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The Law of Small Numbers: Gonzales v. Carhart, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court

Pamela S. Karlan

THE LAW OF SMALL NUMBERS: *GONZALES V. CARHART*, *PARENTS INVOLVED IN COMMUNITY SCHOOLS*, AND SOME THEMES FROM THE FIRST FULL TERM OF THE ROBERTS COURT*

PAMELA S. KARLAN**

This Article uses two of the blockbuster decisions of the 2006 Term, Parents Involved in Community Schools v. Seattle School District No. 1 *and* Gonzales v. Carhart (Carhart II), *as a lens for considering how the Roberts Court may deal with key questions of constitutional law. It begins by showing that the divisions among the Justices are not just doctrinal or methodological, but may reflect deep disagreements in their cultural worldviews. These disagreements, which have also appeared in some of the Court's other opinions, may foreshadow a Court sharply divided across a wide range of issues. The Article then turns to how the Court's decisions handle two central features of constitutional adjudication: the level of deference to be accorded to the political branches and the method of constitutional challenge. It suggests that the Roberts Court may be embarking upon an attempt to reintegrate desegregation and abortion rights jurisprudence into more general constitutional categories. Finally, this Article looks at how the Court's opinions in* Parents Involved *and* Carhart II *stake their claim to legitimacy as the true heirs to central values derived from* Brown v. Board of Education *and* Roe v. Wade.

** Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. I presented earlier versions of this Article as the Frank Irvin Lecture at Cornell Law School and at the University of North Carolina School of Law's Symposium on Precedent and the Roberts Court. Many of the ideas in this essay came initially from conversations I had with Anurima Bhargava, Debo Adegbile, Cilla Smith, Reva Siegel, and Viola Canales. In the interest of full disclosure, I should note that I served as counsel for the petitioners in *Crawford v. Marion County Election Board*, No. 07-21 (U.S. argued Jan. 9, 2008), and as counsel for amicus California Medical Association in *Gonzales v. Carhart* (*Carhart II*), 550 U.S. __, 127 S. Ct. 1610 (2007), two of the cases discussed in this Article. The views I express in this Article are entirely my own.

INTRODUCTION

During October Term 2006, the Supreme Court of the United States decided fewer cases than during any Term since the end of the Civil War.[1] A full third of the cases were decided by a five-to-four vote, the highest proportion in more than a decade.[2] And in all those five-to-four decisions, Justice Anthony Kennedy was in the majority.[3]

One version of the law of small numbers tells us to be wary of attempts to generalize about a sequence from the first few items.[4] Thus, it would be risky to predict where the Roberts Court will go on the basis of only a Term and a half's worth of decisions.

But although there have not yet been many decisions from the Roberts Court, the decisions so far suggest an eagerness to revisit doctrines across the legal spectrum. Sometimes, the Court has expressly overruled prior cases. In *Leegin Creative Leather Products v. PSKS, Inc.*,[5] the Court expressly overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[6] abandoning the per se prohibition of resale price maintenance agreements under the Sherman Antitrust Act.[7] In *Bowles v. Russell*,[8] the Court expressly overruled the "unique circumstances" rule of *Harris Truck Lines, Inc. v. Cherry*

1. Posting of David Stras to SCOTUSblog, http://www.scotusblog.com/wp/2007/05/page/5/ (May 3, 2007, 21:25 CDT).

2. Posting of Adam Chandler to SCOTUSblog, http://www.scotusblog.com/wp/2007/07/page/4/ (July 2, 2007, 09:48 CDT).

3. Memorandum from Akin Gump Strauss Hauer & Feld LLP 2 (June 28, 2007), *available at* http://www.scotusblog.com/movabletype/archives/MemoOT06.pdf.

4. *See generally* Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, *in* A HANDBOOK FOR DATA ANALYSIS IN THE BEHAVIORAL SCIENCES: METHODOLOGICAL ISSUES 341 (Gideon Keren & Charles Lewis eds., 1993) (discussing how individuals often mistakenly believe that small samples are representative of the larger population from which they are drawn).

5. 551 U.S. __, 127 S. Ct. 2705 (2007).

6. 220 U.S. 373 (1911), *overruled by Leegin*, 551 U.S. at __, 127 S. Ct. at 2710.

7. *Leegin*, 551 U.S. at __, 127 S. Ct. at 2710.

8. 551 U.S. __, 127 S. Ct. 2360 (2007).

Meat Packers, Inc.,[9] which had permitted otherwise untimely appeals when the untimeliness stemmed from reliance on a district court order.[10] And in *Bell Atlantic Corp. v. Twombly*,[11] the Court suggested that the longstanding *Conley v. Gibson*[12] rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,"[13] had "earned its retirement."[14] More aggressively, individual Justices have called on the Court to overrule core cases involving taxpayer standing,[15] campaign finance regulation,[16] the First Amendment rights of school children,[17] and qualified immunity.[18] And this list does not even include a number of additional cases in which concurring or dissenting judges castigated the majority for overruling existing doctrine sub silentio.[19]

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9. 371 U.S. 215 (1962); *see also* Thompson v. INS, 375 U.S. 384, 386–87 (1964) (applying *Harris Truck Lines*).

10. *Bowles*, 551 U.S. at __, 127 S. Ct. at 2366.

11. 550 U.S. __, 127 S. Ct. 1955 (2007).

12. 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. __, 127 S. Ct. at 1969.

13. *Id.* at 45–46.

14. *Twombly*, 550 U.S. at __, 127 S. Ct. at 1969. Two weeks later, however, in *Erickson v. Pardus*, 551 U.S. __, 127 S. Ct. 2197 (2007) (per curiam), the Court seemed to backtrack somewhat, quoting a portion of *Twombly* that had in turn quoted *Conley*'s statement that, in a complaint, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' " *Id.* at __, 127 S. Ct. at 2200 (quoting *Twombly*, 550 U.S. at __, 127 S. Ct. at 1964).

15. Hein v. Freedom from Religion Found., 551 U.S. __, __, 127 S. Ct. 2553, 2574 (2007) (Scalia, J., joined by Thomas, J., concurring in the judgment) (calling on the Supreme Court to repudiate Flast v. Cohen, 392 U.S. 83 (1968), which recognized taxpayer standing to challenge government expenditures under the Establishment Clause, *id.* at 88).

16. FEC v. Wis. Right to Life, Inc., 551 U.S. __, __, 127 S. Ct. 2652, 2684–87 (2007) (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in part and concurring in the judgment) (urging the Court to overrule its prior decision upholding section 203 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (codified at 2 U.S.C. § 441b (2000 & Supp. V 2005))).

17. Morse v. Frederick, 551 U.S. __, __, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., concurring) (urging the Court to overrule Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), which had recognized the First Amendment rights of students attending public schools).

18. Scott v. Harris, 550 U.S. __, __, 127 S. Ct. 1769, 1780–81 (2007) (Breyer, J., concurring) (urging the Court to revisit the requirement announced in Saucier v. Katz, 533 U.S. 194 (2001), that lower courts faced with claims of qualified immunity first resolve the merits of the plaintiff's constitutional claim before addressing whether the law was clearly established at the time the defendant acted).

