

Looking Ahead: October Term 2006

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October Term 2006 will be the first full opportunity for Court-watchers to assess the impact of recent changes in the Court's membership. It will be Chief Justice Roberts' second full term and Justice Alito's first. It also will provide the first full term in which to assess whether Justice Kennedy will reclaim his role as "swing justice." Accompanying these changes in the Court's personnel will be a docket full of interesting cases on topics such as the constitutionality of racial diversity programs, abortion, environmental law, punitive damages, and criminal procedure.

Consistent with prior contributions to this series, this essay offers readers a critical overview of what to expect during October Term 2006 at the U.S. Supreme Court. Given the potentially important shifts in the Court's personnel and the consequences of those shifts for the Court's voting blocs, the essay first analyzes the general effect of these shifts in membership, especially the impact of Chief Justice Roberts and Justice Alito as well as the increased importance of Justice Kennedy. The second portion of the essay examines the major cases on the Court's docket for October Term 2006 and places them in context of these changes in the Court's membership.

I. Changing Personnel and the New Voting Dynamics

This part of the essay addresses the impact of changes in the Court's personnel. It considers the impact of Chief Justice Roberts, Justice Alito, and Justice Kennedy.

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A. Chief Justice Roberts

The impact of Chief Justice Roberts is two fold: his impact as chief and his impact as a justice. The chief justice has often been described as the first among equals.¹ That is, with respect to the bread-and-butter work of the Court, he possesses certain institutional prerogatives, mostly by tradition.² Otherwise, he has no more power to influence an outcome than any other justice. This is especially true when he is in the minority, whether on a certiorari petition, a stay application, or a decision of the Court. In three respects, though, Chief Justice Roberts has had or has the potential to have an impact on the Court in his capacity as chief justice.³

First, Chief Justice Roberts has, to a point, achieved a greater degree of consensus on the Court. During his confirmation hearings, Chief Justice Roberts expressed his desire to achieve greater judicial consensus, which was a matter of particular importance at the time in light of recent splintered decisions at the Court such as the Ten Commandments cases.⁴ As part of this desire to achieve consensus,

¹Denis Steven Rutkus & Lorraine H. Tong, Congressional Research Service, *The Chief Justice of the United States: Responsibilities of the Office and Process for Appointment*, at Summary-1 (CRS Report for Congress RL 32821) (September 12, 2005).

²On the statutory responsibilities of the chief justice, see *id.* at CRS-4-CRS-7.

³A fourth deserves brief mention but does not warrant full treatment. Some accounts suggest that the chief justice also has influenced the dynamics of the justices' conferences, where they discuss certiorari petitions and their votes on cases. Whereas Chief Justice Rehnquist allegedly ran those conferences on a fairly tight schedule, Chief Justice Roberts allegedly has loosened those restrictions and, thereby, occasioned greater debate among the justices. See, e.g., Linda Greenhouse, *In the Roberts Court, More Room for Argument*, N.Y. Times, May 3, 2006, at A19; Linda Greenhouse, *New Leaders, Tough Issues for Court in Transition*, N.Y. Times, Sept. 30, 2005, at A1. The justices' conferences remain entirely private, so, until a justice retires and makes his papers publicly available, these speculations are extremely hard to verify through objective means.

⁴Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 371 (2005), available at 2006 WL 86787 (F.D.C.H.) [hereinafter *Transcript of Roberts Confirmation Hearings*] (“Well, if I am confirmed, I think one of the things that the Chief Justice should have as a top priority is to try to bring about a greater degree of coherence and consensus in the opinions of the Court. . . . I think the Court should be as united behind an opinion of the Court as it possibly can.”); *id.* at 303 (“I do think, though, it’s a responsibility of all the Justices, not just the Chief Justice, to try to work toward an opinion of the Court I do think the Chief Justice has a particular obligation

Chief Justice Roberts has commented favorably on the subject of judicial minimalism, famously quipping at Georgetown University's Law School this year: "If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more."⁵ In several respects, Chief Justice Roberts already has succeeded in his efforts at consensus building. In October Term 2005, the Court decided nearly fifty percent on its docket without dissent, a significant uptick over recent terms.⁶ This past term, the Court decided sixteen cases by five-vote majorities, far fewer than in its most recent terms.⁷ Of all the justices who sat during the entire term, Chief Justice Roberts was most often in the majority—both across all cases and in split decisions.⁸ Notably, some of these consensus decisions included areas where Court watchers had predicted pitched battles. The Court handed down unanimous decisions in cases involving the constitutionality of the Solomon Amendment, New Hampshire's abortion law, restrictions on abortion protests, standing in dormant Commerce Clause cases, the death penalty, and religious freedom.⁹

Of course, the chief justice's efforts at building consensus did not always succeed. Indeed, given the controversial nature of many cases on the Court's docket, it is hardly surprising that, so long as

to try to achieve consensus consistent with everyone's oath to uphold the Constitution, and that would certainly be a priority for me if I were confirmed."

⁵Cass R. Sunstein, *The Minimalist*, L.A. Times, May 25, 2006, at B11, available at <http://www.law.uchicago.edu/sunstein-minimalism-roberts.html> (last visited July 30, 2006).

⁶Rebecca Cady, Georgetown University Law Center Supreme Court Institute, *Supreme Court of the United States: October Term 2005 Overview 1* (June 30, 2006) [hereinafter *Georgetown Overview*]. Any statistical account of activity at the Supreme Court must make certain methodological assumptions such as how to count consolidated cases, how to treat per curiam opinions, and how to treat partially joined opinions for purposes of determining voting affinities. While several sources exist, this essay utilizes the statistics of (and the methodological assumptions contained in) the *Georgetown Overview* for the current term and some of my own research for prior terms.

⁷*Id.*

⁸*Id.* at 7–8.

⁹See *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*, 126 S. Ct. 1297 (2006); *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006); *Scheidler v. N.O.W., Inc.* 126 S. Ct. 1264 (2006); *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006); *Hill v. McDonough*, 126 S. Ct. 2096 (2006); and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006).

the Supreme Court permits separate opinions, justices will continue to write them. In several cases, in areas such as environmental law, voting rights, and campaign finance, the Court was unable to achieve a majority.¹⁰ Perhaps the most extreme disappointment in this regard was the Texas redistricting case, where one virtually needs an instructional manual to understand the holding:

Kennedy, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts II-A and III, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined, an opinion with respect to Parts I and IV, in which Roberts, C. J., and Alito, J., joined, an opinion with respect to Parts II-B and II-C, and an opinion with respect to Part II-D, in which Souter and Ginsburg, JJ., joined. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Breyer, J., joined as to Parts I and II. Souter, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, J., joined. Breyer, J., filed an opinion concurring in part and dissenting in part. Roberts, C. J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Alito, J., joined. Scalia, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Thomas, J., joined, and in which Roberts, C. J., and Alito, J., joined as to Part III.¹¹

In the coming term, watch for Chief Justice Roberts to continue to strive for consensus—or at least greater clarity—in the Court’s decisions.

