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From Bad to Worse: Some Early Speculation about the Roberts Court and the Constitutional Fate of the Poor

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FROM BAD TO WORSE?: SOME EARLY SPECULATION ABOUT THE ROBERTS COURT AND THE CONSTITUTIONAL FATE OF THE POOR

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I. INTRODUCTION

I have to confess that when I first heard the topic for this panel, I laughed. Why would we want to talk about class and the Equal Protection Clause under the Roberts Court? As everybody who studies the Constitution knows, the Supreme Court long ago rejected the idea that the poor are a suspect or semisuspect class under the Equal Protection Clause in cases like *Dandridge v. Williams*,¹ *James v. Valtierra*,² and *San Antonio Independent School District v. Rodriguez*.³ Moreover, the Court has not struck down a welfare classification on constitutional grounds in thirty-four years and counting.⁴ If in its headier days the Supreme Court failed to take class seriously as an equal protection category, then why even ask the question in the days of Chief Justice Roberts and Justice Alito? As one of my colleagues quipped when hearing about this panel, my talk might as well be entitled “Is There a Number Less Than Zero?”

On further reflection, however, the joke is not so funny. Careful examination of the caselaw leads me to three quite serious conclusions. First, the existing body of constitutional doctrine takes class more seriously than the above caricature

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1. 397 U.S. 471, 486 (1970) (holding that a regulation that capped welfare benefits, regardless of the size of the family, was valid under the Equal Protection Clause).

2. 402 U.S. 137, 142–43 (1971) (holding that plaintiffs, who were eligible for low cost housing because of their low income status, had not been discriminated against by California’s use of a mandatory referendum and, thus, the law did not violate the Equal Protection Clause).

3. 411 U.S. 1, 18 (1973) (holding that the plaintiffs challenging Texas’s system of school funding and residing in poorer districts were not a suspect class that warranted heightened judicial scrutiny).

4. For a particularly thorough and adept telling of this story, see Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993).

would indicate.⁵ Second, the Rehnquist Court, though not a major innovator in this area, largely respected the doctrinal status quo. Finally, there are a number of reasons to think the Roberts Court might be unwilling to do the same. Hence, the title of my talk: *From Bad to Worse?: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*.

II. THE CONSTITUTION, CLASS, AND EQUALITY

The blackletter law is quite clear: despite the best effort of a sophisticated group of lawyers and advocates in the 1960s and early 1970s, wealth and poverty classifications are treated like all other forms of general economic and social legislation and subjected only to rational basis review when challenged under the Equal Protection Clause.⁶ However, as my former students in the audience are probably tired of hearing me say, the blackletter law often hides as much as it reveals. In actuality, the Court has utilized a variety of constitutional doctrines in a very pragmatic way to afford a modest amount of constitutional protection to the economically disadvantaged.

Examples abound. Take, for instance, the well-established line of cases that hold that the inability to pay fees cannot be used to prevent someone from filing a criminal appeal,⁷ filing for divorce,⁸ voting,⁹ or running for office.¹⁰ It is illegal to imprison people simply for nonpayment of fines that they cannot afford to pay.¹¹ Durational residency requirements are unconstitutional for the provision of important services like welfare benefits¹² and nonemergency medical care.¹³ Under *Goldberg v. Kelly*¹⁴ and its progeny, the Court has insisted on substantial procedural due process protections for the loss of governmental benefits.¹⁵ In a couple of difficult-to-decipher cases, *United States Department of Agriculture v. Moreno*¹⁶

5. My marginally optimistic reading of the caselaw draws upon the work of Frank Michelman and Lawrence Sager. See LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 95–102 (2004); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L. REV. 659 (advancing the theory that the Constitution and caselaw support a constitutional right to a certain standard of living that enables people to exist and participate in a democratic society).

6. See Loffredo, *supra* note 4, at 1278.

7. Griffin v. Illinois, 351 U.S. 12, 18 (1956); cf. Douglas v. California, 372 U.S. 353, 356–57 (1963) (holding that if state law provides a right to appeal a criminal conviction, indigent defendants have the right to a state-appointed lawyer for the first such appeal).

8. Boddie v. Connecticut, 401 U.S. 371, 380–81 (1971); cf. Little v. Streater, 452 U.S. 1, 16–17 (1981) (holding that an indigent defendant in a paternity action is entitled to free blood testing).

9. Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966).