19. *See, e.g.*, *Wis. Right to Life*, 551 U.S. at __, 127 S. Ct. at 2687 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (accusing the majority of overruling its prior decision in McConnell v. FEC, 540 U.S. 93 (2003)); Brewer v. Quarterman, 550 U.S. __, __, 127 S. Ct. 1706, 1723 (2007) (Scalia, J., joined by Thomas and Alito, JJ., dissenting)

But the two decisions that raise the most profound questions about the Roberts Court's relationship to precedent and its approach to constitutional law more generally were the 2006 Term's blockbusters: *Parents Involved in Community Schools v. Seattle School District No. 1*,[20] which concerned the constitutionality of race-conscious voluntary desegregation plans, and *Gonzales v. Carhart* (*Carhart II*),[21] which concerned the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003.[22]

In its first Term, the Roberts Court sidestepped similar questions. With respect to voluntary desegregation, the Court declined to review a decision upholding race-conscious student assignment policies in the Lynn, Massachusetts, public schools.[23] With respect to abortion, in Justice O'Connor's final opinion for the Court, the Court unanimously remanded a challenge to New Hampshire's abortion statute for reconsideration of the remedial issue without saying very much at all about the nature of the substantive due process interest at issue.[24] In its second Term, however, the Court confronted those issues head on, and the collision produced sparks and splinters. In *Parents Involved*, the Court struck down two school systems' voluntary desegregation plans. And in *Carhart II*, the Court upheld a federal statute criminalizing the use of a particular technique for performing abortions. Together, these decisions served notice that the meaning and continued vitality of several signature decisions of the Warren, Burger, and Rehnquist Courts—*Brown v. Board of Education*,[25] *Swann v. Charlotte-Mecklenburg Board of Education*,[26] and *Grutter v. Bollinger*;[27] and *Roe v. Wade*[28] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[29]—are now up for grabs. They showed that even when the Court declines to overrule existing precedent expressly, it seems prepared to recast it—in Justice Scalia's colorful phrase, "beating [it] to a pulp and then sending it out to the lower courts weakened,

(accusing the majority of overruling prior precedents regarding the application of Texas's death penalty).

20. 551 U.S. __, 127 S. Ct. 2738 (2007).
21. 550 U.S. __, 127 S. Ct. 1610 (2007).
22. 18 U.S.C. § 1531 (Supp. V 2005).
23. Comfort v. Lynn Sch. Comm., 546 U.S. 1061, 1061 (2005) (denying certiorari).
24. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006).
25. 347 U.S. 483 (1954).
26. 402 U.S. 1 (1971).
27. 539 U.S. 306 (2003).
28. 410 U.S. 113 (1973).
29. 505 U.S. 833 (1992).

denigrated, more incomprehensible than ever, and yet somehow technically alive."[30]

This Article identifies several characteristics that the Court's opinions in *Parents Involved* and *Carhart II* share, and that may shed light on issues that will face the Roberts Court in the coming Terms. Part I considers the way the Court's opinions frame the legal issues, looking in particular at the Justices' choice of language. In both *Parents Involved* and *Carhart II*, the divisions among the Justices are not just doctrinal or methodological. They reflect deep disagreement about how the Justices see the world around them. This disagreement, which has appeared in some of the Court's other opinions as well, may foreshadow a Court sharply divided across a wide range of issues. Last Term's collection of five-to-four decisions in important cases may turn out to be a central feature of the Roberts Court—at least with its current membership.

Part II turns to how the opinions in *Carhart II* and *Parents Involved* handle two central features of constitutional adjudication. The first concerns the level of deference to be accorded to the political branches. The Rehnquist Court had subjected both governmental uses of race and governmental restrictions on abortions to forms of heightened scrutiny.[31] In neither *Carhart II* nor *Parents Involved*, however, was the Court's application of the existing structure of scrutiny entirely straightforward. The second concerns the method of constitutional challenge. A hallmark of the Rehnquist Court was its general resistance to facial, rather than as-applied, constitutional challenges. In the area of abortion, however, that resistance had been tempered significantly by the Court's willingness to find a restriction facially invalid if "in a large fraction of the cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[32] *Carhart II*, however, rejected the challengers' facial attack on the federal abortion statute, in a significant way reintegrating abortion law into the more general

30. Hein v. Freedom from Religion Found., 551 U.S. __, __, 127 S. Ct. 2553, 2584 (2007) (Scalia, J., concurring in the judgment) (criticizing the Court's continued recognition of taxpayer standing in cases challenging congressional enactments in light of its refusal to apply a similar rule to cases involving challenges to Executive Branch action).

31. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876–78 (1993) (holding that the state cannot pursue its interest in fetal life by placing an undue burden on a woman's right to choose whether to terminate a pregnancy).

32. *Casey*, 505 U.S. at 895.

framework for determining the scope of a constitutional challenge. And while *Parents Involved* accorded very different constitutional significance to the fact that the challenged policy directly affected relatively few individuals, it too may mark a significant reintegration of school desegregation law into an emerging framework for approaching governmental consideration of race.

Finally, Part III looks at how the opinions in *Carhart II* and *Parents Involved* stake their claim to legitimacy as the true heirs to central values derived from *Roe v. Wade* and *Brown v. Board of Education*. In a stunning coincidence, both *Carhart II* and *Parents Involved* bring back before the Court individuals who participated in those foundational cases: *Carhart II* through citing an amicus brief filed by Sandra Cano (the "Mary Doe" of *Doe v. Bolton*,[33] the companion case to *Roe*) and *Parents Involved* by quoting from the oral argument of Robert L. Carter in *Brown*. Each time, the Court's strategy raises more questions about the Court's adherence to precedent than it settles.

I. THE FRAMING OF CONSTITUTIONAL ISSUES

On a number of occasions, Chief Justice Roberts has expressed a strong desire for the Court to decide cases narrowly and unanimously.[34] For cases to be *decided* this way, the Justices must first agree on how to frame the issue before them: they are simply not going to reach consensus if the question is "what does the Fourteenth Amendment mean?"

Parents Involved and *Carhart II* illustrate one formidable obstacle to reaching consensus on how to frame difficult legal questions. The Justices are deeply divided not just on questions of constitutional meaning or methodology; they seem sharply split on how to describe the world around them.

The policies at issue in *Parents Involved* were promulgated by local school boards in Seattle and Louisville. They were designed to respond to the phenomenon, common among American jurisdictions, that students of different races live in different parts of the jurisdiction, and thus that student assignment policies that rely to any

33. 410 U.S. 179 (1973).

34. *See, e.g.*, Jeffrey Rosen, *Roberts's Rules*, ATLANTIC MONTHLY, Jan.–Feb. 2007, at 104, 110 (interviewing Chief Justice Roberts); Posting of Geoffrey R. Stone to The Blog, http://www.huffingtonpost.com/geoffrey-r-stone/chief-justice-roberts-and_b_40277.html (Feb. 2, 2007, 14:46 EST) (reporting on a speech by Chief Justice Roberts); Posting of Cass Sunstein to the Faculty Blog, http://uchicagolaw.typepad.com/faculty/2006/05/chief_justice_r.html (May 25, 2006, 09:52 CDT) (same).

significant degree on where students live will likely produce a set of schools with very different racial and ethnic compositions from one another. The districts wanted to accomplish at least two things through their assignment policies: first, they wanted to give individual parents a choice among schools within the district; second, they wanted to produce schools whose racial compositions did not vary dramatically from one another.[35] In order to serve these goals, the districts took students' race into account in deciding whether and how to honor parents' preferences.[36]

The preceding paragraph contains an extraordinarily deracinated description of the issue before the Court. The reason for my stilted diction is not that I cannot describe things more concretely or colorfully. Of course I can. But it took quite a long time to come up with a description of the policies that does not use the terms deployed by the various Justices in *Parents Involved*. Chief Justice Roberts, in his opinion for the Court, identified the condition the districts sought to address as " 'racial imbalance in the schools' "[37]—a racial imbalance produced by private choice for which the government is not responsible. Only once in his lengthy opinion did he use the phrase "*de facto* segregation."[38] Otherwise, he wrote as if the condition of "imbalance" had nothing to do with the "segregation by state action"[39] forbidden by the Equal Protection Clause. Faced with this constitutionally nonproblematic "imbalance," the districts—for no reason he could discern—sought to achieve "racial balance,"[40] a phrase the Chief Justice sometimes modified with such words as "outright" or "pure" or "for its own sake," as if the districts' goals had been essentially about the appearance of class photographs.[41] Indeed,

35. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. __, __, 127 S. Ct. 2738, 2746–47 (2007).

36. *See id.* at __, 127 S. Ct. at 2747, 2749–50 (discussing the two plans).

37. *See, e.g., id.* at __, 127 S. Ct. at 2752 (quoting Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977), for the proposition that "the Constitution is not violated by racial imbalance in the schools, without more"); *id.* at __, 127 S. Ct. at 2761 (drawing a "distinction between segregation by state action and racial imbalance caused by other factors").