Second, watch also how the chief justice assigns opinions. In some potentially controversial cases, he assigned the opinion to himself and achieved either a unanimous opinion or unanimity in judgment, suggesting that he has sought to use the opinion assignment process to build consensus.¹² Yet not all his opinion assignments seem geared to consensus. In some, rather than assigning the opinion to a “swing” justice, who might be inclined to resolve the case on narrower, more

¹⁰See *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006) [hereinafter LULAC]; and *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

¹¹LULAC, 126 S. Ct. at 2604.

¹²See *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006); and *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006).

minimalist grounds, he has instead assigned the opinion to a justice who was bound to write a far broader opinion. The starkest example from the past term was *Hudson v. Michigan*,¹³ where the Court held that the exclusionary rule did not apply to violations of the Fourth Amendment's knock-and-announce requirement.¹⁴ Justice Scalia's opinion for the Court rested on broad reasoning that is not easily confined to the knock-and-announce context (and could therefore foreshadow a broader scaling back of the exclusionary rule).

Third, watch the size of the docket. During the Rehnquist Court, the size of the Court's argument docket shrunk.¹⁵ At his confirmation hearings, Chief Justice Roberts indicated that he believed the Court could increase the size of its docket.¹⁶ This past term did not mark a significant shift in the docket size, and the Court only decided seventy-five cases after argument, consistent with the relatively small docket in recent years.¹⁷ Of course, in two respects, it is difficult to attribute that statistic to Chief Justice Roberts—a portion of the docket had been set before he became chief justice and, at conference, he only has a single vote whereas certiorari requires four.¹⁸ Perhaps more tellingly, though, the Court only has twenty-nine cases on its docket for October Term 2006, far fewer than have been on its docket at comparable points in prior years.¹⁹ Until a justice's vote sheets are released in the national archives decades from now, we can only speculate why this might be the case: perhaps cert-worthy cases are not reaching the Court; perhaps Chief Justice Roberts is having difficulty persuading his brethren of the desirability of taking more cases; or perhaps the chief justice himself is having second thoughts

¹³126 S. Ct. 2159 (2006).

¹⁴ See, e.g., *id.* at 2165.

¹⁵See David M. O'Brien, A Diminished Plenary Docket, 89 *Judicature* 134 (Nov.-Dec. 2005), available at http://www.ajs.org/ajs/publications/Judicature_PDFs/O'Brien_893.pdf (last visited July 30, 2006).

¹⁶Transcript of Roberts Confirmation Hearing, *supra* note 4, at 337 ("I do think there is room for the court to take more cases. They hear about half the number of cases they did 25 years ago. There may be good reasons for that that I will learn if I am confirmed, but just looking at it from the outside, I think they could contribute more to the clarity and uniformity of the law by taking more cases.')

¹⁷See Peter Bowman Rutledge & Nicole L. Angarella, An End of Term Exam: October Term 2003 at the United States Supreme Court, 54 *Cath. U.L. Rev.* 151, 240 (2004).

¹⁸Robert L. Stern, et al., *Supreme Court Practice* 336 (8th ed. 2002).

¹⁹Georgetown Overview, *supra* note 6, at 25.

about the desirability of increasing the docket. The coming term will provide additional indications of whether the chief justice is able to increase the docket.

Apart from his impact in his capacity as first among equals, Chief Justice Roberts' impact as a voting justice has been relatively straightforward. He generally has aligned himself with the views of Justices Scalia and Thomas on most issues, including executive power, criminal law, and the Commerce Clause.²⁰ In terms of voting affinity Chief Justice Roberts voted with Justice Scalia 86.4% of the time, the second-highest voting affinity after the Scalia-Thomas affinity (86.8%).²¹ By contrast, he aligned least frequently with Justice Stevens.²² One major exception to this trend came in *Padilla v. Hanft*.²³ In that case, the Court denied certiorari, and Chief Justice Roberts joined an opinion by Justice Kennedy respecting the denial of certiorari.²⁴ In that opinion, also joined by Justice Stevens, Justice Kennedy expressed some concern over how Padilla's transfer could frustrate habeas review and noted the "fundamental" separation of powers considerations raised by the case.²⁵ As described below in Part II, the coming term offers several opportunities to test whether the voting alliance between Chief Justice Roberts and Justices Scalia and Thomas will continue to stick.

B. Justice Alito

The coming term also will provide further insights into the impact of Justice Alito. Compared to Chief Justice Roberts, Justice Alito provides a far more limited data set (he voted in only thirty-six cases the past term). In those cases, however he voted most frequently with Chief Justice Roberts.²⁶ By contrast, he voted with Justice Stevens

²⁰See *Georgia v. Randolph*, 126 S. Ct. 1515 (2006); *House v. Bell*, 126 S. Ct. 2064 (2006); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

²¹Georgetown Overview, *supra* note 6, at 9. Other studies suggest that the voting alliance between Chief Justice Roberts and Justice Scalia was the highest on the Court. See Tom Goldstein, *The First Voting Statistics*, Scotusblog (June 28, 2006), available at www.scotusblog.com/movabletype/archives/2006/06/the_first_votin.html.

²²Georgetown Overview, *supra* note 6, at 9.

²³See *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), cert. denied, 126 S. Ct. 1649 (2006).

²⁴See 126 S. Ct. at 1649–50 (Kennedy, J., concurring).

²⁵*Id.* at 1650.

²⁶Georgetown Overview, *supra* note 6, at 9.

only 41.2% of the term, by far the lowest voting affinity of the Court of any pair of justices.²⁷ While one should not read too much into these statistics due to the limited data set, several data points suggest the emergence of a Roberts-Scalia-Thomas-Alito voting bloc. In the 5-4 cases decided by the Court this past term, those four justices voted together six times. Another telling indicator came in three cases reargued after his confirmation. In each, Justice Alito voted with the Roberts-Scalia-Thomas bloc.²⁸ As with Chief Justice Roberts, there are a few, low-level counter-trends. In his first vote following confirmation, Justice Alito declined to vacate a stay in a capital case (contrary to the views of Justices Scalia and Thomas).²⁹ Additionally, he parted company with Justice Scalia in *United States v. Gonzalez-Lopez*,³⁰ which held that depriving a criminal defendant of the counsel of his choice represented structural error.³¹ As discussed below in Part II, the coming term presents several occasions where the Roberts-Alito bloc can have a significant impact on the course of the Court's jurisprudence.

