Federal Cigarette Labeling and Advertising Act.<sup>161</sup> Moreover, other than in this tobacco case, *Altria v. Good*, the Roberts Court’s preemption decisions demonstrate almost no signs of the Court’s ideological divisions.

Most of the Roberts Court’s preemption decisions thus far have been decided by quite lopsided margins. *Riegel v. Medtronic*<sup>162</sup> is perhaps the most controversial of the Court’s recent preemption decisions, and it was decided 8-1.<sup>163</sup> So, too, was *Preston v. Ferrer*, decided on the same day.<sup>164</sup> Justice Ginsburg was the lone dissenter in *Riegel*;<sup>165</sup> Justice Thomas in *Ferrer*.<sup>166</sup> The third preemption case decided that day, *Rowe v. New Hampshire Motor Transport Association* was unanimous.<sup>167</sup> This was not an aberration from OT 2007. The biggest preemption case from OT 2005, *Merrill Lynch v. Dabit*,<sup>168</sup> was unanimous as well.

Where the cases have been closer, the lack of predictable ideological division has remained. In *Watters v. Wachovia*,<sup>169</sup> for example, the Court

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159. *CBOCS West Inc. v. Humphries*, 128 S. Ct. 1951 (2008); *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008); *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008). See also Chemerinsky, *supra* note 13, at 967-68.

160. Chemerinsky, *supra* note 13, at 968.

161. See *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008). It is also worth noting that in *Exxon Shipping* the Supreme Court unanimously rejected Exxon Shipping’s claim that the Clean Water Act preempted punitive damages under the federal common law of maritime. See *Exxon Shipping Co.*, 128 S. Ct. at 2619.

162. 128 S. Ct. 999 (2008).

163. *Id.*

164. 128 S. Ct. 978 (2008).

165. *Riegel*, 128 S. Ct. at 101-20 (Ginsburg, J., dissenting).

166. *Ferrer*, 128 S. Ct. at 989 (Thomas, J., dissenting).

167. 128 S. Ct. 989 (2008).

168. 547 U.S. 71 (2006).

169. 550 U.S. 1 (2007).

considered the preemptive effect of regulations governing mortgage lenders promulgated by the Office of the Comptroller of the Currency under the National Bank Act. The Court held, 5-3, that state licensing and reporting requirements for mortgage lenders are preempted by these regulations.<sup>170</sup> Of particular interest was the Court's lineup. Justice Ginsburg wrote the majority opinion for herself and Justices Kennedy, Souter, Breyer, and Alito.<sup>171</sup> Justice Stevens dissented, joined by the Chief Justice and Justice Scalia.<sup>172</sup> Of further note, this was the first case in which Chief Justice Roberts and Justice Alito disagreed, but it would not be the last.

In the preemption cases, as in other business-related areas of the law, it does appear that the Court, as a whole, is generally receptive to the positions advocated by the business community. But insofar as this is the case, it does not particularly support Dean Chemerinsky's argument that the Roberts Court is notably more conservative than its predecessors.<sup>173</sup> The Roberts Court's pro-business leanings are independent of—and in some cases in conflict with—its alleged conservative inclinations.

To the extent the Roberts Court is pro-business, it is *not* so because it has embraced an aggressive agenda to impose constitutional constraints on the government's power to regulate economic activity or to rewrite the law to favor business interests. In business-related areas other than those analyzed by Dean Chemerinsky, such as environmental regulation, the Court has been anything but sympathetic to business concerns.<sup>174</sup> Rather, the Roberts Court can be called pro-business insofar as it is sympathetic to some basic business-oriented legal claims, reads statutes narrowly, resists finding implied causes of action,<sup>175</sup> has adopted a skeptical view of antitrust complaints, and does not place its finger on the scales to assist non-business litigants. This is pro-business, to a degree, and may even qualify as "conservative," but it is also a more modest orientation than Dean Chemerinsky would suggest.

#### V. COURTING JUSTICE KENNEDY

Dean Chemerinsky suggests that calling this Court, the "Roberts Court," may be something of a misnomer. Instead, he suggests, the

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170. *Id.*

171. *Id.* at 1563-64.

172. *Id.*

173. Chemerinsky, *supra* note 13, at 956.

174. See *Massachusetts*, 549 U.S. 497; *Env'tl. Def.*, 549 U.S. 561 (2007). See also Adler, *supra* note 126.

175. See *Stoneridge Inv. Partners v. Scientific-Atlanta*, 128 S. Ct. 761 (2008).

current Court is more accurately described as the “Anthony Kennedy Court.”<sup>176</sup> There is something to this claim. Yet insofar as the Roberts Court at age three is really the Kennedy Court, this only undermines Dean Chemerinsky’s claim that the Roberts Court is the “most conservative” court since Justice Kennedy was born.<sup>177</sup>

The claim that the Roberts Court is really the “Kennedy Court” is not new.<sup>178</sup> After OT 2006, it appeared that Justice Kennedy literally controlled the outcome in close cases. During that term he voted with the majority in all twenty-four 5-4 decisions, even those that did not break along ideological lines.<sup>179</sup> No other justice came close.<sup>180</sup> Perhaps even more remarkably, Justice Kennedy only cast two dissenting votes over the course of the entire term.<sup>181</sup> As the Court issued opinions in sixty-eight cases, this means that Justice Kennedy was in the majority a remarkable ninety-seven percent of the time.