38. *Id.* at __, 127 S. Ct. at 2761.

39. *Id.* at __, 127 S. Ct. at 2761.

40. *Id.* at __, 127 S. Ct. at 2746; *see also, e.g., id.* at __, 127 S. Ct. at 2755 (referring to districts' goal as "racial balance, pure and simple"); *id.* at __, 127 S. Ct. at 2757 (implying that districts were seeking " '[r]acial balance . . . for its own sake' " (quoting Freeman v. Pitts, 503 U.S. 467, 494 (1992))); *id.* (comparing districts' goal to the prohibited practice of " 'outright racial balancing' " (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003))).

41. Indeed, the Chief Justice's opinion seemed to suggest that other verbal formulations were simple subterfuges. *See id.* at __, 127 S. Ct. at 2758–59 ("While the school districts use various verbal formulations to describe the interest they seek to

in his concurrence, Justice Thomas made this point explicit: "Nothing," he wrote, "but an interest in classroom aesthetics and a hypersensitivity to elite sensibilities justifies the school districts' racial balancing programs."[42]

But Justice Thomas went further. He characterized the districts' practices not just as "racial classification," which should trigger strict scrutiny—and swift invalidation—but as "coerced racial mixing."[43] That is a stunning phrase. It raises the question of who is being coerced. And what are they being coerced to do? None of the plaintiffs in either the Seattle or the Louisville schools claimed a right to attend a monoracial public school. Such a claim would of course have had no constitutional basis whatsoever. Indeed, the opinion for the Court that Justice Thomas joined claimed elsewhere that the illegitimacy of the race-conscious assignment policies was reinforced by the fact that the schools would be racially mixed even in their absence.[44] Ironically, given his repeated invocations of the arguments offered by the plaintiffs in *Brown v. Board of Education* attacking segregated schools, Justice Thomas's language is reminiscent of the vocabulary of the segregationists. Professor Herbert Wechsler described their position in explaining what he saw as a central tension in *Brown* and its progeny: "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant."[45] It seems paradoxical to describe the constitutional evil of race-conscious student assignment policies like Seattle and Louisville's as "forced racial mixing" when a plaintiff is challenging his exclusion from a racially mixed school.

By contrast, Justice Kennedy's concurrence and Justice Breyer's dissent (which was joined by Justices Stevens, Souter, and Ginsburg)

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promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.").

42. *Id.* at __, 127 S. Ct. at 2770 n.3 (Thomas, J., concurring). Left unexplained in Justice Thomas's concurrence is why the policy choices of a popularly elected school board reflect a "hypersensitivity to elite sensibilities," rather than responsiveness to majoritarian preferences.

43. *Id.* at __, 127 S. Ct. at 2776; *see also id.* at __, 127 S. Ct. at 2778 (describing the districts' practices as "forced racial mixing").

44. *See id.* at __, 127 S. Ct. at 2756–57 (finding that even absent race-based assignments, the schools would be racially diverse "under any definition of diversity").

45. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959). I discuss the relationship between *Brown v. Board of Education* and Wechsler's Neutral Principles article more fully in Pamela S. Karlan, *What Can* Brown *Do For You?*, 58 DUKE L.J. (forthcoming Mar. 2009).

described the problem the school boards faced as "racial isolation"[46] and "segregation"[47] and used phrases like "racially integrated education,"[48] "diverse student population,"[49] and the "democratic objective[]"[50] of "producing an educational environment that reflects the 'pluralistic society' in which our children will live"[51] to describe the end state the districts were trying to produce. Thus, the concurrence and the dissent saw racial separation as a persistent, and persistently constitutionally troubling, aspect of American society, while the majority saw the same facts on the ground as something beyond the reach of government.

This gulf in language and sense of the world was equally evident in *Carhart II*. There, the Court confronted a federal statute that prohibited the performance of certain second-trimester abortions. Abortion, far more than school assignment policies, has long been an arena in which the competing positions use dramatically different vocabularies. In *Carhart II*, the opinion for the Court used the locution "abortion doctor" to refer to physicians who perform abortions,[52] rather than referring to them either as "doctors" or "physicians" without elaboration or by their formal areas of medical specialization such as surgeons or obstetrician-gynecologists.[53] Like the statute it upheld, the Court's opinion repeatedly referred to the individual seeking or obtaining an abortion as a "mother."[54] It often referred to the fetus as an "unborn child."[55] By contrast, in discussing

46. *See, e.g.*, *Parents Involved*, 551 U.S. at __, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at __, 127 S. Ct. at 2791; *id.* at __, 127 S. Ct. at 2796; *id.* at __, 127 S. Ct. at 2820 (Breyer, J., dissenting); *id.* at __, 127 S. Ct. at 2835.

47. *See, e.g.*, *id.* at __, 127 S. Ct. at 2802 (Breyer, J., dissenting).

48. *Id.* at __, 127 S. Ct. at 2800.

49. *Id.* at __, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

50. *Id.* at __, 127 S. Ct. at 2835 (Breyer, J., dissenting).

51. *Id.* at __, 127 S. Ct. at 2821 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1970)).

52. Gonzales v. Carhart (*Carhart II*), 550 U.S. __, __, 127 S. Ct. 1610, 1622, 1625, 1631, 1632, 1635, 1636 (2007).

53. Justice Kennedy took a very different tack in his opinion for the Court in *Gonzales v. Oregon*, 546 U.S. 243 (2006). While he recognized that "the issue of physician-assisted suicide ... has been the subject of an 'earnest and profound debate' across the country," *id.* at 267 (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)), Justice Kennedy attached no descriptive adjectives (like "doctors of death" or "suicide doctors") to physicians who sought to assist a terminally ill patient to end his or her life by prescribing lethal drugs.

54. *See, e.g.*, *Carhart II*, 550 U.S. at __, 127 S. Ct. at 1625, 1634, 1635.

55. *See, e.g.*, *id.* at __, 127 S. Ct. at 1620, 1634.

the same actors, the dissent referred to "women," not "mothers," and "doctors" and "physicians," without any additional adjective.[56]

What's striking in both *Parents Involved* and *Carhart II* is not that the Justices on both sides choose their language to reinforce their positions. Skilled writers usually do. Rather, it is that the gulf between the two sides on questions of race and reproductive autonomy seems so complete. The Justices are, almost literally, not speaking the same language. Thus it is hardly surprising that they reach very different conclusions about the constitutional questions before them.

We can certainly expect that constitutional questions involving race and abortion will continue to come before the Supreme Court.[57] If anything, the Court's opinions in *Parents Involved* and *Carhart II* may increase the amount of race- and abortion-related litigation before the Court, because they unsettled preexisting doctrine.

The point about differing worldviews, however, extends beyond these two areas: to take just one additional example from last Term, consider the opinions in *Scott v. Harris*.[58] The case involved a high-speed chase in which a police officer rammed Harris's car, forcing it off the road and over an embankment; the crash left Harris a quadriplegic.[59] The central legal question before the Court was whether the officer had acted unreasonably, in which case his actions would have violated the Fourth Amendment's prohibition on

56. For the dissenters' discussion of this linguistic gulf, see *id.* at __, 127 S. Ct. at 1650 (Ginsburg, J., dissenting).

57. In October Term 2008, for example, the Court will almost surely face the question whether Congress's reauthorization of the special provisions of section 5 of the Voting Rights Act of 1965, *see* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81 (codified at 42 U.S.C.A. § 1973c (West Supp. 2007)), reflects a permissible use of congressional power under the enforcement clauses of the Reconstruction Amendments. Litigation challenging the reauthorization is already underway before a three-judge district court in the District of Columbia. *See* Complaint, Nw. Austin Mun. Util. Dist. No. One v. Gonzales, No. 1:06-cv-01384 (D.D.C. Aug. 4, 2006). The Voting Rights Act confers mandatory appellate jurisdiction on the Supreme Court. *See* 42 U.S.C.A. § 1973c(a) (West Supp. 2007) ("Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."). The Eighth Circuit is currently considering en banc the constitutionality of a South Dakota statute that requires physicians to make a variety of ideologically charged statements to their patients before performing an abortion. *See* Planned Parenthood Minn., N.D., S.D. v. Rounds, 467 F.3d 716 (8th Cir. 2006), *reh'g granted, vacated*, No. 05-3093 (8th Cir. Jan. 9, 2007).

