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WHEN IT MATTERS MOST, IT IS STILL THE KENNEDY COURT

Erwin Chemerinsky

OCTOBER TERM 2007 will be most remembered for a few high-profile cases that dealt with issues of enormous legal and social significance: the meaning of the Second Amendment,¹ the right of individuals imprisoned in Guantanamo to have access to the federal courts,² the ability of a state to impose the death penalty for the crime of child rape.³ Not surprisingly, each of these cases was decided by a 5-4 margin with Justice Anthony Kennedy in the majority.

Simply put, on issues that are defined by ideology, the conservative position prevails in the Roberts Court except when Justice Kennedy joins with Justices Stevens, Souter, Ginsburg, and Breyer. Occasionally this term, Justice Stevens or Justice Breyer joined with the five most conservative Justices to create a 6-3 or 7-2 vote for a

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¹ *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

² *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

³ *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008).

conservative result.⁴ But never did one of the four most conservative Justices – Chief Justice Roberts and Justices Scalia, Thomas, and Alito – vote for a more liberal result in a case defined by ideology.⁵ The bottom line is that when the Court is divided 5-4 on issues where there are clear liberal and conservative positions, Justice Kennedy is the swing vote.

This term, though, there were fewer cases defined by ideology and fewer 5-4 decisions than in the first two years of the Roberts Court. In October Term 2007, there were 14 decisions that were resolved by a 5-4 or 5-3 margin, compared with 24 cases the year before. There were more instances than in prior terms of the Roberts Court where criminal defendants and employees won important victories. I do not think that this indicates a shift in the ideology of the Court or the Justices, but rather reflects what was on the docket this year.

One other overall theme is important: in some key areas, the Court rejected facial challenges to state laws, but left open the possibility of “as applied” challenges. For example, in *Crawford v. Marion County*,⁶ the Court, without a majority opinion, upheld an Indiana law for voter identification based on the record before it. Similarly, in *Baze v. Rees*,⁷ the Court, again without a majority opinion, upheld the three-drug protocol used for lethal injection based on the record before it. But in both cases, the Court’s rejection of a facial challenge left open the possibility of a different result on a more developed record. In each instance, the lack of a majority opinion will confound lower courts as they deal with the almost certain future litigation.

⁴ See, e.g., *Baze v. Rees*, 128 S.Ct. 1520 (2008) (upholding the three-drug protocol for death by lethal injection); *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008) (upholding a state law requiring photo ID in order to vote).

⁵ There was one case in which Justice Alito did join with Justices Stevens, Kennedy, Souter, Breyer, and Ginsburg: *Gomez-Perez v. Potter*, 128 S.Ct. 1931 (2008), which held that federal employees may bring retaliation claims under the federal Age Discrimination in Employment Act.

⁶ 128 S.Ct. 1610 (2008).

⁷ 128 S.Ct. 1520 (2008).

SECOND AMENDMENT

The case that understandably received the most media attention was *District of Columbia v. Heller*, which concerned the constitutionality of a 32-year-old District of Columbia ordinance which prohibited possession of handguns and imposed significant restrictions on long guns. The Supreme Court, in a 5-4 decision, invalidated the ordinance as violating the Second Amendment.

There long has been a debate about the meaning of the Second Amendment, which provides: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." One side of the debate sees the latter clause as being key and interprets the Second Amendment as creating an individual right to possess firearms. The other side of the debate emphasizes the first clause and says that it is a right only for purposes of service in the militia.

The Court split 5-4 between these interpretations, choosing the former, with Justice Scalia writing for the majority. He carefully traced the history of gun rights, in England and the United States, and said that the Second Amendment recognizes an individual's right to have firearms, especially in the home for the purpose of self-defense. Justice Stevens, writing for the dissenters, also carefully looked at this history and came to the opposite conclusion, arguing that the text and history of the Amendment make clear that it protects a right to have firearms only for purposes of militia service.

Justice Scalia's majority opinion can be understood only through an ideological prism. Conservatives long have favored gun rights and Justice Scalia took this position, even though it required him to abandon the conclusions that should have followed from his traditional methods of constitutional interpretation. The case thus powerfully demonstrates that Justice Scalia's constitutional rulings, despite his professions to the contrary, ultimately are animated by his conservative politics.