10. Bullock v. Carter, 405 U.S. 134, 149 (1972).

11. See, e.g., Tate v. Short, 401 U.S. 395, 398–99 (1971) (holding that the imprisonment of an indigent man for nonpayment of traffic fines violated the Equal Protection Clause); Williams v. Illinois, 399 U.S. 235, 241 (1970) (holding that a state may not continue to imprison a convicted defendant beyond the statutory maximum for inability to pay the fine and court costs due under his sentence).

12. Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

13. Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 269–70 (1974).

14. 397 U.S. 254 (1970).

15. See, e.g., *id.* at 270–71 (holding that welfare recipients whose benefits were to be terminated were entitled to confrontation and cross-examination of the state's witnesses, as well as an "impartial decision maker").

16. 413 U.S. 528 (1973).

and *United States Department of Agriculture v. Murry*,¹⁷ the Supreme Court has even held that it is unconstitutional to deny benefits to otherwise eligible individuals simply because of disapproval of their living arrangements.¹⁸

For a slightly more opaque example, consider *Plyler v. Doe*,¹⁹ a case that the student commentator discusses in his contribution to the symposium.²⁰ *Plyler* holds that states cannot exclude students from public schools because of their parents' immigration status.²¹ While the rationale for that decision has been widely debated,²² the one theme that clearly runs through the majority and concurring opinions is the Justices' belief that the Constitution does not countenance government action that creates or perpetuates a permanent underclass.

Another milepost in the constitutional protection of the poor is the Court's decision in *Papachristou v. City of Jacksonville*,²³ which struck down most of the loitering and antivagrancy statutes then in existence.²⁴ While at first blush the decision may seem more closely related to individual rights or criminal procedure, such statutes have historically been used, first and foremost, to regulate and harass the poor. When you combine *Papachristou* with the cases discussed above, which hold that states cannot limit—or even significantly burden—the ability of indigents to establish residence in a new community,²⁵ it becomes clear that the Court has taken the surprisingly bold step of declaring unconstitutional both of the major mechanisms localities have traditionally used to regulate class.

Taking all of these cases together, it is apparent that the Court has read the Constitution in a manner that provides a surprising number of protections to the economically disadvantaged. To be sure, the decisions are not particularly expansive, but when stitched together, they are not trivial either. The big picture is that the Court has rejected a broad proclamation that the Constitution provides affirmative rights to material well-being or even shows particular solicitude for the poor. But, around the margins, the Court has made a series of pragmatic accommodations that suggest that equality and fairness to the poor are values of a constitutional dimension.

17. 413 U.S. 508 (1973).

18. See *Moreno*, 413 U.S. at 537–38; *Murry*, 413 U.S. at 514.

19. 457 U.S. 202 (1982).

20. Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 760 (2008).

21. *Plyler*, 457 U.S. at 226, 230.

22. See, e.g., Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409, 419–26, 428–31 (1983) (analyzing the majority opinion and discussing the immediate positive and negative effects of the Court's decision); Maria Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1385–91 (2005) (questioning the Court's use of rational basis scrutiny in *Plyler v. Doe*).

23. 405 U.S. 156 (1972).

24. See *id.* at 171.

25. See, e.g., *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 269–70 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

III. THE REHNQUIST COURT HOLDS THE LINE

Now we turn our attention to the Rehnquist Court, the second of the three topics discussed in this Essay. As scholars try to figure out the legacy of the Rehnquist Court,²⁶ one reality that confounds is that the Court moved very rapidly and very aggressively to the right in some areas of the law;²⁷ basically protected the status quo in other areas;²⁸ and moved rapidly to the right for a while and then stopped abruptly in still a third set of areas.²⁹ In determining which areas of the law fall into which category, a major factor to be considered is the point at which Justices Sandra Day O'Connor and Anthony Kennedy concluded that the existing precedents struck the right balance between competing values.³⁰ That is kind of the stopping brake on the mechanism. Somewhat surprisingly in the broad area discussed in this topic—whether referred to as “The Constitution and Social Welfare,” “The Rights of the Poor,” or “Class and the Constitution”—the Rehnquist Court pretty much protected the status quo. The Court did very little to unravel the pragmatic compromise that was at the heart of the prior generation’s doctrine.³¹

26. For my contribution to the collective project of writing the history of the Rehnquist Court, see Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097 (2006). For a thorough, albeit incomplete, bibliography of other works attempting to do the same, see *id.* at 1099 n.1.

