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My talk this morning focuses on the agenda of the current Roberts Court. I think that every Supreme Court can be said to have an agenda. Sometimes it seems conscious and deliberate, apparent from the outset. Sometimes it seems to evolve and only becomes obvious later.

Let me show what I mean when I talk about the agenda of a Court to set up a discussion of the current Roberts Court. I think we'd all agree that in the first third of the 20th century the *Lochner* Court, as it was known, had its agenda. It was very much protecting business from government regulations during this time from the late 19th century to 1936. The Supreme Court struck down over 200 federal state local laws affecting workers and consumers.

The Roosevelt Court from 1937 to 1953 had its agenda, which was very much about deferring to government power. This was evident in overruling the *Lochner*-era decisions and deferring to government economic regulation tragically. It also led to *Korematsu v. United States*,[1] which deferred to the government's decision in World War II to in turn and evacuate Japanese Americans. It led to *Dennis v. United States*,[2] where the Supreme Court upheld the Smith Act and the prosecution conviction of those suspected of being communists.

The Warren Court from 1953 to 1969 had its agenda and it was especially evident in the latter years of the Warren Court from 1962 to 1969, after Justice Arthur Goldberg took the place of Justice Felix Frankfurter. The Warren Court was committed to ending the Jim Crow

1. 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).
2. 341 U.S. 494 (1951).

laws that imposed apartheid so much of the country, to protecting the right to vote and opening up the political process, and to expanding the rights of criminal suspects and criminal defendants.

The Burger Court from 1969 until 1986 had its agenda. It was very much in response to the Warren Court. It wanted to limit the rights of criminal suspects and defendants, wanted to restrict desegregation of the schools, and it wanted to limit any movement under the Constitution for economic equality. I've often thought that the Burger Court was most and best known by its decisions of *San Antonio Independent School District v. Rodriguez*[3] in 1973 and in *Milliken v. Bradley*[4] in 1974. In *Rodriguez*, the Supreme Court held that education is not a fundamental right, and that poverty is not a suspect classification. The Court ruled that disparities in school funding don't violate the Constitution. Then *Milliken v. Bradley* limited the ability of federal courts to impose desegregation remedies. These decisions institutionalized separate and unequal schools.

The Rehnquist Court followed this beginning in 1986 and continued in 2005. I think its agenda stressed federalism and states' rights. It limited the scope of Congress's commerce power for the first time since 1936 in cases like *United States v. Lopez*[5] and *United States v. Morrison*.[6] It restricted Congress's powers under Section 5 of the 14th Amendment in *City of Boerne v. Flores*.[7] It revived the Tenth Amendment as a limit on federal power, in cases such as *New York v. United States*[8] and *Printz v. United States*.[9] And it dramatically expanded the scope of state sovereign immunity.

The Roberts Court began in 2005. I think it is a mistake to look at it as homogeneous throughout its existence. The early years of the Roberts Court – and I'll put them until Donald Trump picked three justices – were especially a pro-business court. This era perhaps is best exemplified by the Robert's Court decision in 2010 in *Citizens United v. Federal Election Commission,*[10] which held that corporations have the right to spend unlimited amounts of money in election campaigns. Even its decision in 2012, upholding the Affordable Care Act in

3. 411 U.S. 1 (1973).
4. 418 U.S. 717 (1974).
5. 514 U.S. 549 (1995).
6. 529 U.S. 598 (2000).
7. 521 U.S. 507 (1997).
8. 505 U.S. 144 (1992).
9. 521 U.S. 898 (1997).
10. 558 U.S. 310 (2010).

National Federation of Independent Business v. Sebelius,[11] is a pro-business decision because of the way the Affordable Care Act helped a major sector the economy, the insurance industry.

But the current version of the Roberts Court, that I want to talk about this morning, has a different agenda. I see this version of the Court being a result of Donald Trump putting three justices on the Court between 2017 and 2020. And I think the agenda of the current Roberts Court is very much to advance the conservative social and political agenda. It's worth thinking about how we got to the current version of the Roberts Court.

Between 1960 and 2020 there were thirty-two years with Republican presidents and twenty-eight years with democratic presidents; almost exactly even. In 2024 it will be even thirty-two and thirty-two. But between 1960 and 2020 Republican presidents picked fifteen justices and democratic presidents picked eight justices. Another way to look at it: Donald Trump picked three justices in his four years in the White House. But the prior three Democratic presidents—Jimmy Carter, Bill Clinton, and Barack Obama – served a combined twenty years in the White House and in those two decades picked only four justices.