His opposition to abortion rights, his hostility to all forms of race-conscious remedies, his desire to allow school prayer and aid

to parochial schools, and his supporting of gun rights all come not from a method of constitutional interpretation, but a conservative political agenda. Unless one believes that the framers' intent and the contemporary Republican platform are identical, Justice Scalia's decisions cannot be seen as reflecting an originalist method of constitutional interpretation.

In fact, had Justice Scalia been true to his own interpretive philosophy, rather than his conservative politics, he would have had to come to the opposite conclusion and find that the Second Amendment protects a right to possess firearms only for purposes of service in the militia. First, Justice Scalia repeatedly has emphasized the importance of focusing on the text in interpreting legal documents.⁸ Justice Scalia could find an individual right to have guns only by effectively ignoring the first half of the Second Amendment. Yet, a cardinal rule of interpretation is that every clause of a provision must be given meaning. Justice Scalia interprets the Second Amendment as if it said, "The right of the people to keep and bear Arms shall not be infringed." But that's not what the provision says. The only way to give meaning to both clauses is to conclude that the Second Amendment protects a right to have firearms only for purposes of militia service.

Justice Scalia says that the first half of the Second Amendment is the prefatory clause and the second half is the operative clause, and that a prefatory clause never can negate an operative clause.⁹ But that is circular. Both halves of the Second Amendment are "operative." The first half negates the second only if one starts with the conclusion that the Second Amendment protects a right to possess weapons apart from militia service.

Second, Justice Scalia has said that if there is ambiguity in the text, it is important to look to the original meaning at the time the provision was adopted. James Madison drafted the Second Amendment, as he did all of the provisions of the Bill of Rights. His initial draft of the Second Amendment included a provision providing an

⁸ Antonin Scalia, *A Matter of Interpretation* (1997).

⁹ 128 S.Ct. at 2788-89.

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exemption from militia service for those who were conscientious objectors. It provided: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."¹⁰ The inclusion of this clause in the Second Amendment strongly suggests that the provision was about militia service.

Third, Justice Scalia could come to his conclusion only by abandoning *stare decisis*. Every prior Supreme Court decision interpreting the Second Amendment, and every federal court of appeals decision until a few years ago, had rejected the view that the Second Amendment protects an individual's right to have guns other than for militia service.

In *United States v. Miller*,¹¹ the Supreme Court declared that the Second Amendment was limited to safeguarding possession of firearms for militia service. The Court upheld a federal law prohibiting possession of sawed-off shotguns, explaining that they were not weapons used in militia service at the time the Bill of Rights was ratified. The Court was clear that it believed that the Second Amendment was about protecting a right to have firearms for militia service:

With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view. . . . The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators.¹²

Fourth, in opinion after opinion, Justice Scalia has professed the need to defer to elected officials and railed against judicial activism

¹⁰ Creating the Bill of Rights 12 (H. Veit, K. Bowling & C. Bickford eds. 1991).

¹¹ 307 U.S. 174 (1939).

¹² *Id.* at 178.

of Justices substituting their own views for those of legislatures.¹³ The District of Columbia law invalidated by the Court had been on the books for 32 years. It was the product of a popularly elected legislature.

But despite all of this, the conservatives on the Court found the District of Columbia law unconstitutional. In doing so, they showed that the conservative rhetoric about judicial restraint is a guise that is used to oppose rights they don't like. When it serves their political agenda, conservatives, such as Justice Scalia, are very much the activists.

There is no doubt that this decision will lead to challenges to countless federal, state, and local laws regulating firearms. Two issues will be key in this litigation. First, what regulation of guns will be allowed under what circumstances? Justice Scalia's majority opinion was clear that the Second Amendment does not create an absolute right. He said, for example, that the government certainly could regulate where guns would be allowed and could keep some individuals (such as those with criminal records or histories of serious mental illness) from having firearms. However, the majority opinion did not specify the level of scrutiny to be used. This will be crucial as lower courts hear challenges to criminal and regulatory statutes dealing with firearms.