58. 550 U.S. __, 127 S. Ct. 1769 (2007).

59. *Id.* at __, 127 S. Ct. at 1773.

unreasonable seizures.[60] The distinctive aspect of the case was that the entire pursuit was filmed by cameras mounted in two of the police cars involved. On its way to explaining why the officer's behavior was reasonable, Justice Scalia's opinion for the Court declared itself "happy to allow the videotape to speak for itself."[61] According to the Court, the way Harris drove posed such a danger to the safety of others that the officers were entitled to use deadly force to end the chase. No reasonable jury could conclude otherwise, and thus the officers were entitled to summary judgment.[62]

Not all the Justices, however, thought the videotape said the same thing. Justice Stevens dissented, arguing that the tape "actually confirm[ed], rather than contradict[ing]," the view of all four judges below,[63] who had concluded that the case should be submitted to a jury.[64] Justice Stevens described those judges as "surely more familiar with the hazards of driving on Georgia roads than we are,"[65] and in a footnote, puckishly suggested that had his Supreme Court colleagues "learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately."[66]

In an intriguing experiment, Professors Dan Kahan, David Hoffman, and Donald Braman took up the Court's invitation to watch the *Scott v. Harris* tape.[67] Actually, they showed the tape to more than 1,300 Americans.[68] Their experiment revealed significant differences in the subjects' responses. While most of the sample would have reached the same result as the Court, a substantial fraction of the respondents would have decided the case in favor of

60. *See id.* at __, 127 S. Ct. at 1776.

61. *Id.* at __, 127 S. Ct. at 1775 n.5. The Court made the video available on its Web site. *See Scott v. Harris* Video, http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb (last visited Apr. 14, 2008); *see also Scott*, 550 U.S. at __, 127 S. Ct. at 1780 (Breyer, J., concurring) ("Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court's opinion, and watch it." (citation omitted)).

62. *See Scott*, 550 U.S. at __, 127 S. Ct. at 1779.

63. *Id.* at __, 127 S. Ct. at 1781 (Stevens, J., dissenting).

64. *See id.* at __, 127 S. Ct. at 1781.

65. *Id.* at __, 127 S. Ct. at 1781.

66. *Id.* at __, 127 S. Ct. at 1781 n.1.

67. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. (forthcoming Jan. 2009) (manuscript at 1), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081227.

68. *Id.* (manuscript at 4).

Harris.[69] Moreover, the differences in subjects' responses were correlated with differences in their "cultural worldviews."[70] Using a framework developed by anthropologist Mary Douglas, which classifies individuals' views along two dimensions—an individualist/communitarian spectrum and a hierarchical/egalitarian one—Kahan and his coauthors discovered marked differences in subjects' views of the tapes.[71] Presumably, the Justices too have different cultural worldviews, and their differences may well be reflected in their framing questions differently in areas such as criminal justice, free speech, punitive damages, and the like.

II. THE STRENGTH AND SCOPE OF CONSTITUTIONAL SCRUTINY

The divisions on the Court reflected in *Parents Involved* and *Carhart II* concern not only worldview but legal doctrine as well. In particular, the cases reflected a continuing deep division over the Court's relationship to other government actors, including legislatures and local governments. A signal theme of the Rehnquist Court had been its assertion of a particularly robust vision of judicial supremacy in interpreting the Constitution.[72] This vision was reflected, among other places, in the Court's skeptical stance towards Congress.[73] The Rehnquist Court issued a series of opinions limiting the scope of the Commerce Clause and Section 5 of the Fourteenth Amendment—two of the three provisions, along with the spending power, that underpin most congressional action.[74] As a result of its interpretations of these key constitutional provisions, the Rehnquist Court struck down more federal statutes than any other Court in modern times.[75] A second, and related, feature of the Rehnquist Court was its revival of federalism as a central constitutional value. This revival was reflected in a stepped-up version of the Eleventh Amendment's conferral of

69. *See id.* (manuscript at 25–26) (reporting results).

70. *See id.* (manuscript at 29–39).

71. *See id.* (manuscript at 20–21) (describing anthropologist Mary Douglas's identification of these dimensions of cultural worldviews); *id.* (manuscript at 39–40) (describing how these differences in worldview correlated with different reactions to the *Scott v. Harris* tape).

72. *See, e.g.*, Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 13–14, 128–58 (2001) (describing this development).

73. For a thorough discussion of this point, see generally Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

74. For a more extended discussion of this point, see generally Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (analyzing the Court's restrictive interpretation of congressional authority to grant private rights of action).

75. Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 988 (2005).

immunity from suit,[76] a newly crafted anticommandeering doctrine under the Tenth Amendment,[77] and a further tightening of the availability of habeas relief and structural reform injunctions.[78]

Underpinning many of the Rehnquist Court decisions was a subsidiary decision about whether federal courts should defer to other governmental actors' findings. The Court seemed simultaneously to be more deferential to factfinding by state-level actors and less deferential to factfinding by Congress. Compare, for example, *Grutter v. Bollinger*,[79] where the Court deferred to the University of Michigan Law School's conclusions about the importance of racial diversity in its student body and the need to take race into account in its admissions decisions, with the Court's hostile dissection of the legislative record underlying the Violence Against Women Act in *United States v. Morrison*,[80] or the record underlying the employment-related provisions of the Americans with Disabilities Act in *Board of Trustees v. Garrett*.[81]

For most of its life, the Rehnquist Court had the luxury of interpreting the Constitution without reference to what Chief Justice Marshall long ago called "the various *crises* of human affairs."[82] Unlike the Warren Court, it did not face the moral crisis of American apartheid, which ultimately demanded congressional engagement in the form of the Civil Rights Act of 1964[83] and the Voting Rights Act of 1965[84] to dismantle Jim Crow.[85] Unlike the Roberts Court, it did

76. *See* Karlan, *supra* note 74, at 188–95 (discussing the Court's robust Eleventh Amendment caselaw).

77. *See* Printz v. United States, 521 U.S. 898, 935 (1997) (holding that Congress cannot require state executive branch officials to implement federal commands); New York v. United States, 505 U.S. 144, 188 (1992) (holding that Congress cannot require states to pass laws implementing federal policy).

78. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995) (limiting the scope of federal desegregation remedies); Teague v. Lane, 489 U.S. 288 (1989) (restricting the retroactive application of rules of criminal procedure in habeas proceedings).

79. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (deferring to the University of Michigan's administration).

80. *See* 529 U.S. 598, 614–27 (2000) (concluding that Congress's findings were inadequate to support legislation providing a federal civil remedy for assault).

81. *See* 531 U.S. 356, 368–74 (2001) (rejecting Congress's conclusion that there was a serious problem of impermissible state discrimination against disabled employees).

82. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

83. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C., 42 U.S.C.).

84. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C.A. §§ 1971 to 1973aa-6 (West 2003 & Supp. 2007)).

85. *See* Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 38 (2003) (pointing out that "[i]n those

not, until its last years, face the national security crisis triggered by the September 11 attacks. There is a direct line of descent from the "cold war imperative" that contributed to the Court's decisions in *Brown* and its progeny[86] to the post-9/11 Rehnquist Court's heavy reliance in *Grutter v. Bollinger* on an amicus brief filed by retired military officers to buttress its conclusion that racial diversity in higher education constitutes a compelling governmental interest.[87]

The abortion law before the Court in *Carhart II* was distinctive in that it was the first *federal* law directly restricting a woman's access to abortion to come before the Court in recent years. The Congress that passed the Partial-Birth Abortion Ban Act of 2003 was faced with the Supreme Court's 2000 decision in *Stenberg v. Carhart* (*Carhart I*),[88] which had struck down a quite similar Nebraska statute in part on the grounds that the statute did not contain an exception for cases where use of the forbidden procedure was necessary to preserve the health of the woman.[89] Nonetheless, Congress deliberately chose to exclude a health exception in part as a straightforward challenge to the Court's precedents.[90] This challenge is reflected in the series of findings at the beginning of the Act. Among them was the following: in *Stenberg*, the Supreme Court had been "required"—presumably by

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statutes, Congress required (and achieved) levels of equality substantially beyond anything the courts had required on their own initiative").