The last five Republican appointees to the Supreme Court were John Roberts, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. It's hard to talk about, but I don't think we can ignore that all five of them were raised or are currently Catholic. That is not a criticism; no justice should be selected or opposed on the grounds of religion. But I don't think it's coincidence either. These Republican presidents were wanting to send a message to their political base that they were picking justices who advanced the conservative social agenda, especially with regard to abortion.

Now, of course, with six Republican appointed justices and six very conservative justices we have the current Roberts Court.
If I were to ask you what are the things that conservatives care most about with regard to a social agenda or political agenda what would come to your mind? Abortion, dismantling the administrative state, affirmative action, gun rights, religion, voting. I want to suggest that in each of these areas the Roberts Court has already moved remarkably fast and remarkably far in advancing the conservative agenda.

Consider each of these areas. We start, of course, with abortion. There's nothing that's been more important to the conservative social

11. 567 U.S. 519 (2012).

and political agenda than overruling *Roe v. Wade*[12] and ending abortion rights. I don't think it's coincidental that in Amy Coney Barrett's first term on the Supreme Court the Supreme Court granted review in *Dobbs v. Jackson Women's Health Organization*[13] and that in her first full year on the court the Supreme Court overruled *Roe v. Wade*.

The Supreme Court's opinion in *Dobbs* is familiar to all of you. The Supreme Court said that *Roe v. Wade* was "egregiously wrong" and exceedingly poorly reasoned. Alito said the issue of abortion should be left to the political process. But what's going to follow *Dobbs*? There surely will be cases coming up that continue to involve abortion rights. There's an issue that's split the lower courts about a federal law that requires hospitals receiving federal funds to provide emergency medical treatment to pregnant women, including abortion services/ Does this preempt state anti-abortion laws. States are considering a host of different laws restricting abortion, some of which will come to the court. Missouri has a bill before it that would make it a crime for a woman to cross state lines to get an abortion. Many states like Texas prohibit importing into the state medication that would induce an abortion and these will all come before the Court. Wyoming adopted a law that prohibited medically induced abortions.

In his majority opinion, Justice Alito said a right should be protected by the Constitution only if it's stated in the text or part of the original meaning of the Constitution or where there is a long unbroken historical tradition. Justice Thomas wrote a concurring opinion in *Dobbs* saying that now the Supreme Court should overrule *Griswold v. Connecticut*[14] the 1965 case that said there's a constitutional right purchase and use contraceptives, *Lawrence v. Texas*[15] the 2003 decision that said that a state cannot criminally prohibit private adult consensual same-sex sexual activities, and *Obergefell v. Hodges*,[16] the 2015 case that states cannot prohibit same-sex marriage. Justice Alito, in his majority opinion, said none of those other decisions are in jeopardy because none involve potential life. The dissent said the majority are saying "Scout's Honor" trust us. Of course, if the majority is being sincere, that a right is protected only if it's in the textual part

12. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
13. 142 S. Ct. 2228 (2022).
14. 381 U.S. 479 (1965).
15. 539 U.S. 558 (2003).
16. 576 U.S. 644 (2015).

of the original meaning or a long unbroken tradition, then it would seem *Griswold* and *Lawrence* and *Obergefell* might be in danger in the future.

Now with regard to *Griswold*, I don't imagine states are going to adopt laws that prohibit the sale, distribution, and use of contraceptives, but some states are considering bills that would prohibit methods of contraception that they see as acting after conception like the morning after pill or even the IUD.

I don't foresee that the Supreme Court is going to overrule *Lawrence v. Texas*, but I do think there are many cases coming to the court about whether people, on account of their religious beliefs, can discriminate against gays and lesbians. As for Obergefell, Chief Justice Roberts and Justices Thomas and Alito vehemently dissented in that case. Amy Coney Barrett, a law professor at the time, sharply criticized it. Justice Gorsuch, since coming on the court, already has expressed his disagreement with *Obergefell*. There is no doubt it would not be decided the same way today.

And there are cases now coming through the lower courts that will make their way to the Supreme Court where there's an attempt to have the Supreme Court declare that personhood begins at conception and the laws that allow abortion deny to the fetus—those laws call it the "unborn child"—equal protection law. In other words, these cases are asking the Supreme Court to hold that the Constitution prohibits abortion.

On the one hand, I think a majority of the current justices believe that. On the other hand, the conservative criticism with regards to *Roe* since 1973 was always that this is an issue to be left to the political process. That was Justice Alito's central theme in *Dobbs*.

The second area that I identified was the conservative desire to dismantle the administrative state. We saw this too last term on the last day, Thursday June 30th, when the Supreme Court decided *West Virginia v. Environmental Protection Agency*[17]—about whether or not the EPA has the authority to regulate greenhouse gas emissions from coal-fired power plants. Such pollution is a major source of the pollutants that are causing climate change.