Second, does the Second Amendment apply to state and local governments? Never has the Second Amendment been found to apply to other than the federal government and the Court did not deal with this issue in *Heller* since a District of Columbia law was at issue. Already challenges have been brought to gun control ordinances in San Francisco and Chicago, and the Supreme Court will need soon to resolve this issue.

ENEMY COMBATANTS & ACCESS TO THE COURTS

In *Boumediene v. Bush*,¹⁴ the Supreme Court held that non-citizens held as enemy combatants, including those imprisoned in Guan-

¹³ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

¹⁴ 128 S.Ct. 2229 (2008).

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tanamo, have the right to bring habeas corpus petitions in federal court. Since the first detainees were brought to Guantanamo in January 2002, the Bush administration has vehemently argued that federal courts lack the authority to hear their habeas corpus petitions. After the Court rejected this argument in *Rasul v. Bush*,¹⁵ Congress adopted the Detainee Treatment Act and then the Military Commission Act to preclude such federal jurisdiction.

The Military Commission Act provides that non-citizens held as enemy combatants shall not have access to federal courts via a writ of habeas corpus or otherwise, except that if there is a military proceeding, the detainee may seek review of the outcome in the United States Court of Appeals for the District of Columbia Circuit.

In a 5-4 decision, with Justice Kennedy writing an opinion joined by Justices Stevens, Souter, Ginsburg, and Breyer, the Court held that the preclusion of habeas corpus jurisdiction was unconstitutional. Justice Kennedy explained that Article I, § 9 of the Constitution allows Congress to suspend habeas corpus in times of rebellion or invasion. Neither was claimed to be present. Moreover, the Court concluded that the remedy provided, review in the D.C. Circuit, did not substitute for habeas corpus.

The majority and the dissent articulated vastly different views about the role of the federal courts during the war on terrorism. For the majority, the Constitution – and access to the federal courts to enforce it – are essential even in times of crisis. From this perspective, the decision was a profound reaffirmation of the rule of law. For the dissent, the decision was dangerous judicial meddling in a realm properly left to President and Congress. Justice Scalia said he believed that people would needlessly die because of the majority's opinion.¹⁶

In the short term, the most important effect of the decision is to allow hundreds of suits by Guantanamo detainees to go forward. I

¹⁵ 542 U.S. 466 (2004).

¹⁶ *Id.* at 2294 (Scalia, J., dissenting) (“The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.”).

have been representing a Guantanamo detainee – Salem Gherebi – for the last six years. He has been given no meaningful due process of any sort. There is no foreseeable end to his detention. He is a father of three who grew up in Libya, though he has never met his third child. His wife was pregnant when he was apprehended in Afghanistan. Maybe he is a dangerous man who should be held; maybe the government made a mistake and he should have been released years ago. That is what due process is all about, making sure that there is a neutral judge to determine whether a person should be incarcerated.

Justice Scalia may be right that someone released could commit terrorist acts. But every time a person is released from custody for inadequate evidence, there is the chance that individual will commit crimes and people will die. That, of course, never has been taken as allowing indefinite detention without due process. Nor should it be a basis for indefinite detention of enemy combatants without a semblance of due process.

CRIMINAL LAW & PROCEDURE

Criminal defendants fared better this year than in many recent terms. There were two major death penalty cases, one of which was a victory for those on death row. In *Kennedy v. Louisiana*,¹⁷ the Court held that the death penalty could not be imposed for the crime of child rape. Justice Kennedy, writing for the Court in a 5-4 decision, held that a person may be sentenced to death only for the intentional killing of another.

Justice Kennedy's majority opinion said once more that the determination of what is cruel and unusual punishment is based on "evolving standards of decency." He noted that only six states allow the death penalty for child rape and none have executed a person for the crime in the last several decades. He said that the goals of the death penalty, in terms of deterrence and retribution, would not be served by allowing such executions.

¹⁷ 128 S.Ct. 2641 (2008).

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It is notable that this is the same majority that held a few years ago in *Roper v. Simmons* that the death penalty cannot be imposed for crimes committed by children.¹⁸ It seems clear that these five Justices — Stevens, Kennedy, Souter, Ginsburg, and Breyer — will prevent expansion of the death penalty and will limit its use. This, of course, could change dramatically if any of them are replaced by individuals with views like those of the four dissenters.