Justice Kennedy’s influence on case outcomes was not nearly so pronounced in OT 2007.<sup>182</sup> He cast ten dissenting votes, and was in the minority for several 5-4 decisions.<sup>183</sup> Rather than Justice Kennedy it was Chief Justice Roberts who joined the Court’s prevailing side most often (ninety percent). Nonetheless, Justice Kennedy wrote the majority opinion in four of the Court’s 5-4 decisions, including *Boumediene v. Bush*,<sup>184</sup> *Kennedy v. Louisiana*,<sup>185</sup> *Stoneridge Investment Partners v. Scientific-Atlanta*,<sup>186</sup> and *Dada v. Mukasey*.<sup>187</sup> So even as his influence waned, Justice Kennedy remained a pivotal justice.

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176. Chemerinsky, *supra* note 13, at 948.

177. *Id.* Justice Kennedy was born on July 23, 1936. Supreme Court of the United States, *The Justices of the Supreme Court*, available at <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Mar. 9, 2009).

178. Among others, I made this claim in 2007. See Jonathan H. Adler, *How Conservative Is This Court?*, NATL. REV. ONLINE (July 5, 2007), available at <http://article.nationalreview.com/?q=Y2Y3NjNkM2ZkYTcxNzQwYTZhZWZkNzEyZGYyMWExMjE=> (last visited Mar. 9, 2009).

179. SCOTUSblog, *supra* note 9.

180. Justice Alito was the justice second-most likely to be in the majority in 5-4 decisions, and yet he was only in the majority for seventeen of the Court’s twenty-four 5-4 decisions. *Id.*

181. *Id.*

182. See Ben Winograd, *End of Term “Super StatPack,”* SCOTUSblog, June 26, 2008, at 5, available at <http://www.scotusblog.com/wp/end-of-term-super-statpack/#more-7575> (last visited Mar. 9, 2009).

183. *Id.*

184. 128 S. Ct. 2229.

185. 128 S. Ct. 2641.

186. 128 S. Ct. 761.

187. 128 S. Ct. 2307 (2008).

Insofar as the current court is more properly considered Kennedy Court, this further undermines Dean Chemerinsky's claim of a particularly conservative court. While Justice Kennedy is a moderately conservative justice on most issues, he is anything but a reliable "conservative" vote on a wide-range of politically charged issues. Justice Kennedy frequently joins his more liberal colleagues in some of the most contentious and controversial cases, including those involving capital punishment, executive authority, standing, and sexual liberty. Indeed, Justice Kennedy's ideological separation from the next most conservative justices on the Court is one of the things that makes such an important median justice—what some would call a "super median."<sup>188</sup>

Justice Kennedy is the least likely member of the Court to uphold government restrictions on speech.<sup>189</sup> Thus, he joined Justices Scalia and Thomas in urging the Court to overturn portions of the Court's 2003 decision in *McConnell v. FEC*<sup>190</sup> and void federal limits on political advertising adopted as part of the McCain-Feingold campaign finance reforms, rejecting the incremental approach adopted by Chief Justice Roberts that would have preserved the recent precedent.<sup>191</sup> He also joined Justice Alito's concurrence in *Morse v. Frederick*,<sup>192</sup> the "Bong hits 4 Jesus" case, to ensure the Court's ruling would not permit limits on political speech by students.<sup>193</sup> Justice Kennedy was also the only member of the Court to embrace the narrow holding of *Flast v. Cohen*,<sup>194</sup> rejecting the more conservative justices' desire to revisit (if not overturn) the holding that taxpayers could have standing to challenge legislative enactments that violate the First Amendment's Establishment Clause.<sup>195</sup>

If Roberts and Alito are consistent minimalists, Justice Kennedy has a "maximalist" streak, making him the justice least likely to defer to the political branches and among the most likely to reconsider past precedents. Justice Kennedy joined Justice Stevens' opinion for the Court in *Massachusetts v. EPA* that expanded citizen standing to sue for

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188. See Lee Epstein & Tonya Jacobi, *Super Medians*, 61 STAN. L. REV. 37 (2008).

189. See Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2000*, 48 UCLA L. REV. 1191 (2001). An updated version of this article, covering cases through the 2002 term, is available. Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2002*, available at <http://www.law.ucla.edu/volokh/howvoted.htm> (last visited Mar. 9, 2009).

190. 540 U.S. 93 (2003).

191. See *Federal Election Comm'n v. Wis. Right To Life, Inc.*, 127 S. Ct. 2652, 2674 (2007) (Scalia, J., concurring in part and concurring in the judgment).