86. *See, e.g.*, Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (describing how the U.S. government argued in favor of *Brown* on foreign policy grounds); *see also* Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1647–48 (1997) (explaining how the federal government's involvement in enforcing the desegregation of Little Rock's schools reflected foreign affairs concerns).

87. In Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1625–26, 1628–30 (2007), I explore the relationship between *Grutter* and its reliance on the military amicus brief and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006). In *FAIR*, the Court shifted from upholding the Solomon Amendment, 10 U.S.C. § 983 (2000 & Supp. V 2005)—part of which requires universities to provide extensive access to military recruiters even though the military violates the schools' antidiscrimination policies with respect to openly gay, lesbian, and bisexual students, § 983(b)—as a valid use of congressional spending authority toward upholding it under an expansive reading of the Article I powers connected to raising armies, *see FAIR*, 547 U.S. at 58–59.

88. 530 U.S. 914 (2000).

89. *See id.* at 929–30.

90. *See, e.g.*, 149 CONG. REC. H4879, 4946 (daily ed. June 4, 2003) (statement of Rep. DeLay) ("I came to the House to pass very strong, important legislation and then to fight in the courts for my position. I do not let the courts decide what direction I go."); 148 CONG. REC. 14,240, 14,272–73 (2002) (statement of Rep. Linder) (replying to opponents of the Act who "tell us we have no right to legislate a ban on this horrible practice because the Supreme Court says we cannot" that "I believe the Congress has its own duty to create and pass laws that protect the people of this country").

general principles of federal civil procedure—"to accept the very questionable findings issued by the district court judge,"[91] but Congress held itself "not bound to accept the same factual findings."[92] Freed from the prior findings, Congress concluded that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[93]

The Supreme Court recognized that under its controlling precedents, including the unanimous decision the prior Term in *Ayotte v. Planned Parenthood of Northern New England*,[94] the federal Act would be unconstitutional "if it 'subject[ed] [women] to significant health risks.' "[95] And it recognized that Congress's findings were, in several respects, demonstrably incorrect: the evidence presented to the district courts undercut the claim of a medical consensus in support of Congress's conclusion.[96] Thus, "[u]ncritical deference to Congress' factual findings in these cases is inappropriate."[97] Nonetheless, the Court upheld the prohibition.

It did so by abandoning a prior abortion-specific jurisprudence that had entertained challenges to regulations of abortions as facial challenges.[98] The Rehnquist Court had adopted a general principle that a law could be struck down as facially invalid only if the challenger could "establish that no set of circumstances exists under

91. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(7), 117 Stat. 1201, 1202.

92. *Id.* § 2(8), 117 Stat. at 1202.

93. *Id.* § 2(1), 117 Stat. at 1201.

94. 546 U.S. 320 (2006) (holding that New Hampshire's parental involvement statute would be unconstitutional if, as applied, it subjected a pregnant minor to a significant health risk).

95. Gonzales v. Carhart (*Carhart II*), 550 U.S. __, __, 127 S. Ct. 1610, 1635 (2007) (alterations in original) (quoting *Ayotte*, 546 U.S. at 328).

96. *Id.* at __, 127 S. Ct. at 1637–38 ("As respondents have noted, and the District Courts recognized, some recitations in the Act are factually incorrect. . . . Congress also found there existed a medical consensus that the prohibited procedure is never medically necessary. The evidence presented in the District Courts contradicts that conclusion." (citation omitted)).

97. *Id.* at __, 127 S. Ct. at 1638.

98. For an extensive and thoughtful discussion of the distinction between facial and as-applied challenges, and its elaboration in *Carhart II*, as well as its implications for the constitutionality of voter identification statutes—an issue I discuss later in this Article—see generally Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right To Vote?*, HASTINGS CONST. L.Q. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1080256.

which the Act would be valid."[99] Challengers who could not meet this standard were required instead to challenge the law "as applied"—that is, to show that a particular application of the law exceeded the legislature's power.[100] Citing a series of precedents from outside the abortion context—with the sole exception of his dissent in *Stenberg*—Justice Kennedy wrote that "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[101] While the Court was prepared to acknowledge that there might well be cases where the federal abortion ban would be unconstitutional because of its omission of a health exception, it found that the challengers "have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases."[102] Since the absence of a health exception would be irrelevant in cases where a woman's health was not at issue, most applications of the statute would pose no constitutional difficulties. Citing the prior Term's per curiam decision in *Wisconsin Right to Life, Inc. v. FEC*,[103] Justice Kennedy concluded that "[t]he Act is open to a proper as-applied challenge."[104] In short, because the lack of a health exception affected only a small number of women, the law survived facial challenge.

As Justice Ginsburg pointed out in dissent, however, there was no "fraction of relevant cases": the need for a health exception could only be relevant in cases where a woman's health was at risk, and so the fact that most women needing abortions would not be affected by the lack of a health exception was simply beside the point.[105] The Court seemed to conflate the conclusion that a law *with* a health

99. United States v. Salerno, 481 U.S. 739, 745 (1987) (rejecting a facial challenge to the Bail Reform Act of 1984). Mike Dorf has argued that the Court's hostility to facial challenges is not quite as consistent as it claims and that the distinction between facial and as-applied challenges is often more porous than the black-letter statements may suggest. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 294 (1994).

100. *See Carhart II*, 550 U.S. at __, 127 S. Ct. at 1638–39 (discussing the jurisprudence of facial and as-applied challenges).

101. *Id.* at __, 127 S. Ct. at 1636.

102. *Id.* at __, 127 S. Ct. at 1639.

103. 546 U.S. 410 (2006).

104. *Carhart II*, 550 U.S. at __, 127 S. Ct. at 1639. Just to show how protean the distinction between facial and as-applied challenges can sometimes be, the week after the decision in *Carhart II* was announced, the Court heard oral argument in the second round of the *Wisconsin Right to Life* challenge to portions of the McCain-Feingold campaign finance law, and ultimately issued a decision with respect to an as-applied challenge that resembled in all but name a decision to strike down the challenged provision wholesale. *See* FEC v. Wis. Right to Life, Inc., 551 U.S. __, __, 127 S. Ct. 2652, 2659 (2007).

105. *See Carhart II*, 550 U.S. at __, 127 S. Ct. at 1651 (Ginsburg, J., dissenting).

exception could constitutionally prohibit a large fraction of the women seeking abortions from obtaining the procedure outlawed by the federal Act—because the health exception would not apply to them—with the idea that a health exception was not required in the first place.

While *Parents Involved* did not involve the distinction between facial and as-applied challenges, it did implicate questions of judicial deference and the constitutional relevance of only small numbers of individuals being affected by the government policy at issue. On both these issues, the Court took a different approach in *Parents Involved* than it had in *Carhart II*.

The Rehnquist Court had held, in *Adarand Constructors, Inc. v. Peña*,[106] that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[107] Thus, among other things, *Parents Involved* raised the question whether racial integration served a compelling state interest. The debate was played out most explicitly in the dueling opinions of Justice Thomas and Justice Breyer. In dissent, Justice Breyer, relying on social scientific studies, argued that there was a compelling "educational element" in providing integrated education.[108] While he recognized that there was disagreement among social scientists, he concluded that "the evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one."[109] By contrast, Justice Thomas in his concurrence pointed to the "fervent debate" among social scientists as a reason *not* to defer to the decisions of elected officials.[110] Indeed, he saw the social scientific evidence as legally irrelevant: "We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial

106. 515 U.S. 200 (1995).