C. Justice Kennedy

Since he joined the Court in 1988, Justice Kennedy has shared with Justice O'Connor the power of serving as "swing justice" on most issues. During her last five terms on the bench, Justice O'Connor was in the majority most often in 5-4 decisions.³² Prior to that, Justice Kennedy regularly was most often in the majority in such close cases.³³ When Justice O'Connor announced her retirement, Court watchers predicted the solidification of Justice Kennedy's position as the swing justice.³⁴

²⁷*Id.*

²⁸See *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Hudson v. Michigan*, 126 S. Ct. 2159 (2006); and *Kansas v. Marsh*, 126 S. Ct. 2516 (2006).

²⁹See *Rutherford v. Crosby*, 126 S. Ct. 1190 (2006).

³⁰126 S. Ct. 2557 (2006).

³¹See *id.* at 2566 (Alito, J., dissenting).

³²Rutledge & Angarella, *supra* note 17, at 157.

³³*Id.*

³⁴See, e.g., Charlie Savage, With Alito, Kennedy would have pivotal role, *Boston Globe*, Nov. 4, 2005, at A3; Orin S. Kerr, O'Connor's Successor Will Likely Be a Swinger, *L.A. Times*, July 3, 2005, at M1.

October Term 2005 largely confirms this prediction and suggests that Justice Kennedy perhaps even relishes the role a bit.³⁵ Somewhat surprisingly, among the justices who sat for the entire term, Justice Kennedy ranked behind Chief Justice Roberts among justices in the majority in split decisions (i.e., those decided by five-vote majorities).³⁶ But in “high-profile” cases (i.e., those involving major issues of constitutional law or otherwise expected to spark significant disagreement among members of the Court), he was by far most frequently in the majority and wrote the majority opinion most often.³⁷ In several close cases, Justice Kennedy parted from a Roberts-Scalia-Thomas(-Alito) bloc and provided the critical vote joining a Stevens-Souter-Ginsburg-Breyer bloc.³⁸ In others, he wrote separate opinions—either concurring or concurring in the judgment—effectively providing the governing rule for the case.³⁹ The coming term presents further opportunities to test whether Justice Kennedy will solidify his role as the “swing justice” in close cases.

This section has identified some of the major trends at the Court brought about by the changes in membership that can be expected to influence the coming term. The next section identifies some of the critical cases on the Court’s docket and analyzes how the changing voting dynamics at the Court can influence the outcome of those cases.

II. Key Cases on the Docket

As noted above, the Court currently has twenty-nine cases on its argument docket for October Term 2006. In this brief essay, it is impossible to discuss all of them in adequate depth. This part highlights some of the more important ones—in areas including punitive

³⁵See, e.g., Drew C. Ensign, Comment, The Impact of Liberty on Stare Decisis: The Rehnquist Court from Casey to Lawrence, 81 N.Y.U. L. Rev. 1137, 1165 (2006); Andrew Cohen, The Kennedy Court: The Real Power Lies With Kennedy’s Swing Vote, CBS News (July 4, 2006), at <http://www.cbsnews.com/stories/2006/07/04/opinion/courtwatch/main1774288.shtml>.

³⁶Georgetown Overview, *supra* note 6, at 8.

³⁷*Id.*

³⁸See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring); *Georgia v. Randolph*, 126 S. Ct. 1515 (2006).

³⁹See *Hudson v. Michigan*, 126 S. Ct. 2159, 2170 (2006) (Kennedy, J., concurring); *Rapanos v. United States*, 126 S. Ct. 2208, 2236 (2006) (Kennedy, J., concurring).

damages, abortion, affirmative action, environmental law and criminal procedure. It places these cases in the context of the voting dynamics described above.

A. *Punitive Damages*

During the confirmation hearings on Justices Roberts and Alito, various commentators expressed the hope that the Court would take more “business” cases.⁴⁰ In *Philip Morris USA v. Williams*,⁴¹ the Supreme Court answers that call and again takes up the constitutional limits on punitive damages awards. Ten years ago, in *BMW of North America v. Gore*, the Supreme Court set forth the modern-day framework for those limits.⁴² *Gore* required that punitive damages awards be measured against three “guideposts”: the reprehensibility of the defendant’s conduct, the proportionality between the punitive damages award and the harm to the plaintiff, and a comparison of the punitive damages award to other civil or criminal penalties.⁴³ More recently, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court further expounded on those limits.⁴⁴ At bottom, the Court in *State Farm* held that the reprehensibility guidepost permits, at most, only a limited consideration of lawful out-of-state conduct and that a 145:1 ratio between punitive and compensatory damages was “excessive.”⁴⁵

Williams arises out of a widow’s tort suit against the cigarette manufacturer following her husband’s death for lung cancer. After a trial, a jury awarded the widow approximately \$821,000 in compensatory damages (subsequently remitted to approximately \$521,000) and \$79.5 million in punitive damages. Following extensive appellate proceedings (including a vacatur and remand by the U.S. Supreme Court in light of *State Farm*), the Oregon Supreme Court upheld the \$79.5 million punitive award.⁴⁶

⁴⁰See, e.g., Ronald A. Cass & Kenneth W. Starr, In Case You Missed It: The Supreme Court’s Business, *Wall St. J.*, Oct. 20, 2005, at A14.

⁴¹No. 05-1256.

⁴²517 U.S. 559 (1996).

⁴³*Id.* at 574–75.

⁴⁴538 U.S. 408 (2003).

⁴⁵*Id.* at 422, 424–26.

⁴⁶*Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1171 (2006) (summarizing history of the case).

As it comes to the Supreme Court, *Williams* presents two basic issues: (1) the relationship between the various *Gore* guideposts and (2) whether the Constitution permits a jury to consider non-party conduct as it awards punitive damages. The first issue presents the recurring problem in any legal doctrine that turns on a multi-factor test: what does one do when the factors cut in different directions? Here, for example, the proportionality guidepost suggests that the punitive damages award (more than 150 times the remitted compensatory damages) exceeded the constitutional limit (the Supreme Court previously had suggested that a 4:1 ratio was “close to the constitutional line.”)⁴⁷ But can such a ratio be justified when the defendant’s conduct is particularly reprehensible under the first *Gore* guidepost?

The second issue re-raises an issue that the Court addressed, but did not squarely resolve, in *State Farm*. *State Farm* suggested that a jury could not, in its award, punish a defendant for conduct that affects non-parties,⁴⁸ but it was unclear whether this limitation applied to all conduct involving non-parties or only dissimilar conduct. The Oregon Supreme Court applied the narrower reading, a limitation that did not bar consideration of harm suffered by other smokers due to Philip Morris’s alleged conduct.⁴⁹ If *Williams* rejected this interpretation and erected a broader bar, that could have a profound effect on the admissibility of evidence during the damages phase of a case.