27. Federalism is the classic example. See, e.g., *United States v. Morrison*, 529 U.S. 598, 618–19, 627 (2000) (striking down a claim brought under the Violence Against Women Act as exceeding the scope of Congress’s powers under the Commerce Clause and Section 5 of the Fourteenth Amendment, thus relegating regulation of this area of the law to the states); *Alden v. Maine*, 527 U.S. 706, 712–13 (1999) (upholding states’ immunity from suit in state court without consent); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that, in reference to the Brady Act’s requirements that state law enforcement officers conduct background checks on individuals seeking to purchase handguns, “Congress cannot compel the States to enact or enforce a federal regulatory program”); *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996) (holding that Congress could not subject states to suit in federal court under the Indian Gaming Regulatory Act); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act exceeded Congress’s authority under the Commerce Clause, thus leaving this area of the law to be exclusively regulated by the states); *New York v. United States*, 505 U.S. 144, 177 (1992) (holding that the “take title” provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 was outside Congress’s powers and infringed on state sovereignty).

28. The Court’s decisions upholding important precedents against furious challenges include *Grutter v. Bollinger*, 539 U.S. 306, 325–27 (2003) (endorsing Justice Powell’s qualified acceptance of affirmative action in *Regents of University of California v. Bakke*, 438 U.S. 265, 271–72 (1978), and validating continued use of affirmative action under certain circumstances); *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (validating the continued use of the rules from *Miranda v. Arizona*, 384 U.S. 436 (1966), and stating that the case was a “constitutional decision” and therefore could not be overturned by an act of Congress); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845–46 (1992) (preserving the “essential holding” of *Roe v. Wade*, 410 U.S. 113 (1973)).

29. Takings is a prime example. Compare *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 341–42 (2002) (showing substantial deference to local land-use regulators and holding that a temporary building moratorium designed to facilitate sensible land-use planning did not constitute a compensable taking), with *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 1031 (1992) (creating a new per se regulatory takings rule and portending other substantial curbs on the ability of states to enact comprehensive land-use regulations without paying compensation).

30. For one interesting take on this phenomenon, see J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1972–80 (2006).

31. See discussion *supra* Part II.

There are at least three cases I can think of in which the Court had prime opportunities to overrule or to limit some of the precedents that are discussed above. All of these were cases that in fact required the Court to stretch—just a little bit, but still stretch—and expand doctrines that protected the poor. These are classic examples of cases in which the Court, if it had wanted to, could have overruled precedents, or it could have moved the law to the right without overruling precedents by wedging in some kind of distinction between precedent and the case at hand. In many of the areas the Court cared about the most—federalism,³² private rights of action,³³ and even to some extent, abortion³⁴—the Court chose the latter option and while not overruling the precedents that pointed toward their less favored result, simply distinguished them on very flimsy grounds.³⁵

In three cases, over the dissent of some combination of Justices Rehnquist, Scalia, and Thomas,³⁶ the Court rejected opportunities to either overrule or distinguish precedents protective of the poor, and rather remained true to the letter and spirit of the prior generation's pragmatic compromise. The first case is *M.L.B. v. S.L.J.*,³⁷ which addressed whether a state can make the right to appeal an order terminating parental rights contingent on the parent's ability to pay substantial fees.³⁸ The Court stated “no,”³⁹ based on precedents from other areas of family law.⁴⁰

Then there is *Saenz v. Roe*,⁴¹ which raised an issue similar to the one presented in *Shapiro v. Thompson*.⁴² In *Shapiro*, the Court addressed whether a state can impose durational residency requirements for the receipt of welfare benefits.⁴³ In *Saenz*, the question was not whether a state may bar new arrivals from receiving benefits but whether the state can limit the level of benefits to those received in the previous state of residence.⁴⁴ Again, the Court said “no,” reaffirming and slightly expanding prior precedent.⁴⁵

32. See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 177 (1992); *supra* note 27.

33. See *Alexander v. Sandoval*, 532 U.S. 275, 284–88 (2001).

34. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46 (1992).

35. For my discussion of the Court's use of this technique in one prototypical area of its jurisprudence, see Siegel, *supra* note 26, at 1118–29 (discussing cases involving the availability and scope of federal remedies).

36. *City of Chi. v. Morales*, 527 U.S. 41 (1999) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting); *Saenz v. Roe*, 526 U.S. 489 (1999) (Rehnquist, C.J., joined by Thomas, J., dissenting); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (Thomas, J., joined by Scalia, J. and, joined in part, by Rehnquist, C.J., dissenting).