192. 127 S. Ct. 2618 (2007).

193. *Id.* at 2636 (Alito, J., concurring).

194. 392 U.S. 83 (1968).

195. *Hein*, 127 S. Ct. at 2572 (Kennedy, J., concurring) ("*Flast* is correct and should not be called into question.").

the violation of environmental laws and effectively ordered the EPA to begin the federal regulation of greenhouse gas emissions.<sup>196</sup> As noted above, this decision worked a dramatic change in several doctrinal areas and could have profound economic and political implications. Kennedy also wrote the majority opinion in *Leegin Creative Leather Products v. PSKS, Inc.*,<sup>197</sup> overturning a decades-old antitrust precedent,<sup>198</sup> and another in *Panetti v. Quarterman* adopting an innovative and expansive interpretation of federal law allowing convicted criminal defendants to file additional habeas corpus petitions.<sup>199</sup> It was also Justice Kennedy who embraced the consideration of international law and the Court's own moral compass to invalidate the death penalty for child rape in *Kennedy v. Louisiana*.<sup>200</sup>

Justice Kennedy has an over-sized impact on the Court's decisions because he is the median justice. Indeed, as noted above, Justice Kennedy is something of a "super-median."<sup>201</sup> A consequence is that the Court's jurisprudence will often reflect Justice Kennedy's own: mildly conservative in many areas of the law, but not so conservative in several areas of profound significance. So long as Justice Kennedy is the median justice, it will be hard to argue that we have the "most conservative" Court since Justice Kennedy was born.

## VI. WHEN THE ROBERTS COURT COMES OF AGE

As noted at the outset, it is difficult to know much about any court after three years, and this is particularly true of the Roberts Court. With an incredibly shrunken docket, and a lineup of justices that is likely to change, any definitive judgment about the Court, or even its newest justices, would be premature. Among other things, the issues upon which Court commentators fixate today are unlikely to be those that preoccupy the Court in the future. Nor are present ideological divisions likely to dominate for an extended period of time. Today's left-right divisions over abortion and race could easily be eclipsed by the sorts of divisions observed in other lines of cases, such as those between formalists and pragmatists in the *Apprendi-Booker* sentencing guideline cases.<sup>202</sup> There is also no way to know how the justices continued interaction, or the

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196. 548 U.S. at 501-35.

197. 127 S. Ct. 2705 (2007).

198. *See* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

199. 127 S. Ct. 2842 (2007).

200. 128 S. Ct. at 2645-65.

201. *See* Epstein & Jacobi, *supra* note 188.

202. *See, e.g.*, *U.S. v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

potential addition of new justices in the years to come, will alter the Court's behavior. So even if we think we know the Roberts Court well at this point, we must be ready to change our minds.

That said, is there *any* way the current Court could be called "conservative?" There are certainly some issues, including the constitutional protection of campaign-related speech and gun rights, where the Court is to the right of its predecessors. On gun rights in particular, it would be fair to call this Court the "most conservative" since the 1930s, as there has never before been an opinion recognizing an individual right to keep and bear arms under the Second Amendment.<sup>203</sup> But this case does not establish that we have a particularly conservative Court, overall.

It would also be fair to suggest the Roberts Court, right now, has a more conservative trajectory. That is to say that unlike its predecessors—the Warren and Burger Courts in particular—this Court appears unlikely to embrace the continued progressive evolution of constitutional law doctrines in the coming decades. In most areas, it seems more likely to maintain, and refine, the status quo. The Roberts Court also seems inclined to decide most cases as narrowly as possible, producing few seismic shifts in any direction. Insofar as it can be maintained, this is certainly a more modest or "conservative" approach to judging than the Court has demonstrated in recent decades. It is also a far more conservative approach to the law than what many would like or expect, even if it does not make the Court the "most conservative" since before the New Deal.

A final way the Roberts Court may be called conservative is in its apparent tendency to decide cases on the most narrow available grounds. In cases across a range of controversial issues—lethal injection,<sup>204</sup> voter ID,<sup>205</sup> abortion,<sup>206</sup> child pornography,<sup>207</sup> among others—cases that were expected to divide 5-4 were instead decided on narrow grounds by larger majorities. This so-called minimalist approach narrows the range of disagreement among the justices and minimizes doctrinal changes. In many ways this is a significantly more conservative approach to judicial review than exhibited by prior courts—and it may well become the hallmark of the Roberts Court.

In sum, the Roberts Court has yet to show itself as dramatically more ideologically conservative than its predecessors, let alone any Court in

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203. See *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

204. *Baze v. Rees*, 128 S. Ct. 1520 (2008).

205. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

206. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).

207. *United States v. Williams*, 128 S. Ct. 1830 (2008).

over 70 years. Such a modest and tentative assessment of the Roberts Court may not excite the passions or motivate the base. Overstating the Court's ideological orientation has great appeal. Yet getting the Roberts Court right is more important than proving the Roberts Court is right already.