Apart from the interesting doctrinal questions presented by *Williams*, the case also presents an opportunity for Chief Justice Roberts and Justice Alito to shape the jurisprudence in this area. Here, the fault lines among the other justices are a bit unconventional. Justices Scalia and Thomas have repeatedly expressed their view that *Gore* was wrongly decided and that the Due Process Clause does not constrain the size of punitive damages awards.⁵⁰ Justice Ginsburg likewise disagreed with *Gore* and the Court’s post-*Gore* jurisprudence

⁴⁷*State Farm*, 538 U.S. at 425. See also *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991).

⁴⁸*State Farm*, 538 U.S. at 423–24.

⁴⁹*Williams*, 127 P.3d at 1175–76.

⁵⁰See *Gore*, 517 U.S. at 598 (Scalia, J., dissenting). See also *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting).

but on federalism grounds—viewing the *Gore* doctrine as an unjustified federal intrusion into matters traditionally committed to the states.⁵¹ By contrast, Justices Stevens, Kennedy, Souter, and Breyer all have subscribed to some constitutional limits on the size of punitive damages awards. This leaves Chief Justice Roberts and Justice Alito as the swing votes in the case. Neither of them during their time on the federal appellate bench had an occasion to express a view on the scope of the doctrine. Thus, if they both joined the Scalia-Thomas-Ginsburg wing, *Williams* has the potential to cut back on the limits articulated in *Gore* and *State Farm*. As a case coming from a state trial court, the case presents a particular opportunity for Justice Ginsburg to advance her federalism arguments and perhaps, in doing so, persuade one or two of the new justices.

B. Abortion

Two cases on the docket this year—*Gonzales v. Carhart*⁵² and *Gonzales v. Planned Parenthood*⁵³—invite the Court to consider again the constitutionality of laws restricting abortion, here the federal Partial Birth Abortion Act.⁵⁴ Such issues are not new for the Court. In *Stenberg v. Carhart*,⁵⁵ the Court invalidated a Nebraska law that prohibited one type of late-term abortion known as “dilation and extraction” (D&X).⁵⁶ One of the Nebraska statute’s flaws, according to the *Stenberg* Court, was its failure to include an exception that would allow D&X where necessary to protect the mother’s health. Last term, *Ayotte v. Planned Parenthood of Northern New England*⁵⁷ presented the Roberts Court an opportunity to reconsider whether the Constitution requires abortion regulations to contain a “maternal health” exception. But the Court in *Ayotte* clearly declined to “revisit [its] abortion precedents today,” instead resolving the case on a narrower ground—namely that the lower court had crafted too broad a remedy by invalidating the entire statute.⁵⁸

⁵¹*Gore*, 517 U.S. at 607 (Ginsburg, J., dissenting).

⁵²No. 05-380

⁵³No. 05-1382.

⁵⁴Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (2006)).

⁵⁵530 U.S. 914 (2000).

⁵⁶*Id.* at 950–51.

⁵⁷126 S. Ct. 961 (2006).

⁵⁸*Id.* at 964–65.

The two cases currently on the Court's abortion docket likely will resurrect the debate in *Stenberg* and *Ayotte* over the constitutional requirement for a maternal health exception. The federal law, enacted in response to *Stenberg*, prohibits two types of late-term abortions—D&X and dilation and evacuation (D&E). While the federal act, like the Nebraska act, does not include a maternal health exception, the statute includes specific findings that attempt to justify this decision.⁵⁹ The Nebraska statute lacked such findings. Notwithstanding the differences, federal appellate courts in both cases, the Eighth Circuit in *Gonzales v. Carhart*⁶⁰ and the Ninth Circuit in *Gonzales v. Planned Parenthood*,⁶¹ invalidated the federal statutes. In his petitions for writs of certiorari, the solicitor general framed the question in terms of whether the federal law was unconstitutional due to its failure to include a maternal health exception.

The Court's treatment of the two petitions is noteworthy. In *Gonzales v. Carhart*, the Court held the petition pending its decision in *Ayotte*, rejecting the solicitor general's suggestion that the Court grant the petition. Instead, the Court granted the petition after deciding *Ayotte*. Thereafter, in *Gonzales v. Planned Parenthood*, the Court again rejected the solicitor general's suggestion about how to treat the petition. Here, the solicitor general suggested that the Court hold the petition until it had resolved *Gonzales v. Carhart*. Contrary to that suggestion, the Court this time granted the petition.

What explains the Court's treatment of these petitions and repeated rejections of the solicitor general's suggestions? As to its decision to hold *Gonzales v. Carhart* for *Ayotte*, rather than grant it, two are possible. First, as already noted, *Ayotte* presented an opportunity for the Court to display rare consensus on an abortion case (perhaps illustrative of Chief Justice Roberts's philosophy of judicial minimalism); in light of the 5-4 decision in *Stenberg*, such consensus would have been impossible if the Court had also considered *Gonzales v. Carhart*. Second, deferral on *Gonzales v. Carhart* means that Justice Alito, rather than Justice O'Connor, will address the major question whether the Constitution requires a maternal health

⁵⁹Pub. L. No. 108-105, *supra* note 54, at § 2.

⁶⁰*Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005).

⁶¹*Planned Parenthood Federation of America v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006).

exception. This is potentially quite significant, for Justice O'Connor joined the majority in *Stenberg* whereas Justice Kennedy dissented. This means that, if Justice Alito (and Chief Justice Roberts) joined Justices Scalia, Thomas, and Kennedy, potentially five votes exist to uphold the federal statute. This would depend, as well, on whether Justice Kennedy remains committed to his views expressed in *Stenberg* or, instead, follows *Stenberg* in reliance on stare decisis. Thus, this case presents one of the starkest examples where the new voting dynamics of the Roberts Court will shape the doctrine.

What about the Court's decision to grant the petition in *Gonzales v. Planned Parenthood* rather than hold it? This is particularly curious: both petitions presented precisely the same question, and the Court's order granting certiorari did not reframe the question or order the parties to address additional issues. Nonetheless, again, two explanations are possible. One is that the Court saw *Gonzales v. Planned Parenthood* as an opportunity to address additional constitutional challenges to the federal law. These include whether the federal law imposed an "undue burden" on a woman's decision whether to have an abortion and whether the law was void for vagueness. This reason is at least a bit dubitable, for the solicitor general expressly conceded that the respondents in *Gonzales v. Carhart* properly preserved these issues below and, thus, the Court could consider them in that case.⁶² Another, more likely, reason why the Court may have granted the petition in *Gonzales v. Planned Parenthood* is to consider again the remedial questions at issue in *Ayotte*. The Ninth Circuit's decision contained a richer discussion of whether, in light of *Ayotte*, to invalidate the federal law in its entirety.⁶³ By contrast, the Eighth Circuit decided *Gonzales v. Carhart* before the Supreme Court decided *Ayotte* and, thus, naturally lacks consideration of this more recent jurisprudence.

Of course, we will only know the answer to this question after the Court hands down its opinion in *Gonzales v. Planned Parenthood*, but the opinion (particularly its author) will be quite revealing. In particular, if Chief Justice Roberts is in the majority, it may well reveal something about his use of the opinion-assignment power.