The Supreme Court, in a six to three decision, ruled that the EPA lacked this authority. Chief Justice Roberts wrote for the conservatives, and he invoked what's now called the "major questions doctrine." He said when it comes to a major question of economic or political

17. 142 S. Ct. 2587 (2022).

significance an administrative agency can act only if there's clear direction from Congress. He said whether the EPA has the authority to regulate greenhouse gas emissions from coal-fired power plants is a major question of economic or political significance. He said the Clean Air Act is not sufficiently specific and therefore this regulatory authority is impermissible.

Justice Kagan, in dissent, pointed out the major questions doctrine is of very new vintage. I would think that even among constitutional law professors or judges relatively few heard of it until a few years ago and Justice Kagan points out that it is unknown what's a major question of economic or political significance, or what's sufficiently specific congressional direction to meet the requirements of the major questions doctrine. The Supreme Court doesn't say and in that regard, it's very much opened the door to challenges to every form of government administrative regulation. Health and safety laws, environmental laws, regulations of business, are all being challenged because it's so easy now to say this is a major question and Congress hasn't given enough direction. Surely this is going to lead to a lot more cases before the Supreme Court that are going to have to clarify the major questions doctrine.

It is possible that the Supreme Court will reconsider and overrule the *Chevron* doctrine that says that Court should give deference to administrative agencies when the interpreting the statutes they act under. I think another key question with regard to the administrative state is whether the Supreme Court's going to revive the so-called nondelegation doctrine. The nondelegation doctrine is the principle that Congress cannot delegate its legislative power to administrative agencies. The Supreme Court last used it in 1935 in two cases. *A.L.A. Schechter Poultry Corp. v. United States*[18] and *Panama Refining Co. v. Ryan.*[19]

Conservatives have argued for some time that the Nondelegation Doctrine should be revived. In fact, if you would have talked to me in 2019 or immediately after I would have said I think it's imminent that the court will do this. In June 2019, the Court decided *Gundy v. United States.*[20] It involved the Sex Offender Registration Notification Act, which makes it a federal crime for a person to cross state lines if he or she is not registered as a sex offender as required by state law. The law was unclear about whether it was to apply retroactively to those who

18. 295 U.S. 495 (1935).
19. 293 U.S. 388 (1935).
20. 139 S. Ct. 2116 (2019) (plurality).

have been convicted before it was enacted. The Attorney General, by regulation, said it would apply retroactively. Herman Gundy brought a challenge and said that for this to be decided by the Attorney General to do this is an impermissible delegation of power by Congress. The Supreme Court in a five to three decision ruled against Grundy. Justice Kagan wrote the plurality opinion, joined by justices Ginsburg, Breyer, and Sotomayor, and emphatically rejected reviving the nondelegation doctrine. She spoke of the importance of giving broad delegations to agencies to deal with key economic and social problems. Justice Alito was the fifth vote in the majority. His opinion was short and enigmatic. He said if there were five votes to revive the nondelegation doctrine, he would join them, but they did not have that. Justice Gorsuch wrote a scathing dissent, joined by Chief Justice Roberts and Justice Thomas, saying that the Court should revive the non-delegation doctrine and should do it now to declare this unconstitutional. Since then, Justices Kavanaugh and Barrett have come on the court. It seemed there likely are six justices to revive the nondelegation doctrine.

The difference between the major questions doctrine and the nondelegation doctrine is that under the former the court strikes down the administrative agency regulation saying that was not clear direction from Congress. With the nondelegation doctrine, the Court strikes down the federal statute as an impermissible delegation. Whether it is by reviving the non-delegation doctrine or through the major questions doctrine, hundreds and maybe thousands of federal statutes and regulations may be vulnerable. It'll take years for the Supreme Court to clarify when is there enough in terms of clarity from Congress to meet these requirements and when is it impermissible. And so, whether it's under the guise of the major question doctrine or under the nondelegation doctrine being revived, the Court is going to continue to dismantle the administrative state.

The third area that I identified concerns affirmative action. There's no doubt that a key part of the conservative social agenda for decades has been eliminating affirmative action. In 1978, in *Regents of the University of California v. Bakke*,[21] in 2003 in *Grutter v. Bollinger*,[22] and in 2016 in *Fisher v. University of Texas at Austin*,[23] the Supreme Court said that college and universities have a compelling interest in a diverse student body. The Court held that colleges and universities may use

21. 438 U.S. 265 (1978).
22. 539 U.S. 306 (2003).
23. 570 U.S. 297 (2013).

race as one factor in admission decisions to enhance diversity and benefit minorities. On October 31, 2022, the Supreme Court heard two cases about whether to overrule *Bakke*, *Grutter*, and *Fisher*.