37. 519 U.S. 102.

38. *Id.* at 107.

39. *Id.* at 128.

40. *Id.* at 116–19.

41. 526 U.S. 489.

42. 394 U.S. 618 (1969).

43. *Id.* at 621–22.

44. *Saenz*, 526 U.S. at 492.

45. *Saenz*, 526 U.S. at 507. However, in reaching its conclusion the Court relied on the Citizenship Clause of the Fourteenth Amendment, *id.* at 506–507, while the Court based its decision in *Shapiro* on the Due Process Clause, 394 U.S. at 643–44.

Finally, it is worth looking at *City of Chicago v. Morales*,⁴⁶ which raised questions about the scope of *Papachristou v. City of Jacksonville*⁴⁷ and the constitutional prohibition on antiloitering and antivagrancy ordinances.⁴⁸ Responding to the constitutional concerns expressed in *Papachristou*, many localities drafted much more narrowly tailored antiloitering provisions; these statutes were easy to distinguish—in fact and perhaps even in principle—from the statutes invalidated in *Papachristou*. Over strong objections, the Court quite clearly and quite boldly rejected the opportunity to distinguish the earlier decision and reaffirmed its commitment to the proposition that most antiloitering and antivagrancy statutes violate the right to move freely and congregate on public streets and sidewalks.⁴⁹

These three cases suggest that in three different areas, the Rehnquist Court was comfortable with the existing precedent regarding the constitutional rights of the poor and the constitutional status of classifications based on wealth. There are several other cases worthy of mention that, while not as directly on point as others, do suggest the same kind of respect for the existing doctrinal settlement. One of these cases is *Halbert v. Michigan*,⁵⁰ which was one of the last cases the Rehnquist Court decided. The case addressed a defendant's right to a state-appointed lawyer in a criminal appeal.⁵¹ In earlier cases, the Court had held that individuals have a right to state-appointed counsel for their first appeal "as of right."⁵² In *Halbert*, the Court had to decide whether the labeling of an initial appeal from a guilty plea as "discretionary" rather than "as of right" allowed the state to sidestep the earlier cases and avoid appointment of a lawyer.⁵³ The Court said "no," defendants are still entitled to a lawyer.⁵⁴

Additional examples include *Nevada Department of Human Resources v. Hibbs*⁵⁵ and *Tennessee v. Lane*.⁵⁶ Here, in a very different civil rights context, the Court demonstrated its pragmatism, assessing real world consequences and upholding statutes that under the pure logic of its more recent decisions might be in doubt.⁵⁷ Finally, notice *Austin v. Michigan Chamber of Commerce*,⁵⁸ a campaign finance case. Here, the conservative Court talked about the dangers of

46. 527 U.S. 41 (1999).

47. 405 U.S. 156 (1972).

48. *Morales*, 527 U.S. at 45–46.

49. *Id.* at 53–54 (recognizing "the freedom to loiter for innocent purposes").

50. 545 U.S. 605 (2005).

51. *Id.* at 609.

52. See *Douglas v. California*, 372 U.S. 353, 357 (1963).

53. *Halbert*, 545 U.S. at 612–14.

54. *Id.* at 623–24.

55. 538 U.S. 721 (2003).

56. 541 U.S. 509 (2004).

57. In *Hibbs*, the Court held that Congress acted within its Section Five power when it abrogated states' immunity by enacting the family-care provision of the Family and Medical Leave Act. 538 U.S. at 735. In *Lane*, the Court upheld title II of the Americans with Disabilities Act of 1990, finding the statute to be another valid exercise of Congress's power under Section Five of the Fourteenth Amendment. 541 U.S. at 533–34.

58. 494 U.S. 652 (1990).

concentrations of wealth⁵⁹ and validated the power of legislatures to constrain the influence of such concentrated wealth on the political process.⁶⁰

I will not claim that the Rehnquist Court was some kind of left-wing Court, even on issues of class. But as a general matter, the Court refrained from deciding these issues as much as possible. When the Court did weigh in, however, it respected the pragmatic settlement of prior generations.

IV. FIVE REASONS TO DOUBT THAT THE ROBERTS COURT WILL DO THE SAME

That brings us to the Roberts Court, which in many areas of the law continues the project of the Rehnquist Court. However, there are good reasons to question whether we can expect such continuity in cases that raise issues of class. There are some significant early signs that the Roberts Court might be unwilling to accede to the existing pragmatic compromise that provides interstitial constitutional protection for the poor. There are five overlapping reasons for this prediction that I want to discuss.