⁶²Petition for Writ of Certiorari, *Gonzales v. Planned Parenthood Federation of America, Inc.* (No. 05-1382).

⁶³435 F.3d at 1184–91.

If he assigns the opinions to a justice who would like to expressly overrule *Roe* and *Casey* (like he did in *Hudson* in the context of the exclusionary rule), these decisions might contain broad language presaging a broader shift in the Court's abortion jurisprudence. By contrast, if he assigns the opinion to a justice with more moderate (perhaps minimalist) views, then the opinion likely will lack such broad language and signal the Court's reluctance to reconsider its past abortion decisions.

C. Affirmative Action

Two cases this term—*Meredith v. Jefferson County Board of Education* (“*Meredith*”)⁶⁴ and *Parents Involved in Community Schools v. Seattle School District #1* (“*Parents Involved*”)⁶⁵—present the Court with an opportunity to consider the constitutionality of programs that use race to determine a student's assignment to a public high school. The Court most recently addressed related issues two terms ago in *Gratz v. Bollinger*,⁶⁶ which involved the University of Michigan's undergraduate admissions system, and *Grutter v. Bollinger*,⁶⁷ which involved the University's law school admissions system. Those decisions were criticized for sending conflicting signals over the constitutional contours of affirmative action programs.⁶⁸ In some respects, that criticism was unfair. Both decisions shared certain common conclusions. In those cases the Court held: (1) that affirmative action admissions programs constituted race-based classifications subject to strict scrutiny, and (2) that diversity (at least in the context of higher education) was a “compelling state interest” that could justify a race-based classification.⁶⁹ In other respects, though, the criticism was justified. The decisions parted company on a core issue—namely whether the admissions programs were “narrowly tailored” to advance the state's interest. While the two admissions programs differed in certain respects (such as how race factored into the admissions process), these distinctions surely were slender reeds

⁶⁴No. 05-915

⁶⁵No. 05-908.

⁶⁶*Gratz v. Bollinger*, 539 U.S. 244 (2003).

⁶⁷*Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁶⁸See, e.g., Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 *Ohio St. L.J.* 201, 202 (2006).

⁶⁹*Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 325.

on which to distinguish the cases and particularly difficult to justify as a matter of constitutional principle. The different results in *Gratz* and *Grutter* came under harsh criticism as examples of the Court's confusing, patchwork jurisprudence that failed to provide clear guidance to lower courts and policymakers.⁷⁰ In a passage that has been the subject of much criticism, Justice O'Connor's majority opinion in *Grutter* announced famously that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."⁷¹ As Justice O'Connor provided the swing vote in the two cases, there was a plausible argument that the outcomes seemed to turn on little more than Justice O'Connor's personal policy preferences.

Enter, then, *Meredith* and *Parents Involved*. *Meredith* concerns a challenge to Jefferson County, Kentucky's school assignment system. Under that system, which has existed in some form since a 1975 desegregation order, students can indicate their preferred school, but the school district assigns them based on a formula that ensures that the African American student population at each school is between 15% and 50%.⁷² While the school district maintains that most students receive one of their top-two choices, some parents complain that the assignment system has not worked—it imposes educational disadvantages on their children and creates logistical problems for students who in some cases must travel several hours per day to and from school. *Parents Involved* concerns a challenge to the Seattle School District's program for assigning students to high schools; under that system, the school district considers race as one of several factors in assigning students to schools, particularly where the school district deems the school to be "racially imbalanced."⁷³ Under that system, the school district had excluded qualified white applicants who otherwise satisfied the admissions criteria for special "magnet" or other high-achieving schools.

⁷⁰See Suzanne B. Eckes, *Race-Conscious Admissions Programs: Where Do Universities Go From Gratz and Grutter?*, 33 *J.L. & Educ.* 21, 21 (2004), available at http://www.findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333. See also David Faigman, *Laboratory of Justice: The Supreme Court's 200-Year Struggle to Integrate Science and the Law* (2004).

⁷¹*Grutter*, 539 U.S. at 343.

⁷²*McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004)

⁷³*Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 426 F.3d 1162, 1169 (9th Cir. 2005). Specifically, under the program, the school district first

These cases present the first opportunity for the Court, following Justice O'Connor's retirement, to address not only the scope of *Gratz* and *Grutter* but also the continued viability of *Grutter*. Both cases present common themes: (1) whether *Gratz*'s holding that diversity is a compelling state interest extends to admissions preferences in secondary school assignments/admissions, and (2) how to apply the narrow tailoring requirement after *Gratz* and *Grutter*. Unlike the abortion cases, though, these twin cases present distinct questions that explain more clearly why the Court granted both petitions. Most centrally, the petition in *Meredith* could be read to ask the Court to overrule *Grutter* and *Gratz*.⁷⁴

Apart from the interesting doctrinal questions, these cases also will provide important evidence on the shifting vote dynamics on the Court. As in the abortion cases, in *Gratz* and *Grutter* Justice Kennedy aligned himself with Justices Thomas and Scalia. Consequently, if Chief Justice Roberts and Justice Alito share this view, a majority of the Court would exist to cabin or, even, overrule *Grutter*. Even more than the abortion cases, *Meredith* and *Parents Involved* present one of the first opportunities for Chief Justice Roberts and Justice Alito to signal their views on matters of stare decisis. Like the abortion cases, *Meredith* and *Parents Involved* present another test of how Justice Kennedy might position himself as the swing vote—will he hew to his views in *Gratz* and *Grutter* or, instead, back away from them, either through factual distinctions between the cases or in reliance on stare decisis? Finally, as with the abortion cases, assuming Chief Justice Roberts is in the majority, these cases will provide an important insight into his use of the opinion-assignment power—whether to assign the opinions to justices likely to signal broad shifts in the Court's Equal Protection jurisprudence or, instead, to minimalists less inclined to overrule prior precedent.

D. *Environmental Law*

*Massachusetts v. Environmental Protection Agency*⁷⁵ presents one of those classic cases where popular discussions of the issues mask

considers whether the student has a sibling in the school; it then considers race; thereafter, it considers accessibility to the student's home; finally it utilizes random assignment.

⁷⁴*Meredith* also presents the question whether the district court exceeded its remedial powers in its design of the Jefferson County School District's "managed" assignment system.

⁷⁵No. 05-1120.

some of the subtle underlying questions of legal doctrine. Popularly, the case is understood as the “greenhouse gas case,”⁷⁶ the product of a multi-year effort (stretching back before the change in presidential administrations) by a coalition of states, cities, environmental groups, and others (“the environmental petitioners”) to force the Environmental Protection Agency to regulate greenhouse gases. Legally, the case involves complex issues of standing, statutory interpretation, and administrative law.