These were *Students for Fair Admission v. University of North Carolina*[24] and *Students for Fair Admission v. Harvard College*.[25] It is significant that both of these cases are before the Court. Equal protection under the Constitution applies only to the government; that's the North Carolina case. Title VI of the 1964 Civil Rights Act says recipients of federal funds can't discriminate on the basis of race; that, of course, is the Harvard case. I do not know anyone liberal or conservative, except maybe the advocates in these cases, who have any doubt that the Supreme Court is going to overrule *Bakke*, *Grutter*, and *Fisher*. From the five and a half hours of oral argument it seemed clear that there are six justices who are going to do this. It's been a key part of the agenda for Chief Justice John Roberts since he came on the court.

In 2007 in *Parents Involved in Community Schools v. Seattle School District No. 1*,[26] Roberts famously declared the way to stop discrimination based on race is to stop discriminating based on race. I think it'll be very important to look carefully at how the Supreme Court writes the opinions when it decides the North Carolina and Harvard cases.

One way the Court might write the opinion is to say that diversity is not a compelling interest overruling Justice Powell's conclusion from *Bakke* and the Court's conclusion in *Grutter*. Or the Court might proclaim that the Constitution requires colorblindness; that's what John Roberts was suggesting in his language in *Parents Involved* and that's what Justice Thomas has said on many occasions. But if the Supreme Court says that the Constitution requires colorblindness, there'll be enormous implications. For example, if that happens, I wonder then whether disparate impact liability under federal and state laws will be able to survive.

In a concurring opinion in 2009 in *Ricci v. DeStefano*,[27] Justice Scalia raised the idea that laws that create disparate impact liability violate equal protection. He said the Constitution requires that the government and all that it regulates be colorblind. But disparate

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24. 567 F. Supp. 580 (M.D.N.C. 2021), *cert. granted*, Students for Fair Admission v. Univ. of N.C., No. 21-2263 (U.S. argued Oct. 31, 2022).

25. 980 F.3d 157 (1st Cir. 2020), *cert. granted*, Students for Fair Admission v. Harvard College, No. 20-1199 (U.S. argued Oct. 31, 2022).

26. 551 U.S. 701 (2007).

27. 557 U.S. 557 (2009).

impact liability requires that decision makers take race into account in order to avoid liability. There are times when Justices Alito and Thomas in other contexts, such as voting and housing, have suggested the same thing. This could have a major impact for cases under Title VII with regard to employment discrimination, the 1982 Voting Rights Act amendments, and the 1968 open housing law. It'll also be interesting to see in the affirmative action cases what the Supreme Court indicates as to whether colleges and universities can use proxies for race to achieve diversity. For example, Texas adopted a program that takes the top ten percent of students at all public high schools in the state as a way of achieving diversity. There is sufficient racial segregation in Texas that that this program will achieve some diversity at the University of Texas. But if it is done with the purpose of benefiting based on race and if that is the effect, will that be deemed a violation of equal protection?

It's estimated that 60 percent of selective colleges and universities in the country use some form of affirmative action. There are nine states that have eliminated affirmative action: my state of California being one of them. In 1996, California voters passed an initiative that said that the state and all of its subdivisions cannot discriminate or give preference basis of race or sex in the education context.

The immediate impact of 209 was devastating with regard to diversity. If you look at UC Berkeley, where I am, or UCLA, the number of African American freshmen fell by half between 1995, before Proposition 209, and in 1998 immediately after Prop 209 passed. Now UCLA and Berkeley have found ways to achieve diversity without affirmative action. but it took UCLA nineteen years, until 2015, to get back to its pre-1996 levels of diversity.

The fourth key area of the conservative agenda is with regard to guns. I'm not sure why it is this way, but we all know that in our society conservatives are very much advocates of gun rights and liberals are very much advocates for gun regulation. It's often forgotten that between 1791, when the Second Amendment was ratified, to June 2008 not one federal state or local gun regulation was struck down by the Supreme Court as violating this Amendment. In the handful of Supreme Court cases about the Second Amendment, it always said that the Amendment means what it says: it's about a right to have guns for the purpose of militia service.

In June 2008, in *District of Columbia v. Heller*[28] the Supreme Court held that the Second Amendment protects the right of the people to have handguns in their homes for the sake of security. The Court struck down a thirty-two-year-old District of Columbia ordinance that prohibited private ownership and possession of handguns. The Court did not prescribe a test or a level of scrutiny in evaluating gun regulations. The Court made it clear that the Second Amendment is not an absolute right with regard to guns.