First, obviously, is the identity of the Justices. Substituting Justice Samuel Alito for Justice Sandra Day O'Connor is a big change. In some areas of the law, as everyone who has studied the Court knows, this substitution does not make much of a difference because Justice O'Connor was already a lost cause, routinely siding with the conservative members of the Court. But as the cases I have been discussing indicate, on the issue of class she was a moderate, voting in favor of providing interstitial constitutional protection for the poor in all three cases.⁶¹

Somewhat more surprisingly, the substitution of current Chief Justice John Roberts for former Chief Justice William Rehnquist is also a loss in this regard. Former Chief Justice Rehnquist dissented in all three of those cases,⁶² and he was certainly critical of some of the underlying precedents in his early years on the Court.⁶³ But these cases did not arouse the same animosity from the Chief Justice later in his life. It was a pragmatic compromise, and Chief Justice Rehnquist was to some extent a pragmatist. He would listen to consequentialist arguments, particularly in his later years. *Hibbs* is a perfect example of a case in which he

59. *Id.* at 658–60 (describing the potential for corruption and noting that “the resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas” (quoting *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986)) (first alteration omitted, second alteration in original) (internal quotation marks omitted)).

60. *Id.* at 668–69.

61. See *City of Chi. v. Morales*, 527 U.S. 41 (1999); *Saenz v. Roe*, 526 U.S. 489 (1999); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

62. See cases cited *supra* note 61.

63. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 253–54 (1982) (Burger, C.J., joined by Rehnquist, J., dissenting) (disagreeing with the majority opinion’s conclusion that a state may not withhold funds to schools that admitted children of illegal immigrants); *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 285 (1974) (Rehnquist, J., dissenting) (voting to uphold the residency requirement in order to receive nonemergent medical care, finding no precedent for such a right); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 546–47 (1973) (Rehnquist, J., dissenting) (disagreeing with the Court’s conclusion that Congress could not withhold welfare benefits because of living arrangements and finding Congress’s concern with fraud to be a rational one).

stepped outside of rigid formalism to talk about the consequences of the Court's rulings.⁶⁴

Chief Justice Rehnquist was born in a different generation, a generation in which the conservative project for the Court was more results-oriented, and he was a more results-oriented jurist. In contrast, Chief Justice Roberts and Justice Alito came of age in the Reagan Justice Department. As I and others have noted,⁶⁵ that fact is likely to be one of the dominant factors when analyzing the Court in the coming years. Chief Justice Roberts and Justice Alito are participants in an ideological movement committed to a certain way of looking at the law. At the center of this movement's critiques lies the idea that many decisions of the Warren Court, including the decisions I have discussed in this Essay, were squishy, intellectually indefensible, left-wing votes of the heart.⁶⁶ This conservative movement has claimed that the Court needs to assume a more traditional judicial role in which reason and logic control, reasoning is very formal, and consequences matter little.⁶⁷ So, I am worried that Chief Justice Roberts is, in many ways, more of a radical formalist than Chief Justice Rehnquist was and that such an outlook has implications in several areas of the law, including, notably, the constitutional status of the poor.

The formalism of the Roberts Court, in fact, is my second theme. Of particular note is Chief Justice Roberts's opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*.⁶⁸ The opinion seems to be asking only into what doctrinal category statutes fit and then assumes that once the doctrinal category is determined, the rule is clear and the result comes out of some machine.⁶⁹ This type of logic is typical of several cases that the Roberts Court has decided. For example, *Bowles v. Russell*,⁷⁰ a case from last Term that received almost as much press as *Ledbetter v. Goodyear Tire & Rubber Co.*,⁷¹ decided only a few days earlier. In *Bowles*, a judge erroneously told a litigant that he had a few extra days to file his notice of appeal.⁷² When the litigant met the erroneous deadline but missed the actual deadline, the judge allowed him to continue forward with the appeal.⁷³ In reviewing the case, the Supreme Court asked whether the rule regarding the

64. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730–32 (2003) (discussing ramifications for gender equity in the workplace, particularly the fact that women are more likely to take time off to care for sick and aging relatives); *see also* *Dickerson v. United States*, 530 U.S. 428, 434–35, 440 (2000) (reaffirming the rules from *Miranda* for largely pragmatic reasons, particularly the history of coerced confessions).