Back in 1999, the environmental petitioners asked the EPA to regulate carbon dioxide and other greenhouse gases under section 201(a)(1) of the Clean Air Act. Section 201(a)(1) directs the EPA administrator to “prescribe . . . standards applicable to the emission of any air pollutant from [cars] which, in his judgment, cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁷⁷ During the notice-and-comment period on the petition, the National Research Council, an arm of the National Academy of Sciences, issued a report concluding that “causal linkage” between greenhouse gases and global warming “cannot be unequivocally established.”⁷⁸ Following this report, the EPA concluded that the input received during the notice and comment period did not seriously alter the National Research Council’s conclusions. Legally, then, the EPA could not conclude that greenhouse gases “cause, or contribute to, air pollution.”

The environmental petitioners then sought review of the EPA’s decision in the D.C. Circuit. In a badly divided panel opinion, the court dismissed the petitions. Two judges (Randolph and Tatel) believed that the Court should reach the merits—Judge Randolph made the unusual assumption that the plaintiffs had established standing (at least to survive summary judgment), whereas Judge Tatel concluded definitely that at least one plaintiff had standing.⁷⁹ A different pair of judges (Randolph and Sentelle) agreed that the EPA acted reasonably in its decision not to regulate (Judge Sentelle,

⁷⁶See, e.g., Warren Richey, High court to hear ‘greenhouse’ case, *Christian Science Monitor*, June 27, 2006, at 10.

⁷⁷42 U.S.C. § 7521(a)(1).

⁷⁸Committee on the Science of Climate Change, National Research Council, *Climate Change Science: An Analysis of Some Key Questions* 17 (2001).

⁷⁹See, e.g., *Massachusetts v. EPA*, 415 F.3d 50, 56 (D.C. Cir. 2005); *id.* at 64–67 (Tatel, J., dissenting).

unlike Randolph and Tatel, concluded that the plaintiffs did not establish standing).⁸⁰

As it comes to the Supreme Court, the case is curious in several respects. Here, as in the abortion cases, the Court bucked the recommendation of the solicitor general, who had recommended denying certiorari. More notably, the case turns traditional federalism principles on its head. Whereas most federalism debates involve state governments objecting to federal encroachment, here some states are affirmatively asking the federal government to regulate a matter (admittedly, though, other states oppose the requested involvement). Finally, to add to the comedy, the responsible federal agency, in an exceptional example of bureaucratic self-restraint, is taking the view that it lacks the authority to provide the sought-after regulation.⁸¹

Apart from these curiosities, the case presents several interesting doctrinal issues. Some concern standing. There is some doubt whether any of the environmental petitioners can satisfy the injury and redressability requirements set forth in *Lujan v. Defenders of Wildlife*.⁸² While the environmental petitioners submitted extensive documentation on the health and environmental impacts of greenhouse gases, at bottom their complaint bears the hallmarks of the types of generalized grievances that standing doctrine does not tolerate (interestingly, Judge Tatel, who dissented in the D.C. Circuit panel opinion, concluded that a state, the Commonwealth of Massachusetts, had standing).⁸³ A determination by the Supreme Court that any of the environmental petitioners had standing in this case might mark an important new boundary to *Lujan's* sometimes strict standing requirements.

The case also presents an interesting question about how a court should address standing questions that are intimately intertwined with the merits. A few terms ago, the Court in *Steel Co. v. Citizens*

⁸⁰*Id.* at 56–59 (Randolph, J.); *id.* at 60–61 (Sentelle, J., dissenting in part and concurring in part).

⁸¹Notably, in the course of the administrative proceedings in 2003, the EPA general counsel withdrew a memorandum, drafted by his predecessor under President Clinton, that had concluded that the Clean Air Act did authorize the EPA to regulate climate change. *Id.* at 54.

⁸²504 U.S. 555 (1992).

⁸³415 F.3d at 67 (Tatel, J., dissenting).

for a Better Environment⁸⁴ chided lower federal courts for eliding difficult standing questions and, instead, assuming standing in order to dispose of the case on more straightforward merits-related reasons.⁸⁵ The decision created both frustration and confusion among lower federal courts as they sought to sort out the order in which they had to decide jurisdictional and merits issues in a case.⁸⁶ Recognizing the tensions that this case presents with *Steel Company*, Judge Randolph took the exceptional step of relying on the D.C. Circuit's statutory standing cases. He concluded that, notwithstanding doubts about any environmental petitioner's standing, the petitioners had, in his opinion, put forth enough information to defeat summary judgment motion on standing, thereby justifying a decision on the merits.⁸⁷ Watch to see whether the Court uses this case as an opportunity further to gloss *Steel Company's* order of inquiry.

Finally, the case presents another foray by the Court into the scope of the nation's major environmental laws. Court-watchers will recall that, last term, a badly divided Court in *Rapanos v. United States*⁸⁸ addressed the scope of the Clean Water Act, with the justices disagreeing over the precise "nexus" that a particular waterway or wetland had to have in order to qualify for regulation under the act. Here, Justice Kennedy provided the swing vote, concurring in the plurality's judgment but articulating reasoning that, in some respects, aligned him more closely with the dissent.⁸⁹ If the Court reaches the merits, one can expect another pitched battle, with Justice Kennedy likely in the middle, over the scope of the Clean Air Act.

E. Criminal Procedure

The Court's docket consistently has included a large number of criminal cases, and October Term 2006 is no exception.⁹⁰ Three in

⁸⁴523 U.S. 83 (1998).

⁸⁵*Id.* at 93–101.

⁸⁶See, e.g., *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (addressing confusion in the Fifth Circuit over application of *Steel Co.*).

⁸⁷415 F.3d at 55–56.

⁸⁸See *supra* note 10.

⁸⁹See *supra* note 39 and accompanying text.

⁹⁰See *Ornaski v. Belmontes*, 414 F.3d 1094 (9th Cir. 2005), cert. granted, 126 S. Ct. 1909 (2006) (No. 05-493); *Toledo-Flores v. United States*, 149 Fed. Appx. 241 (8th Cir. 2005), cert. granted, 126 S. Ct. 1652 (2006) (No. 05-7664); *Whorton v. Bockting*, 399 F.3d 1010 (9th Cir. 2005), cert. granted, 126 S. Ct. 2017 (2006) (No. 05-595); *Carey v. Musladin*, 427 F.3d 653 (9th Cir. 2005), cert. granted, 126 S. Ct. 1769 (2006) (No. 05-

particular warrant brief mention here—*Cunningham v. California*,⁹¹ *Burton v. Waddington*,⁹² and *Whorton v. Bockting*.⁹³ *Cunningham* and *Burton* both involve the Sixth Amendment jury right as detailed in the Supreme Court's earlier decisions in *Apprendi v. New Jersey*⁹⁴ and *Blakely v. Washington*.⁹⁵ *Apprendi* held that the Sixth Amendment jury guarantee requires that a jury, not a judge, find any fact (apart from recidivism) that increases the statutory maximum penalty for a crime.⁹⁶ *Blakely* extended this holding to invalidate Washington's state sentencing scheme, under which judicial fact-finding could increase a defendant's sentence within a presumptive range that was within the statutory maximum.⁹⁷ (*Blakely* was the critical case in the doctrinal developments that resulted in the Supreme Court's decisions in *Booker* and *Fanfan* that invalidated mandatory application of the United States Sentencing Guidelines).⁹⁸