Two years later in 2010 in *McDonald v. City of Chicago*[29] the Supreme Court said the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment and applies to state and local governments. From *McDonald* in 2010 until Thursday, June 23rd, of 2022, the Supreme Court didn't decide another Second Amendment case. My surmise about this is that the four more conservative justices on the Court were never sure that they had John Roberts' vote to strike down gun regulations. There were dozens of cert petitions with regard to gun cases but the Supreme Court never took them.

But once Amy Coney Barrett came on the Court, the four more conservative justices knew they had a fifth vote and then they took *New York State Rifle & Pistol Association, Inc. v. Bruen*.[30] This was about a New York law, initially adopted in 1907, that restricts having guns in public—particularly concealed weapons. To have a gun in public a permit is required. In order to get a permit, a person would need to show cause. The New York Court said in order to do this the individual would have to demonstrate a safety need. California had a very similar law; in order to have a weapon in public, especially a concealed weapon, it was necessary to get a permit and necessary to show a safety need.

The Supreme Court in a six to three decision declared the New York law unconstitutional. Justice Thomas wrote for the Court. He said that the Second Amendment protects a right to have guns in public and this includes concealed weapons. A state can require licenses, but it cannot limit licenses to those who show cause or to those who demonstrate a safety need.

This would be significant in itself. It is the first time in history that the Supreme Court has ever said that the Second Amendment creates

28. 554 U.S. 570 (2008).
29. 561 U.S. 742 (2010).
30. 142 S. Ct. 2111 (2022).

a right to have guns in public and concealed weapons. But the Court went much further. The Court prescribed a test to be used in evaluating gun regulations in the future. Justice Thomas said that gun regulations should be allowed only if they were historically permitted.

Usually when there's a fundamental right or discrimination against the suspect class, strict scrutiny is the test in evaluating the government's law. Strict scrutiny asks whether the government's action is necessary to achieve a compelling purpose. But in *Bruen*, Justice Thomas's majority opinion expressly rejected using the levels of scrutiny. Under the Court's approach, it doesn't matter how compelling the interest. It doesn't matter if the means are necessary. The only regulation of guns to be allowed are those that were historically permitted. Justice Barrett wrote a concurring opinion saying we haven't decided whether we're focusing just on 1791 or in 1868.

This then opens the door to challenges to every imaginable type of gun regulation. In each of these cases, the question will be whether this is the type of regulation that existed in 1791 or 1868.There are hundreds of cases pending in the lower courts challenging gun regulations. For example, when can the government regulate who has guns? Already a federal district court has declared unconstitutional a federal law that says someone has been who indicted can't continue to have it. A federal court in Texas has struck down a law that says that those under twenty-one can't have guns in public. What about the federal and state laws that say that those with a felony conviction can't have guns? These are being challenged all over the country. What about regulations of where people can have guns? It seems sure that the Court will allow regulation of guns in sensitive places like in courthouses, schools, or airports. But what about the New York law that defines sensitive places so broadly so as to basically prohibit having guns in public in New York City? What will the Supreme Court do with that when the merits come before it? And what about regulations of types of weapons? What about regulations of assault and semi assault weapons like AR-15s?

Or magazines with high capacity? I can go on and on with examples and ultimately many of these cases are going to come to the Court in the future and it seems that all the Court is going to ask is: was this a type of regulation that existed in 1791 or 1868?

The fifth area that I identified concerns religion and one of the places where there have been the most dramatic changes in constitutional law is with regard to the religion Clauses of the First

Amendment. For decades the Supreme Court said that the Establishment Clause of the First Amendment was best understood through a metaphor coined by Thomas Jefferson: that there should be a wall that separates church and state. This is the idea that the place for religion is in the private realm, in our daily lives, our homes, our churches, our synagogues. Under this view, our government must be secular. At the same time, the Supreme Court took a minimalist approach to the Free Exercise Clause. the key case here was *Employment Division v. Smith*[31] in 1990. You might remember it as the Native American peyote case. It involved an Oregon law that prohibited consumption of peyote. and Native Americans claimed a religious exemption from the law based on their free exercise of religion.

The Supreme Court, in an opinion by Justice Antonin Scalia, ruled against the Native Americans. The Court said that does don't give exemptions from general laws on account of religious beliefs so long as the law is a neutral law of general applicability.

In recent years, the Roberts Court has turned jurisprudence with regards to these Clauses exactly backwards and on its head. The Court is essentially reading the Establishment Clause out of the Constitution, obliterating any notion of separation of church and state. At the same time, the Supreme Court is very aggressively protecting free exercise of religion.