In *Baze v. Rees*,¹⁹ the Court upheld the three-drug protocol used for lethal injections in most states that have capital punishment. The decision was 7-2, though there was no majority opinion. Chief Justice Roberts, writing for the plurality, held that to constitute cruel and unusual punishment, a method of execution must present a “substantial” or “objectively intolerable” risk of unnecessary suffering. The Court said that a state’s refusal to adopt an alternative procedure is unconstitutional only where the procedure is feasible, readily implemented, and significantly reduces the risk of substantial pain. Justices Scalia and Thomas concurred in the judgment and said that the method of execution does not violate the Constitution. Justice Stevens concurred in the judgment and expressed reservations about the three-drug protocol, saying that it would not be allowed in veterinary medicine, and questioned whether the death penalty ever can be constitutionally administered. Surprisingly, he nonetheless voted with the majority based on precedent and the record before the Court.

The decision was based on the record before the Court concerning the risks from Kentucky’s method of execution. The door remains open to challenges to lethal injection based on more developed records that show a substantial or objectively intolerable risk of harm from the drugs used for lethal injections.

From the perspective of day-to-day practice in federal courts, two decisions early in the term concerning criminal sentencing were among the most important. In *Gall v. United States*,²⁰ the Court

¹⁸ 543 U.S. 551 (2005).

¹⁹ 128 S.Ct.1520 (2008).

²⁰ 128 S.Ct. 586 (2007).

held that (a) federal courts of appeals are to review sentences under an abuse of discretion standard, and (b) district courts must justify deviations to facilitate appellate review, but there need not be extraordinary circumstances to justify sentences outside the ranges provided under the federal Sentencing Guidelines. In *Kimbrough v. United States*,²¹ the Court applied this to hold that district courts may use their discretion in sentencing to alleviate the substantial disparity in sentencing for crack as opposed to powder cocaine. Together, these cases show that the Court's decision in *United States v. Booker*,²² is enormously important in its holding that the federal Sentencing Guidelines are advisory, not mandatory, and courts of appeals should uphold sentences so long as they are reasonable. *Kimbrough* is likely to be especially important in empowering district courts to alleviate the terribly unjust disparities that exist between crack and powder cocaine sentences.

One other criminal procedure case is quite important. In *Giles v. California*,²³ the Court held that a criminal defendant does not "forfeit" his or her Sixth Amendment Confrontation Clause rights upon a showing that the defendant caused the unavailability of a witness. Four years ago, in *Crawford v. Washington*,²⁴ the Court held that a prosecutor may not use testimonial statements against a criminal defendant if the witness is unavailable at trial and the statements are reliable. The issue in *Giles* was whether there is an exception to *Crawford* in a situation where the defendant killed the witness and thus caused the person's unavailability to testify.

Justice Scalia wrote for the Court and found in favor of the criminal defendant. The Court said that there must be more than a showing that the defendant's actions are responsible for the unavailability of the witness; there also must be a showing that the defendant's actions were undertaken for the purpose of preventing the witness from testifying. This is a case likely to have significant im-

²¹ 128 S.Ct. 558 (2007).

²² 543 U.S. 220 (2005).

²³ 128 S.Ct. 2678 (2008).

²⁴ 541 U.S. 36 (2004).

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plications in domestic violence and child abuse cases. These are the areas where often witnesses are least likely to be available to testify at trial, as the facts of *Giles* illustrate. Limiting the use of statements by the victim often will make convictions difficult, if not impossible.

Together, these cases show that in some areas of criminal procedure – especially sentencing and the Confrontation Clauses – ideology does not predict outcomes. The conservatives on the Court, such as Justice Scalia, have taken the lead in these areas in expanding the rights of criminal defendants.