107. *Id.* at 227.

108. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. __, __, 127 S. Ct. 2738, 2820 (2007) (Breyer, J., dissenting).

109. *Id.* at __, 127 S. Ct. at 2821.

110. *Id.* at __, 127 S. Ct. at 2773 (Thomas, J., concurring).

imbalance, I will not defer to legislative majorities where the Constitution forbids it."[111]

For him, the dissenters' claimed deference to the democratic branches was not methodological at all, since they deferred only because they agreed with the school boards' assessment of the disputed social scientific evidence. "In my view," Justice Thomas declared, "to defer to one's preferred result is not to defer at all."[112] Paradoxically, two years before, Justice Thomas had taken quite a different position in *Johnson v. California*,[113] where he had argued that federal courts should defer to California prison authorities' view that temporary racial segregation of newly arrived or transferred inmates was necessary to institutional security.[114] And in another case from last Term, *Morse v. Frederick*[115] (the so-called "Bong Hits 4 Jesus" case, in which the Court upheld the suspension of a student who unfurled a banner bearing that somewhat opaque slogan at a school-related event[116]), Justice Thomas joined a majority opinion in which the Court essentially deferred to the determinations of a high school principal regarding how to balance students' First Amendment rights against the school's interest in avoiding illegal drug use.[117] By contrast, three of the dissenters in *Morse*—who were not prepared there to defer to education officials' judgments—had joined Justice Breyer in deferring to the school boards' decisions in *Parents Involved*.[118] So perhaps Justice Thomas's critique of claims of deference applies to every member of the Court, including himself.

With respect to the constitutional significance of small numbers, the Court's opinion in *Parents Involved* diverged from its approach in *Carhart II*. There, the fact that few women would require access to the proscribed abortion procedure in order to preserve their health foreclosed a facial challenge. In *Parents Involved*, however, the fact that the challenged policy apparently affected few individuals reinforced, rather than undercut, its unconstitutionality. Very few students' choices among schools were actually restricted because of a student's race: most students either got their first choice or were denied that choice for entirely race-neutral reasons. According to the

111. *Id.* at __, 127 S. Ct. at 2779 n.14.
112. *Id.* at __, 127 S. Ct. at 2779 n.14.
113. 543 U.S. 499 (2005).
114. *See id.* at 524–28 (Thomas, J., dissenting).
115. 551 U.S. __, 127 S. Ct. 2618 (2007).
116. *See id.* at __, 127 S. Ct. at 2622–23.
117. *See id.* at __, 127 S. Ct. at 2629–36.
118. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. __, __, 127 S. Ct. 2738, 2800 (2007) (Breyer, J., dissenting).

Court, "[t]he minimal effect these classifications have on student assignments, however, suggests that other means would be effective,"[119] thus defeating the narrow tailoring prong of strict scrutiny.[120] But in contrast to *Carhart II*, the Court viewed those plaintiffs whose choices were actually constrained by the challenged policy as the relevant universe for determining whether it burdened constitutional rights.

Finally, in a move that paralleled the way that *Carhart II* purported to harmonize the treatment of facial and as-applied challenges in abortion cases with the Court's general approach, both the majority and Justice Kennedy in concurrence seemed to be moving the doctrine governing race-conscious efforts at integrating educational institutions towards other bodies of equal protection law. The majority did so by rejecting any analogy to race-conscious affirmative action in higher education, which the Court had permitted in *Grutter v. Bollinger*,[121] explaining that *Grutter* depended on the " 'special niche in our constitutional tradition' " occupied by universities.[122] *Parents Involved* identified "the unique context of higher education" as a "key limitation[] on [*Grutter*'s] holding," and thus concluded that desegregation in K–12 education was "not governed by *Grutter*."[123]

In his concurrence in part and concurrence in the judgment, Justice Kennedy took a somewhat different tack. His opinion accepted—indeed, it celebrated—the school boards' desire to achieve racially integrated schools. He found that goal to be a compelling state interest, at least in part because he recognized the subordinating effects of racial isolation.[124] But he objected to the means the school boards had chosen: the race-conscious assignment of individual

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119. *Id.* at __, 127 S. Ct. at 2759 (majority opinion).

120. Justice Kennedy agreed, writing that

> it is noteworthy that the number of students whose assignment depends on express racial classifications is limited. I join Part III-C of the Court's opinion because I agree that in the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means.

Id. at __, 127 S. Ct. at 2792–93 (Kennedy, J., concurring).

121. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

122. *Parents Involved*, 551 U.S. at __, 127 S. Ct. at 2754 (quoting *Grutter*, 539 U.S. at 329).

123. *Id.*

124. *See id.* at __, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

students. He was confident that equally race-conscious, but less explicit, action could achieve the same result. The core of Justice Kennedy's opinion lay in his distinction between school board actions that looked at individual students and equally race-conscious, integration-pursuing actions that operated on a more wholesale level:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.[125]

Many supporters of integrated schools will fasten on this passage as a roadmap for continued efforts to dismantle segregated schools and produce what *Green v. County School Board*[126] so aptly called "just schools."[127] And so we should. But this passage does more than attempt to thread the needle between permissible and impermissible uses of race. Taken at face value, it would completely transform existing equal protection doctrine.

To see why requires returning to the origins of strict scrutiny. Strict scrutiny was the consequence, not the cause, of the Warren Court's great antidiscrimination decisions.[128] Not until a decade after *Brown* did the Court use strict scrutiny in the course of striking down an explicit racial classification,[129] and by then, the Court had essentially dismantled formal Jim Crow, in decisions recognizing that the purpose behind the challenged racial classifications was the maintenance of white supremacy.[130] In fact, the first Supreme Court

125. *Id.* at __, 127 S. Ct. at 2792.

126. 391 U.S. 430 (1968).

127. *Id.* at 442.

128. Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1569–71 (2002).

129. *See* McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

130. *See, e.g.*, Loving v. Virginia 388 U.S. 1, 11 (1967) (stating that the Virginia prohibition on interracial marriages failed strict scrutiny because "[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications . . . [reflect] measures designed to maintain White Supremacy"); Anderson v. Martin, 375 U.S. 399, 402–03 (1964) (striking down a Louisiana law that required that a candidate's race be included on the ballot because it operated to arouse racial prejudice against black candidates).

decision in which strict scrutiny arguably made a difference in protecting the rights of African Americans came more than a half-century after *Brown*, when the Court struck down California's temporary racial segregation of inmates in its prison system in *Johnson v. California.*

Johnson v. California is an outlier in another respect as well. Few of the equal protection cases African Americans and other persons of color have brought in the decades since *Brown* have involved facial racial classifications. To the contrary, the cases brought by minority plaintiffs usually involve challenges to facially neutral laws—for example, the use of admissions tests that screen out minority applicants or the staggering disparities in criminal sentencing for drug offenses involving crack and powder cocaine.[131] To be sure, if the plaintiffs prove that the government "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group,"[132] then the facially neutral law will be treated as a racial classification and reviewed using strict scrutiny. But the level of scrutiny will usually be superfluous. The Supreme Court has recognized, in the context of applying rationality review, that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate*," let alone a compelling, "governmental interest."[133] Thus, proof of an invidious motive would by itself strip the challenged law of its presumptive legitimacy.

Justice Kennedy's concurrence in *Parents Involved* divides "race conscious"[134] government action into two categories. First, the government might explicitly classify individuals on the basis of their race and then assign benefits or burdens based on the racial identity of the individuals concerned. That is the kind of activity that would trigger strict scrutiny and that he condemns in *Parents Involved.* Alternatively, the government might rely on race—that is, take racial consequences of its actions into account—without categorizing individuals on the basis of their racial identities. Justice Kennedy

131. For a recent discussion of this point, see *Kimbrough v. United States*, 552 U.S. __, __, 128 S. Ct. 558, 568 (2007).

132. Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

133. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *see also* Romer v. Evans, 517 U.S. 620, 634 (1996) (striking down a Colorado constitutional amendment that discriminated on the basis of sexuality).

134. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. __, __, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

suggests that this form of governmental race consciousness would be "unlikely" to "demand strict scrutiny to be found permissible."[135]

As a historical matter, that simply cannot be right. Consider, for example, the notorious "grandfather clause" case, *Guinn v. United States*,[136] or the Tuskegee gerrymander struck down in *Gomillion v. Lightfoot*.[137] In neither of those cases did the government directly classify individuals on the basis of race. Rather, it chose formally race-neutral policies that were designed to achieve particular racially correlated outcomes—outcomes that in both cases disadvantaged black citizens. *Guinn* and *Gomillion* stand for the proposition that "[t]he Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections."[138] It is hard to imagine, for example, that Justice Kennedy would have found the actions of the Denver School Board in *Keyes v. School District No. 1*,[139] constitutionally permissible. The Supreme Court in *Keyes* found that although Denver had never operated a "statutory dual [school] system,"[140] the school board had deliberately structured attendance zones, chosen new school sites, drafted student transfer policies, and assigned faculty and staff to schools in order to concentrate black and Latino children in particular schools and to maintain the all-white character of other schools.[141] The Denver schools of *Keyes* are a mirror image of the permissibly race-conscious integrative schools of Justice Kennedy's vision. Thus, it cannot be the form of, rather than the motive behind, governmental race-consciousness that alone determines its constitutionality.

Justice Kennedy's citation of *Bush v. Vera*,[142] one of the Court's recent decisions involving race-conscious redistricting, perhaps offers a clue to his thinking. In the context of redistricting, the Court has come to recognize that government decisionmakers are always *aware* of the racial consequences of their choices, and in some sense always

135. *Id.*

136. 238 U.S. 347 (1915). *Guinn* involved a challenge to an Oklahoma law that made it much harder for individuals to vote if they were not the lineal descendants of persons who were eligible to vote in 1866—before the Fifteenth Amendment prohibited racial discrimination in voting. *Id.* at 350–51.

137. 364 U.S. 339 (1960).

138. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 829 (1995) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

139. 413 U.S. 189 (1973).

140. *Id.* at 201.

141. *See id.* at 201–02, 211–12.

142. 517 U.S. 952 (1996).

take those consequences into account.[143] Thus, the Court has significantly relaxed the trigger for strict scrutiny, using it only when racial considerations have "subordinated traditional race-neutral districting principles."[144] It has also permitted jurisdictions to justify their use of race by pointing to the need to comply with provisions of the Voting Rights Act that go beyond prohibiting unconstitutional race discrimination. Those provisions "requir[e] states to arrange their electoral institutions to minimize the lingering effects of prior unconstitutional discrimination not otherwise chargeable to them, as well as to mitigate the impact of racially polarized voting that involves otherwise constitutionally protected private choice."[145]

If Justice Kennedy intends to move general equal protection doctrine toward the approach currently underlying the redistricting cases, then equal protection law may be shifting implicitly toward a model in which the goal of integrating democratic institutions—schools as well as legislatures—justifies race-conscious government action as long as the action does not rely too explicitly on race.

The doctrinal modifications that the Court adopted in *Parents Involved* and *Carhart II* may have implications for other questions of constitutional law beyond abortion and school desegregation. Consider one issue that is currently before the Court: the constitutionality of the new crop of voter identification laws.[146] These laws require citizens to provide specified forms of government-issued identification before being permitted to register or to cast their ballots.[147] Most potentially eligible voters possess the necessary documentation, but nonetheless hundreds of thousands of citizens nationwide—particularly elderly, less affluent, disabled, or minority

143. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. __, __, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (" 'Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.... Electoral district lines are facially race neutral, so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of classifications based explicitly on race.' " (alteration in original) (quoting *Vera*, 517 U.S. at 958 (O'Connor, J., plurality))).

144. Miller v. Johnson, 515 U.S. 900, 916 (1995). I describe the doctrinal evolution in considerable detail in Karlan, *supra* note 128.

145. Karlan, *supra* note 128, at 1603 (footnote omitted).

146. The Court will address the issue this Term in *Crawford v. Marion County Election Board*, No. 07-21 (U.S. argued Jan. 9, 2008).

147. For discussion of these laws and their various provisions, see generally Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007).

individuals—do not and might find the process of acquiring them difficult, costly, or frustrating.[148]

How should courts analyze challenges to voter identification laws? The conventional approach to burdens placed on fundamental rights is to focus on the impact on the rights holder who faces the burden.[149] But—encouraged by a per curiam decision issued early in the Term in *Purcell v. Gonzales*[150]—the frame may have shifted. Consider how the Court described the interests at issue in challenges to draconian voter identification requirements. On the one hand, plaintiffs have a "strong interest in exercising the 'fundamental political right' to vote"[151]—an interest that traditionally has subjected impositions to heightened judicial scrutiny. On the other hand, the Court identified a countervailing constitutional consideration:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[152]

The Court's rhetorical move in *Purcell* was to equate the injury imposed by an official denial of the right to vote with the more psychic injury that comes from a voter's decision not to participate in a process in which he lacks confidence. This not only "represents a breathtaking expansion of the concept of vote dilution," but subtly shifts the focus from whether particular restrictions can be justified to an assumption "that some level of vote denial or dilution is inherent in the system and the only question is which group of voters should be excluded."[153]

Moreover, because voters who are burdened by voter identification requirements form only a small fraction of the electorate, the Court has tentatively expressed some skepticism as to

148. *See* Brief for Petitioners at 12–19, *Crawford*, No. 07-21 (U.S. Nov. 5, 2007) (describing the situation in Indiana).

149. *See, e.g.*, Bd. of Estimate v. Morris, 489 U.S. 688, 698 (1989).

150. 549 U.S. __, 127 S. Ct. 5 (2006) (per curiam).

151. *Id.* at __, 127 S. Ct. at 7 (quoting Dunn v. Blumstein, 405 U.S. 330, 336 (1972)).

152. *Id.* (alteration in original) (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

153. Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 765 (2007).

the cognizability of a facial challenge brought by elected officials, civic groups, and the Indiana Democratic Party, rather than an as-applied challenge by voters who are denied access to the polls.[154] If the Court's ultimate decision in *Crawford v. Marion County Election Board*[155] further strengthens the resistance to facial challenges expressed in *Carhart II*, this may have consequences for constitutional litigation more generally.

III. THE STRUGGLE FOR THE CONSTITUTIONAL HIGH GROUND

Brown v. Board of Education and *Roe v. Wade* are two of the key lightning rods of modern constitutional law. The former has attained iconic status and serves as the third rail of constitutional law: touch it and you die.[156] And while the latter still inspires fervent opposition, it also gets described as not just a precedent, but a "super-duper" one.[157] Thus, when the Court faces cases involving public school desegregation or abortion rights, part of what the Court does is to invoke, once again, the mantle of these decisions. In part, disagreements on the Court in these cases involve struggles over the meaning of fundamental precedents, as an examination of two critical passages in the *Carhart II* and *Parents Involved* opinions shows.

The former U.S. poet laureate, Robert Pinsky, has a wonderful phrase in his poem, *An Explanation of America*: "A country is the things it wants to see."[158] A more critical way of putting this point is Stephen Colbert's concept of "truthiness"—a reliance on gut intuition and, as M. Colbert says, "[w]hat feels like the right answer, as

154. *See* Transcript of Oral Argument at 34–38, 64–66, Crawford v. Marion County Election Bd., No. 07-21 (U.S. argued Jan. 9, 2008). For an extensive and perceptive discussion of this issue, see generally Elmendorf, *supra* note 98.

155. No. 07-21 (U.S. argued Jan. 9, 2008).

156. *See generally* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383 (2000) (describing *Brown*'s apotheosis).

157. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 145 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) ("I don't want to coin any phrases on super-precedents. We will leave that to the Supreme Court. But would you think that *Roe* might be a super-duper precedent in light . . . of 38 occasions to overrule it?"); *see also* Richmond Med. Ctr. for Women v. Gilmore, 219 F.3d 376, 376 (4th Cir. 2000) (referring to Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), as "a decision of super-*stare decisis* with respect to a woman's fundamental right to choose whether or not to proceed with a pregnancy"). *See generally* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006) (discussing the concept more generally).