We've seen this in the cases for the last several years. For example, in a series of decisions – *Trinity Lutheran Church of Columbia, Inc. v. Comer* in 2017, [32] *Espinoza v. Montana Department of Revenue* in 2020, [33] and *Carson v. Makin* in 2022,[34] the Supreme Court has said whenever the government subsidizes private secular education it is constitutionally required to subsidize religious education. Justice Sotomayor pointed out in her dissent in *Trinity Lutheran* that this was the first case in all of American history where the Supreme Court said the government was required to subsidize religion.

This is a dramatic change. For decades, the issue was when may the government give aid to religious schools without violating the Establishment Clause of the First Amendment. Now the issue is, when must the government give aid to religious schools, or it violates Free Exercise.

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31. 494 U.S. 872 (1990).
32. 137 S. Ct. 2012 (2017).
33. 137 S. Ct. 2012 (2017).
34. 142 S. Ct. 1987 (2022).

Take the decision from last term that came down on Monday, June 27th, *Kennedy v. Bremerton Schools*.[35] Joseph Kennedy was a High School football coach in Bremerton, Washington State. He made it a practice of going on to the fifty-yard line after games in kneeling and praying. Sometimes players on his team would join him; sometimes players and the other team would join. A parent complained. He said his son, a player on the football team is an atheist, and that he felt pressure to join the prayers or feared that he would get less playing time. The school asked coach Kennedy to stop going on the field and praying. He briefly complied, but then he began the practice of going under the field and delivering a Christian inspirational message that he described as a prayer. Sometimes he was joined by players of his team and the other team, sometimes even people from the stands would come down onto the field. The school put him on leave and gave him a poor performance evaluation.

Kennedy sued and argued that the school had violated his free exercise of religion and his freedom of speech. The lower courts ruled against Coach Kennedy. They stressed that for sixty years, without exception, the Supreme Court had held that prayer in public schools violates the Establishment Clause.

But the Supreme Court, in a six to three decision reversed. Justice Gorsuch wrote the opinion for the Court and that said the school had violated Kennedy's free exercise of religion and free speech rights. The implications are enormous. By definition, any restriction on prayer in schools limits the free exercise of religion and free speech rights of those who want to pray.

It is unclear how far will the Court go in this regard because this case did not involve school sponsored or initiated prayer. But it is also clear that it is likely that the majority of this Court would not find prayer in any forms unconstitutional in schools. It would not decide the cases the same way as they have been for the last sixty years.

Again, to see how dramatic this is as a change in the law: for sixty years the law was that prayer in public schools violates the Establishment Clause. Now, the Supreme Court is saying the restriction of prayer, at least in this context, violates free exercise and free speech. I think there will be many cases to come where the court has to clarify this line.

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35. 142 S. Ct. 2407 (2022).

There are a couple of cases on the docket this term that are quite important with regard to religion. *303 Creative LLC. v. Elenis*[36] was argued on Monday December 5th. It involves a woman in Colorado who owns a business of designing websites. She wants to now design websites for weddings, but she says because of her religious beliefs she doesn't want to design websites for same-sex weddings. She brought a suit for a declaratory judgment in federal court in Colorado to say that it's unconstitutional to apply the Colorado law to her business established and discriminating against her. The district court in the Tenth Circuit ruled against her. They said that the state has a compelling interest in stopping discrimination on the basis of sexual orientation and that the Colorado anti-discrimination law is constitutional as applied to her. She sought a review in the Supreme Court for both her free speech claim and her free exercise of religion claim.

Interestingly, the Supreme Court took only the Speech claim. I have a theory about this. In 2021 in *Fulton v. city of Philadelphia*[37] three justices – Alito joined by Thomas and Gorsuch – called for the overruling of *Employment Division v. Smith*. Two other justices, Barrett and Kavanaugh, said they were sympathetic to that but did not feel they needed to go that far with regard to the Philadelphia law. Had the Supreme Court taken the free exercise claim in *303 v. Elenis* it would then have had to face the question whether to overrule *Employment Division v. Smith*.

Although it won't happen in this case, I think there are five votes to overrule *Employment Division v. Smith* and to say that whenever the government burdens religion it's going to have to meet strict scrutiny. From the oral arguments, I think it is clear that Lori Smith is going to win. The Court is likely to say applying the anti-discrimination law to her violates her free speech rights.

I think the implications of this for the future are enormous. There is always a tension between liberty and equality. Any law that prohibits discrimination limits the freedom to discriminate. For well over a half century, the Supreme Court has made the choice that stopping discrimination is more important than protecting the freedom to discriminate. But now it is likely that the Supreme Court is going to say that the First Amendment protects freedom to discriminate. Where

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36. 6 F.4th 1160 (10th Cir. 2021), *cert. granted*, No. 21-476 (U.S. argued Dec. 5, 2022).