EMPLOYMENT DISCRIMINATION

It also was a surprisingly good year for employees in employment discrimination litigation. In two cases, *CBOCS West Inc. v. Humphries*,²⁵ and *Gomez-Perez v. Potter*,²⁶ the Court made clear that laws prohibiting employment discrimination include a claim for retaliation, even if that is not provided in the statutes, unless Congress expressly specifies otherwise. In *CBOCS*, the Court held that 42 U.S.C. § 1981, which prohibits racial discrimination in contracting, includes a cause of action for those alleging retaliation based on race. Similarly, in *Gomez-Perez*, the Court held that the Age Discrimination in Employment Act protects federal employees from retaliation, even though the statute expressly provides this only for employees in the private sector.

In *Meacham v. Knolls Atomic Power Laboratory*,²⁷ the Court held that an employer defending a disparate impact claim under the Age Discrimination in Employment Act bears both the burden of production and the burden of persuasion for showing that the decision was based on “reasonable factors other than age.” This is an important victory for plaintiffs in age discrimination suits.

²⁵ 128 S.Ct. 1951 (2008).

²⁶ 128 S.Ct. 1931 (2008).

²⁷ 128 S.Ct. 2395 (2008).

BUSINESS LITIGATION

Overall, the Roberts Court is quite pro-business and that was reflected in a number of its decisions. I think that it is the most pro-business Court since the mid-1930s. For example, in *Riegel v. Medtronic, Inc.*,²⁸ the Court ruled in favor of manufacturers of medical devices and held that approval by the Food and Drug Administration under the Medical Devices Act preempts state tort and breach of warranty claims. Justice Scalia, writing for the Court in an 8-1 decision, concluded that a provision in the Act preempting state regulation of devices approved by the federal government also preempts states from allowing liability. Justice Ginsburg was alone in dissent in arguing that the statute preempts only regulation and not liability and that the Court should follow the traditional presumption against preemption.

In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*,²⁹ the Court held that § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 do not allow a plaintiff class of investors to maintain a civil cause of action against vendors who participated in a scheme to inflate a public corporation's stock price where the vendors made no public statements upon which the plaintiffs relied. This ruling, by a 5-3 margin, is an important win for businesses in limiting their liability under federal securities law.

Once more, the Court limited punitive damages, though this time on very narrow grounds in a case of great significance. What is most important about the Court's recent decision in *Exxon Shipping Company v. Baker* is that it is just about punitive damages in maritime cases.³⁰ The Court was clear and emphatic that it was not relying on the Constitution and, in fact, it denied certiorari on Exxon's constitutional challenge to the punitive damage award against it.

The case arose from the tragic oil spill on March 24, 1989, when the Exxon supertanker *Valdez* grounded on Bligh Reef off the Alas-

²⁸ 128 S.Ct. 999 (2008).

²⁹ 128 S.Ct. 761 (2008).

³⁰ 128 S.Ct. 2605 (2008).

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kan coast, fracturing its hull and spilling millions of gallons of crude oil into Prince William Sound. The tanker was over 900 feet long and was used by Exxon to carry crude oil from the end of the Trans-Alaska Pipeline in Valdez, Alaska, to the lower 48 states. On the night of the spill it was carrying 53 million gallons of crude oil, or over a million barrels. The case before the Court was an action brought by commercial fishermen, native Alaskans, and individuals dependent on Prince William Sound for their livelihoods for the devastating economic losses they suffered.

The accident was the result of the drunkenness and errors of the captain, Joseph Hazelwood. The federal court jury awarded \$5 billion in punitive damages against Exxon. The case was twice remanded by the Ninth Circuit in light of Supreme Court decisions concerning constitutional limits on punitive damages. Ultimately the Court of Appeals approved a \$2.5 billion punitive damages award.

The Supreme Court said that it was ruling only on the scope of punitive damages in the narrow context of maritime cases. However, Justice Souter's reasoning was less about maritime law and more about the need for predictable and consistent rules for punitive damages awards. Justice Souter said that the solution for this is to limit punitive damages to a one-to-one ratio with compensatory damages:

Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.³¹

Since this is based entirely on the Court's power to fashion federal common law, Justice Souter noted that Congress could overturn it. The one-to-one ratio caused the Court to lower the punitive damages from \$2.5 billion to \$507 million. This reasoning could apply

³¹ *Id.* at 2633.

in other areas of federal common law where punitive damages are awarded. But this is a relatively narrow category of cases and the decision should have no impact outside of these areas.