Cunningham involves a challenge under the *Apprendi-Blakely* line of cases to California's Determinate Sentencing Law.⁹⁹ Under that law, generally, a convicted defendant is sentenced to one of several "terms" (upper, middle, or lower), all of which are within the statutory maximum penalty. California's law instructs that the judge "shall" select the middle term unless he finds, by a preponderance of the evidence, that aggravating circumstances warrant imposition of the "upper" term (or mitigating circumstances justify imposition of the "lower" term). In this case, following *Cunningham*'s conviction for continuous sexual abuse of a child under the age of 14, the

785); *United States v. Resendiz-Ponce*, 425 F.3d 729 (9th Cir. 2005), cert. granted, 126 S. Ct. 1776 (2006) (No. 05-998); *People v. Cunningham*, No. A103501, 2005 Cal. App. Unpub. LEXIS 3383 (Cal. App. 1st April 18, 2005), cert. granted, 126 S. Ct. 1329 (2006) (No. 05-6551); *Burton v. Waddington*, 142 Fed. Appx. 297 (9th Cir. 2005), cert. granted, 126 S. Ct. 2352 (2006) (No. 05-9222); and *James v. United States*, 172 Fed. Appx. 144 (11th Cir. 2005), cert. granted, 126 S. Ct. 2913 (2006) (No. 05-9264).

⁹¹No. 05-6551.

⁹²No. 05-9222.

⁹³No. 05-595.

⁹⁴530 U.S. 466 (2000).

⁹⁵542 U.S. 296 (2004).

⁹⁶See *Apprendi*, 530 U.S. at 490.

⁹⁷See *Blakely*, 542 U.S. at 304–05.

⁹⁸See *United States v. Booker*, 543 U.S. 220 (2005).

⁹⁹Cal. Penal Code § 1120.

trial judge determined that various “aggravating factors” justified sentencing Cunningham to the “upper term” of 16 years (rather than the “middle term” of 12 years).¹⁰⁰ At issue before the Supreme Court is whether this four-year upward enhancement under the Determinate Sentencing Law contravenes the *Blakely* doctrine.

While both sides have plausible arguments, Cunningham’s is probably stronger as a matter of doctrine. His argument is straightforward—that under the Determinate Sentencing Law the defendant is subject to an increased punishment based on judicial fact-finding. *Blakely*, however, forbids this practice and, instead, requires the jury to find any facts (apart from the fact of a prior conviction) that increase the sentence, even when that sentence is within the statutory maximum. California advances two main arguments in response. First, it argues that, unlike the scheme in *Blakely*, California’s law (as authoritatively interpreted by its supreme court) permits, but does not require, the judge to enhance the sentence.¹⁰¹ Through this argument, California tries to align its sentencing scheme with the residual federal guidelines scheme following *Booker* (where judges are not obligated to apply the guidelines but, apparently, must consult them in an effort to impose a reasonable sentence within the statutory maximum). Second, California also argues that sentences in its scheme are “based on the verdict” whereas in *Blakely* the sentencing judge could not depart from the presumptive range without additional factfinding.

Whatever the outcome, the case potentially has important doctrinal consequences. If the Supreme Court strikes down the California sentencing law, such an anti-federalist broadening of the *Blakely* principle would call into doubt several other states’ determinate sentencing schemes.¹⁰² If the Supreme Court upholds the California scheme, that decision would supply a bookend to the *Apprendi-Blakely* doctrine. It also would provide Congress a model of how to bring the federal guidelines into compliance with the Sixth Amendment.

¹⁰⁰People v. Cunningham, 2005 Cal. App. Unpub. LEXIS 3383, at *2, *20, *30–31 (Cal. App. 1st April 18, 2005) (describing facts and California sentencing scheme).

¹⁰¹See People v. Black, 113 P.3d 534, 543 (Cal. 2005).

¹⁰²See, e.g., State v. Gomez, 163 S.W.3d 632, 656 (Tenn. 2005); State v. Lopez, 123 P.3d 754, 768 (N.M. 2005).

Burton involves the broader question whether *Blakely* applies retroactively. Generally, under the Court's retroactivity jurisprudence, new procedural rules do not apply to convictions that were final at the time the Court announced the decision (a final conviction is one where the Court has denied certiorari on direct review or the time for filing a certiorari petition on direct review has expired).¹⁰³ The Court first asks whether the rule was "new" (that is, was it "dictated by prior precedent"). If the rule is not new, then it can apply retroactively. If the rule is new, then it generally will not apply retroactively unless the case falls under one of two exceptions: (1) it constitutes a watershed rule of criminal procedure or (2) the rule places certain conduct beyond criminal sanction.¹⁰⁴

In this case, Burton was convicted in a Washington state court of rape, robbery, and murder. Burton was sentenced to forty-seven years imprisonment, twenty-one years higher than the ordinary sentence under Washington's guidelines in effect at the time. Those guidelines, however, permitted the trial judge to make an upward adjustment, and the trial judge did so in this case.¹⁰⁵ After Burton's conviction became final, the Supreme Court invalidated the Washington scheme in *Blakely*. Thus, unless *Blakely* applied retroactively, Burton could not benefit from the decision (he could, however, benefit from *Apprendi*, which was decided before his conviction became final). Doctrinally, therefore, the questions are whether (1) *Blakely* is new (or, instead was "dictated" by *Apprendi*) and, if *Blakely* is new, whether (2) it announced a watershed rule of criminal procedure?

Here, the decision to grant certiorari is curious in light of the Court's recent retroactivity jurisprudence. In recent years, the Court generally only has granted certiorari in non-capital habeas corpus cases either where there is a deep split among the federal courts of appeals over a question of habeas corpus law or where the state is seeking review of an adverse judgment. In this case, the petition effectively conceded the unanimity among federal appellate courts

¹⁰³See *Schiro v. Summerlin*, 542 U.S. 348, 351–52 (2004); *Teague v. Lane*, 489 U.S. 288, 301 (1989).

¹⁰⁴See *Schiro*, 542 U.S. at 351–52. In dicta, *Schiro* arguably modified this second exception—characterizing it as a type of "substantive" rule rather than an exception to the general prohibition against retroactive application of new procedural rules. *Id.* at 352 n.4.