65. *See* David D. Kirkpatrick, In Alito, G.O.P. Reaps Harvest Planted in '82, N.Y. TIMES, Jan. 30, 2006, at A1, A18; Posting of Andrew Siegel to PrawfsBlawg, <http://prawfsblawg.blogspot.com/prawfsblawg/2007/06/meet-the-robert.html> (June 26, 2007, 10:43 EST).

66. Siegel, *supra* note 65.

67. *Id.*

68. 127 S. Ct. 2738 (2007).

69. *See id.* at 2755–57 (plurality opinion) (finding that racial balancing to achieve diversity was not a compelling interest recognized by the Court and that the school districts' attendance zones were not narrowly tailored and thus the plans failed under a strict scrutiny analysis).

70. 127 S. Ct. 2360 (2007).

71. 127 S. Ct. 2162 (2007).

72. *Bowles*, 127 S. Ct. at 2362.

73. *Id.*

appellate deadline is a “mandatory and jurisdictional” rule or a discretionary one.⁷⁴ The Court determined that it was a jurisdictional rule and that no equitable relief was possible.⁷⁵ In other words, the poor guy was out of luck. This is only one of several classic formalist cases.

In some ways, this formalism is laudable.⁷⁶ To a certain extent, I agree with the view that the job of a judge is to blind oneself to certain consequences as outside the realm of constitutionally-relevant facts, and to only consider the rules and structure of doctrine. But in the end, this view ignores the fact that the fidelity one owes as a judge is to the Constitution, not to the doctrinal categories or the rules that judges of prior generations have come up with.⁷⁷ At some point, if the conclusions a judge reaches using the doctrinal categories are so foreign to the constitutional promises of equality and liberty, then the fidelity that judge owes to the Constitution requires a reconsideration of doctrinal premises. And in fact, the pragmatic “accommodationism” illustrated by the class cases is an example of one sort of coping strategy that Professor Roosevelt and others have written about regarding what to do when the doctrine no longer works.⁷⁸ At least for a while, rather than tearing down the doctrinal structure, such an approach allows judges to incorporate the greater constitutional commitments into the doctrine and protect their methods of reasoning. After all, there are costs—predictability for one—to tearing down doctrinal structures every five minutes. The Roberts Court seems unsympathetic to that kind of accommodationist project. All indications are that it has confused doctrine with the Constitution in some fundamental way.

In a similar vein, the Roberts Court seems strikingly unwilling to take real world consequences into account in its rulings. Lilly Ledbetter, the plaintiff in *Ledbetter*,⁷⁹ said a lot of things better than most people can. When she testified before Congress, one of the things she said, agreeing with a comment made by Justice Ginsburg, was that the ruling in her case did not “make sense in the real

74. *Id.* at 2363 (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam)) (internal quotation marks omitted).

75. *Id.* at 2366.

76. Professor Thomas Crocker and Professor Teresa Stanton Collett engaged in a spirited exchange on the subject during the conference. Their exchange inspired the ideas of this paragraph.

77. Discussion of the relationship between constitutional meaning and constitutional doctrine is currently one of the most popular topics in constitutional theory. For a few of the more influential works in this vein, see RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005). For my small contribution to this literature, see Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339 (2006).

78. Roosevelt, *supra* note 77, at 1689–92; see G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 7–65 (2005) (describing the history of several important traditional and modern constitutional doctrines).

79. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); see also Deborah Brake, *What Counts as “Discrimination” in Ledbetter and the Implications for Sex Equality Law*, 59 S.C. L. REV. 657 (2008) (discussing the decision’s effect on present and future antidiscrimination laws promulgated by Congress).

world.”⁸⁰ Well, you can say that about a lot of cases decided by the Roberts Court.⁸¹

My favorite example is one near and dear to my present life: the Seattle schools case.⁸² I live in Seattle now, and it does not take a genius to understand how disconnected from reality the Court was in that case. I could give you a twenty-minute tour that proves how complicit the city of Seattle was in creating and perpetuating the racial segregation of the school system. Just take a tour and look at how many tiny elementary schools there are that are several blocks from other schools. Why is that? In large measure, I think the record in Seattle suggests it’s because breaking neighborhoods into microneighborhoods allows a city to maintain different schools for different races. If Seattle had built the number of schools that you would expect them to have, they would have had to draw the attendance zones broadly enough to have multiracial schools in a time where that was not particularly acceptable. Or look at the fact that the Seattle school district has drawn up its uniform policies so that in the central cluster where I live the three schools that are predominately white have been able to opt out of a supposedly mandatory school uniform policy.⁸³ The kids at these schools go to school dressed like children in fashion catalogues, while the children who attend schools that are predominately minority almost all wear uniforms; the result is that everyone knows where these children go to school simply by looking at their uniforms. It is a different kind of discipline, a different kind of marking. (And, I could give you many more examples of the ways in which Seattle maintains what are fundamentally two separate public school systems.)