37. 141 S. Ct. 1868 (2021).

will the line to be drawn in the future? What about the landlord who says it violates my religious beliefs to rent property to an interracial couple? What about the employer who says it violates my religious beliefs to men and women in the same workplace and refuses to hire women? These are the issues that are sure to arise in the future.

The other case that's on the docket that I want to mention is a statutory case – so far I've been focusing on constitutional cases is *Groff v. DeJoy*.[38] Title VII of the 1964 Civil Rights Act prohibits employment discrimination based on race, sex, or religion. The question is what must an employer do in order to accommodate an employee's religious beliefs. In *Trans World Airlines, Inc. v. Hardison*[39] in 1977 the Supreme Court said that an employer doesn't have to do more than what would be a *de minimis* burden to accommodate religion. The issue in *Groff v. DeJoy* is whether the Court is going to overrule that. I predict it will and I predict it's going to impose much greater burdens on employers—private and public—to accommodate the religious beliefs of employees. But this too is going to lead to a lot of litigation in the future as to where the line is drawn.

The sixth and final area that I identified concerns voting and here I think the Supreme Court has been very much advancing the conservative the Republican political agenda. Think of the cases that have come down already. To go a bit before the current Roberts Court, I have to start the *Shelby County v. Holder*[40] in 2013 where the Supreme Court declared unconstitutional the pre-clearance provisions of the Voting Rights Act of 1965.

I regard the Voting Rights Act of 1965 as one of the most important laws adopted in my lifetime. One of the key things that it did was say for jurisdictions with a history of race discrimination of voting they would have to get pre-approval from the Attorney General or a panel of federal judges before significant change in election practices. When this was scheduled to expire in 2007 Congress held many hearings and compiled a lengthy a legislative record documenting the continuing need for this provision. Congress voted to extend it for another twenty-five years. The vote in the Senate was ninety-eight to nothing. Can you imagine the Senate today doing anything ninety-eight to nothing? And there are only thirty-two votes against it in the House Representatives.

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38. 35 F.4th 162 (3d Cir. 2022), *cert. granted*, No. 22-174 (U.S. argued Apr. 18, 2023).

39. 432 U.S. 63 (1977).

40. 570 U.S. 529 (2013).

President George W Bush signed it into the law. But in *Shelby County v. Holder* the Supreme Court declared the pre-clearance requirement unconstitutional.

Chief Justice Roberts writing for the Court said it violated the principle of equal State sovereignty; that Congress must treat all states the same. Since *Shelby County* we have seen many states putting in the voting restrictions that had been denied pre-clearance. After *Shelby County*, Black voter participation decreased for the first time since the Voting Rights Act was adopted in 1965.

In 2019, in *Rucho v. Common Cause*[41] the Supreme Court said that federal courts cannot hear challenges to partisan gerrymandering. This is when the legislature draws election districts to maximize seats for that political party. Justice Kagan, in her dissent, explained that partisan gerrymandering is an enormous threat to democracy. In a democracy it is supposed to be the voters who choose their elected officials. With partisan gerrymandering, it's the elected officials choosing their voters. But the Supreme Court said that challenges to partisan gerrymandering are non-justiciable political questions and can't be heard ever by the federal courts.

In July of 2021, the Court decided *Brnovich v. Democratic National Committee*.[42] This involves another provision of the Voting Rights Act, section two. It was amended in 1982 to say that state and local governments violate the law when they have election systems or practices that have a discriminatory impact against voters of color. In *Brnovich* the Supreme Court made it much more difficult to prove that state or local election rules violate section two of the Voting Rights Act.

Justice Alito, writing for the Court, identified five guideposts for determining if state or local regulations violate the law. One of these looks to the state's interest in preventing fraud. No matter how carefully you read the Voting Rights Act and how you carefully read the legislative history, there is nothing in it about balancing the state's interest in preventing fraud. The Supreme Court's decision will make it much harder to use section two of the Voting Rights Act to challenge the laws that have recently adopted that restrict absentee ballots or location of polling places and all sorts of other restrictions that limit voting.

41. 139 U.S. 2484 (2019).
42. 141 S. Ct. 2321 (2021).

The case that I am most worried about this term was argued on Wednesday, December 7: *Moore v. Harper*.[43] The question is whether the Supreme Court is going to adopt the independent state legislature theory and limit the ability of state courts to enforce state constitutions with regard to elections.