VOTING RIGHTS

In *Crawford v. Marion County Election Board*,³² the Supreme Court considered the constitutionality of a requirement for photo identification in order for a person to vote. There was no majority opinion for the Court as there was a 3-3-3 split among the Justices, with six voting to allow the regulation.

Justice Stevens wrote for two other Justices – Chief Justice Roberts and Justice Kennedy. He said that in evaluating laws regulating the election process, courts should engage in a balancing test, weighing the justification for the state’s rule against the burdens on voters. He said that Indiana’s requirement for photo identification served important purposes: deterring and detecting voter fraud and enhancing voter confidence in the electoral system. On the other side of the balance, he said that the burden on voters was minimal. He stressed that on the record before the Court, there was no evidence that the Indiana law kept people from voting. He explained that it is relatively easy to get photo identification and those without it can cast a provisional ballot and then verify their identity at their county seat within a short time after the election.

Justice Scalia concurred in the judgment and was joined by Justices Thomas and Alito. He said that Justice Stevens’s opinion did not pay enough deference to state electoral processes and that state laws regulating the electoral process should be invalidated only if they have a “severe” impact on the right to vote. He advocated the “application of a deferential ‘important regulatory interests’ standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote.”³³

Justice Souter wrote a dissenting opinion, joined by Justices Ginsburg and Breyer. He said that by the district court’s estimate,

³² 128 S.Ct. 1610 (2008).

³³ *Id.* at 1625 (Scalia, J., concurring in the judgment).

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one percent of Indiana voters, primarily poorer voters and voters of color, would be kept from casting ballots. He estimated this at 43,000 and detailed the obstacles to receiving photo identification and casting provisional ballots. On the other side of the balance he said that Indiana produced no evidence of a voter fraud problem of the sort that photo identification would solve.

The decision is very troubling. Previously, the Court had ruled that laws which keep some citizens from voting must meet strict scrutiny. For example, in *Harper v. Virginia Board of Elections*,³⁴ the Court used strict scrutiny and held that a \$1.50 poll tax is unconstitutional, even though it would keep only a small number of voters from casting ballots. Nor is there a tradition of deference to states when there are restrictions on the right to vote. It is impossible to reconcile Justice Scalia's deferential approach in *Crawford* with his vote, and the Court's decision, in *Bush v. Gore*.³⁵

Such deference seems particularly inappropriate when a law is clearly motivated by partisan politics. All of the Republicans in the Indiana legislature voted for the law and all of the Democrats against it. This was not coincidence, as the law has a far greater harmful impact on Democrats than Republicans.

Moreover, the Court's aversion to allowing a facial challenge means that a law like this must go into effect and disenfranchise voters at an election in order to be challenged. Justice Stevens's majority opinion stressed the lack of proof that individuals were kept from voting. There certainly is the possibility of future challenges to such laws if there is proof that they keep a significant number of people from voting.

CONCLUSION

As I write in July 2008, the November presidential election looms. What is it likely to mean for the future of constitutional law? In all likelihood, it will produce a Court that is ideologically the same as the past term or is more conservative. A more lib-

³⁴ 383 U.S. 633 (1966).

³⁵ 531 U.S. 98 (2000).

eral Court is unlikely. The vacancies between January 20, 2009 and January 20, 2013 are likely to come from one side of the political aisle. Justice Stevens turned 88 in April of this year and it seems unlikely that he will be on the Court in 2013, the year he turns 93. There are always rumors that Justice Ginsburg might retire and that Justice Souter wants to go home to New Hampshire.

By contrast, John Roberts is 54 years old. If he remains Chief Justice until he is 88, he will be Chief Justice until 2042. Clarence Thomas and Samuel Alito have yet to turn 60. Both Antonin Scalia and Anthony Kennedy turn 72 this year.

Thus, the five conservative Justices are likely, absent unforeseen events, to remain another decade. If it is President McCain replacing Stevens or Souter or Ginsburg, the Court surely will become more conservative. If it is President Obama, the Court will likely stay the same as it is now – a Court where when it matters most, it is the Anthony Kennedy Court.