The Indiana voter identification case that came before the Supreme Court this year⁸⁴ is another case worth mentioning, particularly because it involves the application of one of the rules relating to class and the Equal Protection Clause. Precedent states that significant limitations on the right to vote must usually pass strict scrutiny.⁸⁵ *Crawford v. Marion County Election Board* raises the issues of whether strict scrutiny applies to the new voter identification rules that some states have adopted and whether those rules pass scrutiny.⁸⁶ In looking at the transcript of the oral argument in that case, you see a Court that is skeptical about real world concerns. In this case, the Court was very skeptical that anyone would be unable to

80. *Justice Denied? The Implications of the Supreme Court’s Ledbetter v. Goodyear Employment Discrimination Decision: Hearing Before the H. Comm. on Educ. & Labor*, 110th Cong. 10 (2007) (statement of Lilly Ledbetter, Former Goodyear Employee and Plaintiff in *Ledbetter v. Goodyear*).

81. *See, e.g., Bowles*, 127 S. Ct. at 2369 (Souter, J., dissenting) (noting that the “hardship and unfairness” created by the trial judge’s erroneous deadline could have been alleviated by use of equitable doctrines).

82. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

83. *See* SEATTLE PUBLIC SCHOOLS, SEATTLE PUBLIC SCHOOLS ELEMENTARY SCHOOL CHOICES 2008–09: ENROLLMENT CHOICES FOR PARENTS 24 (2007) [hereinafter SEATTLE PUBLIC SCHOOLS], available at http://www.seattleschools.org/area/eso/elementary_guide.pdf (noting that four out of five predominately minority elementary schools in the central cluster have uniform policies but that Stevens, Montlake, and McGilvra Elementary Schools do not).

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

85. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627–29 (1969).

86. *Crawford*, 128 S. Ct. at 1616–21.

find a way to get to the requisite government agency to obtain their identification cards and that such a statute could really be a burden on anyone.⁸⁷

My fourth reason to be skeptical about the Roberts Courts is the Court's willingness to overrule precedent. Remember that in several of the Rehnquist Court cases discussed above, Justice Thomas argued that the Court's pragmatic accommodationist precedents with regard to class are mushy-headed and should be overruled.⁸⁸ Justice Thomas did not have too many friends on the prior Court, in large measure because, all things being equal, the Rehnquist Court needed a really good reason to overrule precedent. While it was willing to overrule precedent in areas that it thought were really important, such as federalism,⁸⁹ this was not something that the Court did just because it found a decision wrongly decided. I think the culture of the Roberts Court may well be different. Part and parcel of the Roberts Court's emerging formalism and the general style of reasoning that came out of the Reagan Justice Department is the idea that there is something noble about overruling precedents that were wrongly decided.

In practice, the Roberts Court appears quite willing to overrule precedent. Just look at last Term. One of the most-quoted comments of the Term was Justice Breyer's complaint on the last day of the Term that "[i]t is not often in law that so few have so quickly changed so much."⁹⁰ Well, it is worth noting that he was not just referring to the Seattle schools case;⁹¹ he was frustrated about a lot of other cases too. On that last day of the term, he dissented from the bench not just in the Seattle schools case⁹² but also in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,⁹³ a fairly technical antitrust case in which his main objection was that the Court abandoned a doctrine that had been around for a hundred years for no other reason than the fact that a few economists thought it was a bad rule.⁹⁴ Of course, *Gonzales v. Carhart*⁹⁵ is another example.⁹⁶

And finally, though it is only tangentially related, I want to mention the Roberts Court's palpable hostility to litigation. I have previously suggested that litigation

87. See Transcript of Oral Argument at 28, *Crawford*, 128 S. Ct. 1610 (No. 07-21). For instance, Justice Souter posed the following question: "And how many of [the voters without identification cards] are going to suffer from an unreasonable denial of an opportunity to get the ID which the State will provide through the Bureau of Motor Vehicles?" *Id.* As the oral argument predicted, the Court ultimately rejected the constitutional challenge, largely out of skepticism about the consequences of the statute. *Crawford*, 128 S. Ct. at 1621–23.

88. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 133 (1996) (Thomas, J., dissenting) ("I do not think that the equal protection theory underlying the *Griffin* line of cases remains viable." (referring to *Griffin v. Illinois*, 351 U.S. 12 (1956), and its progeny)).

89. See cases cited *supra* note 27.

90. Anthony Lewis, *The Court: How 'So Few Have So Quickly Changed So Much,'* N.Y. REV. BOOKS, Dec. 20, 2007, at 58 (internal quotation marks omitted), available at <http://www.nybooks.com/articles/20899> (reviewing JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007)). This statement was made in reaction to the majority's decision in the Seattle schools case. *Id.*

91. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

92. *Id.* at 2800–37 (Breyer, J., dissenting).

93. 127 S. Ct. 2705, 2721–23 (2007), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

94. *Id.* at 2725–26 (Breyer, J., dissenting).

95. 127 S. Ct. 1610 (2007).

96. *Id.* at 1640 (Ginsburg, J., dissenting).

hostility was the single most important theme of the Rehnquist era,⁹⁷ but the theme certainly did not dominate the Rehnquist Court's jurisprudence to the extent that it has dominated the current Court's thus far.⁹⁸ In the context of this panel, it is worth reminding ourselves that litigation is, at least in its idealized form, one of the most democratic institutions we have. The idea of litigation is powerfully democratic: Anyone of any social status can drag their so-called betters into court and make them answer before a body whose job it is to neutrally adjudicate that dispute. Now we know that is not how the system works in all its details, but it is an ideal and an ideal that has been respected in our jurisprudence—or at least given lip service in our jurisprudence—for most of this country's history.⁹⁹

Well, the Rehnquist Court—not just the conservative Justices but some of the liberal Justices as well—showed less respect for that principle than judges have historically accorded. Your numbers may vary, but somewhere around 25% to 30% of the Rehnquist Court's cases were about access to the courts, availability of litigation, or rooting out theories of statutory interpretation that were pro-litigation.¹⁰⁰ In the Roberts Court, that number has continued to rise. One commentator has gone so far as to call the 2006 Term “the year [the Court] closed the courts.”¹⁰¹ In its early months, the 2007 Term has been more of the same. As of mid-February 2008, more than half of the decided cases involved access to the courts, remedies, theories of statutory interpretation, or other issues that implicate how litigation positive we want our culture to be. And those arguing in favor of litigation and access to the courts have won even fewer cases under the Roberts Court than their counterparts under the Rehnquist Court.¹⁰²

V. CONCLUSION

To summarize my argument, my proposition is that though the class and poverty advocates of the late 1960s and early 1970s were not happy with the constitutional settlement and felt like it was an abandonment of the poor, writing

97. Siegel, *supra* note 26; see also Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343 (2002) (“[T]he Court has sought, across a broad range of subject matters, to reduce the role of judicial lawmaking and to refuse to take responsibility for shaping a workable legal system”); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224 (2003) (arguing that the Court has, in some of its opinions, “opin[ed] to Congress . . . about which litigants ought to be able to bring substantive claims to the federal courts”).

98. Posting of Andrew Siegel to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2007/06/hostility_to_li.html (June 6, 2007, 10:41 EST).

99. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1971) (guaranteeing indigent defendants in civil suits the same access to judicial procedures and protections afforded to wealthier parties); *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (describing the right of indigent defendants to be heard via the right to counsel in criminal proceedings).

100. Cf. Siegel, *supra* note 26, at 1118 n.70 (reporting that twenty-four of seventy-four cases from one Rehnquist Court Term dealt with “the scope or availability of a statutory remedy, qualified or sovereign immunity, the availability of attorney’s fees, preemption, or justiciability”).

101. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (quoting Professor Judith Resnik).

102. For two of the many recent antilitigation opinions, see *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1011 (2008) (holding that federal law preempts many state common law claims against medical device manufacturers); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773–74 (2008) (limiting private right of action for securities fraud).

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them out of the Constitution, the settlement that they were left with did provide the poor with some interstitial constitutional protection. The Rehnquist Court stayed out of this area as much as it could, but when it did weigh in, protected the basic premises of that settlement. Based on the early returns, there are some serious reasons to think that the Roberts Court will not do the same.

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