158. ROBERT PINSKY, AN EXPLANATION OF AMERICA 8 (1979).

opposed to what reality will support."[159] In this light, consider this pivotal passage in *Carhart II*:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.
>
> . . . .
>
> . . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[160]

At one level, Justice Kennedy is correct. *Some* women surely do regret having abortions. But is it, to use a phrase that appears elsewhere in the Court's opinion, a "large fraction of relevant cases"?[161] Should that matter? The sole source Justice Kennedy cites for this proposition is an amicus brief filed on behalf of 180 women who regret having had abortions sometime in the past thirty years.[162] The lead amicus is Sandra Cano, who was the "Mary Doe" of *Doe v. Bolton*, the companion case to *Roe*; her regret involves her participation in the case itself.[163]

But there have been roughly forty-five million legal abortions in the United States since *Roe*.[164] How are we to balance what might be described as Type A regret—the regret women who have had abortions later feel—against what might be described as Type B

159. *See* Urban Dictionary: truthiness, http://www.urbandictionary.com/define.php?term=truthiness (last visited Apr. 14, 2008).

160. Gonzales v. Carhart (*Carhart II*), 550 U.S. __, __, 127 S. Ct. 1610, 1634 (2007) (citations omitted).

161. *Id.* at __, 127 S. Ct. at 1639.

162. *Id.* at __, 127 S. Ct. at 1634 (citing Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at 22–24, *Carhart II*, 550 U.S. __, 127 S. Ct. 1610 (No. 05-380) [hereinafter Brief of Sandra Cano]).

163. *See* Brief of Sandra Cano, *supra* note 162, at app. A.

164. *See* GUTTMACHER INSTITUTE, FACTS ON INDUCED ABORTION IN THE UNITED STATES (2008), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.html.

regret—the regret felt by women who carry unwanted or initially-wanted-but-now-disastrous pregnancies to term? It may seem equally "self-evident" that a woman dissuaded from having an abortion who then suffers health complications that preclude her from successfully maintaining future pregnancies or who gives birth to a child who soon dies painfully from irremediable defects will also struggle with anguished grief and profound sorrow. More fundamentally, what is the connection between regret and a wish to have been precluded from making a choice in the first place?

A particularly striking feature of this passage is how, like the passage in *Purcell*, it reframes the debate in terms of competing, commensurable rights. Instead of pitting the fetus's interest (or the state's interest) against the woman's interest, this articulation reformulates the central question as how best to vindicate women's interests. For all the reasons Professor Reva Siegel gives in her recent work, this formulation marks a stark retreat with respect to women's equality.[165] But ironically, it implicitly recognizes the success of the very feminist movement it resists, by recasting the terms of the debate. Instead of pitting the interests of the woman who seeks to terminate her pregnancy against the state's interests in protecting the fetus, the Court has recast both sides of the equation as involving women's autonomy and dignity, precisely the interest that *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and the Court's other decisions protecting a woman's right to obtain an abortion had identified as central to the constitutional inquiry.

If *Carhart II* has a touch of Colbert, *Parents Involved* evokes memories of a classic scene from Woody Allen's *Annie Hall*.[166] Surely you remember it: Woody is standing in line outside a movie theater and overhears the man behind him spouting off about Marshall McLuhan's views of television.

Woody declares: "You don't know anything about Marshall McLuhan's work," to which the man replies, "Really? Really? I happen to teach a class at Columbia called TV, Media and Culture, so I think that my insights into Mr. McLuhan, well, have a great deal of validity." At that moment Woody says, "Oh, that's funny, because I happen to have Mr. McLuhan right here," and McLuhan says, "I

165. For an extensive discussion of the consequences of this point, see generally Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991.

166. ANNIE HALL (Rollins-Joffe Productions 1977). The quotations in the following account can be found at On the Media, http://www.onthemedia.org/yore/transcripts/transcripts_041604_mcluhan.html (last visited Apr. 14, 2008).

heard, I heard what you were saying. You, you know nothing of my work. How you ever got to teach a course in anything is totally amazing."

The Court was quite conscious in *Parents Involved* that the Justices were involved in a struggle over the meaning of *Brown v. Board of Education*. Chief Justice Roberts's opinion for the Court sought to end the debate by quoting what the counsel for the *Brown* plaintiffs said at oral argument: " 'We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.' "[167] The Court saw "no ambiguity in that statement."[168]

So is that the Marshall McLuhan moment? Actually, . . . no. The attorney who made that statement, Robert L. Carter, is now a distinguished federal district judge. Asked for his reaction to the Court's statement, Judge Carter came awfully close to repeating McLuhan's line: " 'All that race was used for at that point in time was to deny equal opportunity to black people,' Judge Carter said of the 1950s. 'It's to stand that argument on its head to use race the way they use [it] now.' "[169]

Judge Carter's reaction is hardly surprising. For at least the past thirty years—since the publication of Owen Fiss's classic article *Groups and the Equal Protection Clause*[170]—it has been clear that there are at least two ways of thinking about the central meaning of *Brown*. The "antidiscrimination" or "anticlassification" rationale, which is the approach taken by the *Parents Involved* majority, sees the central meaning of the Equal Protection Clause as a prohibition on the government distinguishing among individuals on the basis of impermissible criteria, of which race is the epitome.[171] Under this approach, "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat

167. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. __, __, 127 S. Ct. 2738, 2767–68 (2007) (quoting Transcript of Oral Argument at 7, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10)).

168. *Id.* at __, 127 S. Ct. at 2767–68.

169. Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24. The other surviving lawyer who had argued for the schoolchildren in the consolidated cases known as *Brown* "called the chief justice's interpretation 'preposterous.' " *Id.*

170. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

171. *Id.* at 108.

citizens 'as individuals, not as simply components of a racial, religious, sexual or national class.' "[172] By contrast, the *Parents Involved* dissenters invoked a "moral vision" of the Fourteenth Amendment[173] that rested on what Fiss called the "group-disadvantaging principle" (an approach that is now more commonly described as reflecting an "antisubjugation," "antisubordination," or "anticaste" perspective[174]). Under this view, the "promise of *Brown*" was the full integration of African Americans into American society, rather than the abolition of formal racial distinctions. To pretend that there is no ambiguity in the meaning of *Brown*, then, is to blink reality. But here, even more than in *Carhart II*, the Court is acknowledging that constitutional legitimacy in public school desegregation cases can come only from keeping faith with *Brown*.

CONCLUSION

"[H]istory will be heard," the Chief Justice declared in *Parents Involved*.[175] But what will it be heard to say? As the Chief Justice recognized elsewhere last Term, "[i]t is a familiar adage that history is written by the victors."[176] It is of course far too early to tell who the victors on the Roberts Court will be. Indeed, it may be far too early even to identify what the central battles will concern: the Justices who sat on the Court at the time of *Brown* had not been picked for their views on equal protection, the Justices who sat on the Court at the time of *Roe* had not been grilled during their confirmation hearings about substantive due process and reproductive autonomy, and no one was thinking about national security when the members of the Rehnquist Court were selected. At least in the short term, however, the Court seems likely to remain highly polarized, and the issues posed by fundamental Warren, Burger, and Rehnquist Court cases are likely to remain highly salient.

172. Miller v. Johnson, 515 U.S. 900, 911 (1995) (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

173. *Parents Involved*, 551 U.S. at __, 127 S. Ct. at 2836 (Breyer, J., dissenting).

174. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1515 (2d ed. 1988) (arguing that the Equal Protection Clause embodies "an antisubjugation principle, which aims to break down legally created or legally reenforced systems of subordination that treat some people as second-class citizens").

175. *Parents Involved*, 551 U.S. at __, 127 S. Ct. at 2767.

176. Brewer v. Quarterman, 550 U.S. __, __, 127 S. Ct. 1706, 1720 (2007) (Roberts, C.J., dissenting).