¹⁰⁵*Burton v. Waddington*, 142 Fed. Appx. 297, 299–300 (9th Cir. 2005).

that *Blakely* was not retroactive and could identify only a weak split at best with two state appellate decisions.¹⁰⁶ While it is always difficult to read the tea leaves in a decision to grant certiorari, the Court's order suggests that (a) it saw the case as an opportunity to fill the docket, (b) the case provided a good vehicle to resolve an issue that the Court eventually would have to settle, or (c) some justices genuinely believed that the lower courts were misreading its cues about *Blakely*'s retroactivity.

Some language in the Court's prior decisions suggests that it did in fact believe that *Apprendi* dictated *Blakely* and, thus, *Blakely* was not a new rule. For example, the Court in *Blakely* described the case as requiring it "to apply the rule we expressed in *Apprendi*."¹⁰⁷ Likewise, according to the Court, *Apprendi* reflected "longstanding tenets of common-law criminal jurisprudence."¹⁰⁸ These principles were moreover "acknowledged by courts and treatises since the earliest days of graduated sentencing."¹⁰⁹ The Court might stitch together each of these doctrinal threads to support a holding that *Blakely* was not a "new" rule and, thus, could apply to the issue in *Burton*.

Even more than *Cunningham*, the consequences of *Burton* could be enormous. Affirmance would work little mischief, as it would merely validate the unanimous views of the lower federal courts. Reversal, however, would reopen potentially thousands of sentences entered under schemes created prior to the Supreme Court's rule in *Blakely*. The federalism and finality costs of such a decision, in terms of reopened convictions, could be potentially staggering: it would all but ensure a flood of new habeas corpus petitions in

¹⁰⁶The petition cited a decision from the Tennessee Supreme Court and the Colorado Court of Appeals. See Petition for Certiorari at 7–8, *Burton v. Waddington* (No. 05-9222) (citing *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005); *State v. Johnson*, 121 P.3d 285 (Colo. Ct. App. 2005)). The first decision involved a direct appeal and, therefore, at best only provides dictum on the retroactivity issue. The second, presently under review by the Colorado Supreme Court, does conflict with the unanimous view of the federal appellate courts but does not satisfy the standards for certiorari set forth in Supreme Court Rule 10.

¹⁰⁷542 U.S. at 301.

¹⁰⁸*Id.*

¹⁰⁹*Id.*

state and federal courts, seeking to reopen sentences entered in contravention of *Blakely*.

Like *Burton*, *Bockting* involves the retroactivity of a recent constitutional decision that finds its genesis in an unusual alignment of justices. Court-watchers will recall that in *Crawford v. Washington*¹¹⁰ the Supreme Court overruled *Ohio v. Roberts* and held that, subject to a few historically rooted exceptions, the Confrontation Clause prohibits the introduction of a witness's out-of-court testimonial statements unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness.¹¹¹ That decision had its genesis in views originating with Justice Thomas and strongly resisted by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy.¹¹²

In this case, *Bockting* was on trial for sexual abuse charges. The critical pieces of evidence admitted against him were the child-victim's statements to a detective.¹¹³ Under *Crawford*, such evidence would be inadmissible, but *Bockting*'s conviction became final before the Supreme Court handed down *Crawford*. Nonetheless, the Ninth Circuit held that *Crawford* applied retroactively. In its retroactivity analysis, the Ninth Circuit conceded that *Crawford* announced a new rule (undoubtedly right in light of *Crawford*'s overruling of prior precedent).¹¹⁴ Nonetheless, it concluded that *Crawford* announced a "watershed rule of criminal procedure" and, thus, applied to convictions that were final at the time the Supreme Court decided the case.¹¹⁵ Unlike *Burton*, there is little mystery surrounding why the Supreme Court took this case. The Ninth Circuit's holding on the "watershed" point created a clear conflict among the federal appellate courts.¹¹⁶

Doctrinally, the case will provide the Court another opportunity to gloss the meaning of the exceptions under which new procedural

¹¹⁰541 U.S. 36 (2004).

¹¹¹*Id.* at 67–68.

¹¹²See the opinions in *Lilly v. Virginia*, 527 U.S. 116 (1999), and Justice Thomas's separate opinion in *White v. Illinois*, 502 U.S. 346 (1992).

¹¹³*Bockting v. Bayer*, 399 F.3d 1010, 1012 (9th Cir. 2005).

¹¹⁴*Id.* at 1015–16.

¹¹⁵*Id.* at 1020–21.

¹¹⁶Compare *Brown v. Uphoff*, 381 F.3d 1219, 1226–27 (10th Cir. 2004) (concluding *Crawford* is not a watershed decision).

rules can apply retroactively. In its recent decision of *Schriro v. Summerlin*,¹¹⁷ a bare majority of the Court held that *Ring v. Arizona* did not apply retroactively and, in doing so, narrowly defined the “watershed rule” exception.¹¹⁸ *Schriro* held that such a rule must be one “without which the likelihood of an accurate conviction is seriously diminished.”¹¹⁹ The four *Schriro* dissenters (Stevens, Souter, Ginsburg, Breyer) may see *Bockting* as an opportunity to push back on *Schriro*. Yet they may find it difficult to pick up a fifth vote here. Justice Kennedy joined the *Schriro* majority. While two members of the *Schriro* majority (Justices Scalia and Thomas) were among *Crawford*’s staunchest advocates,¹²⁰ they also supported *Ring* yet did not find it retroactive. *Schriro*, thus, demonstrates that these two justices are reluctant to apply new constitutional rules retroactively even where they may support the underlying rule. That leaves only Chief Justice Roberts and Justice Alito, neither of whom has indicated a strong preference for a robust retroactivity jurisprudence.

Conclusion

October Term 2006 already promises to provide important indicators of the future direction of the Court. Some of the complex cases described above, especially *Massachusetts v. EPA*, will test the chief justice’s ability to achieve consensus. Others such as the abortion and affirmative action cases may reveal how he will use the opinion-assignment power (when in the majority) to shape the doctrine. *Williams* will provide important insights into the impact of Chief Justice Roberts and Justice Alito in an area of the doctrine important to business interests. And everyone will be watching whether Justice Kennedy continues to position himself in the middle of these close cases as he did last year. With a relatively small docket to date and with cases such as the constitutionality of the search of Congressman Jefferson’s office and the terrorist surveillance program looming on the horizon, no doubt more cases testing these dynamics will fill the docket in the months to come.

¹¹⁷See *supra* note 103.

¹¹⁸*Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). In *Ring*, the Court held that the Sixth Amendment precluded imposition of the death penalty based on judicial fact finding. *Ring v. Arizona*, 536 U.S. 484, 609 (2002).

¹¹⁹See *Schriro*, 542 U.S. at 352.

¹²⁰See *Lindh v. Murphy*, 521 U.S. 320 (1997); *Gilmore v. Taylor*, 508 U.S. 333 (1993); and *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