The cases that I quickly reviewed share something in common: they all very much help Republican voting interests. Minority voters – and especially Black voters – overwhelmingly vote Democratic. The reality is that not enforcing the Voting Rights Act helps Republicans. Likewise, because Republicans control the majority of the state legislatures, allowing partisan gerrymandering bestows a significant advantage on Republicans. It is not coincidental that each and every one of the cases I described was decided exactly along partisan lines, with every Republican appointed justice in the majority and every Democratic appointed justice in dissent.

Having described how the Roberts Court is advancing the conservative social and political agenda, I want to conclude by looking at its methodology.

I would identify three characteristics of its methodology. The first is the triumph of originalism.

Originalism is the view that the meaning of a constitutional provision is fixed when it is adopted and can be changed only by Amendment. For example, under originalism Article I means the same thing as it did in 1787; the First Amendment means the same thing as in 1791, the 14th Amendment means the same as in 1868.

It's not that long ago, in 1987, that Robert Bork was rejected for a seat on the Supreme Court because his originalist views were regarded as radical and dangerous. Bork was impeccably qualified to be a Supreme Court Justice. He had been a law professor at the University of Chicago and Yale and the Solicitor General of the United States. He was a judge on the D.C. Circuit when nominated for the Supreme Court. But more Senators voted against Bork's confirmation than against any other Supreme Court nominee in history. This was because of his originalist views: he had said that there is no right to privacy under the Constitution including for contraception and abortion, that there is, no protection for women against discrimination under equal protection, that there is no protection of speech other than political speech.

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43. 868 S.E.2d 499 (N.C. 2022), *cert. granted*, No. 21-1271 (U.S. argued Dec. 21, 2022).

At the time, that originalism was regarded as unacceptable. But now we have three justices who are self-avowed originalists: Clarence Thomas, Neil Gorsuch, and Amy Coney Barrett. The other three conservatives will often join originalist decisions or even write in originalist terms. The cases that I mentioned from last term reflect this. In *Dobbs*, the Supreme Court said the only rights to be protected are those in the text, part of the original meaning, or if there is a long unbroken tradition. In *Bruen*, the Court said that the only type of gun regulation to be allowed is that which was historically permitted. Or *Kennedy v. Bremerton Schools* where Justice Gorsuch says we determine what violates the Establishment Clause solely by looking what the founding fathers thought.

The second thing I would identify with regard to methodology is the Court's lack of adherence to precedent. *Stare decisis* meant nothing in this last term. *Roe v. Wade* was overruled in *Dobbs*. Also, in *Kennedy,* the Court overruled the *Lemon* test, which been used since 1971 to enforce the wall that separates church and state Those aren't the only examples of the Roberts Court overruling precedent. There is *Janus v. American Federation of State, County, and Municipal Employees*[44] with regard to the First Amendment, *Knick v. Township of Scott*[45] with regard to the Takings Clause, and *Franchise Tax Board of California v. Hyatt*[46] with regard to sovereign immunity. All overruled long-standing precedents. And this term there are the affirmative action cases where I predict the Court's going to overrule *Bakke* and *Grutter* and *Fisher*.

The third thing I'd identify methodologically for the Court is the lack of attention to the practical consequences of its decisions. Again think of the decisions from June 2022. With regard to *Dobbs*, it was the dissent that pointed out the practical implications of overruling *Roe* for women's lives. Or in the context of *West Virginia v. EPA*, Justice Kagan began her dissent by talking about the threat of climate change to the planet and all life on it. That got no mention of Chief Justice Roberts' majority opinion. Or in *Bruen*, the Second Amendment decision, Justice Breyer began by talking about the toll of gun violence in the United States in the recent mass shootings. That received no attention in Justice Thomas' opinion and was ridiculed in a concurring opinion by Justice Alito.

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44. 138 S. Ct. 2448 (2018).
45. 139 S. Ct. 2162 (2019).
46. 139 S. Ct. 1485 (2019).

So what of the future is we look ahead with regard to the Roberts Court? It is important here to focus on the ages of the conservative justices. Clarence Thomas is the oldest; he's seventy-four. Samuel Alito, seventy-two. John Roberts just recently turned sixty-eight. The three Trump-appointees Gorsuch, Kavanaugh, and Barrett all are still in their fifties. I've long thought that the best predictor of a long lifespan is being confirmed on the United States Supreme Court. Justice Stevens didn't retire until age ninety. Justice Ginsburg died the bench at age eighty-seven. It is easy to imagine these justices being together as a group for another decade or two. And if they time their retirements for when a Republican is in the White House, it will extend conservative control even further.

I think the bottom line as you reflect about the Roberts Court, is that if you're politically conservative this is a time to be jubilant. This is what conservatives have wanted for more than a half century: a solid staunch conservative majority of the justices. But if you're politically liberal, this is a time to be petrified about the future of constitutional law.