PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 34
Issue 5 *The Rookie Year of the Roberts Court & A Look Ahead*

Article 12

1-20-2007

Civil Rights

Erwin Chemerinsky

Civil Rights

Erwin Chemerinsky*

Thank you so much. It is really an honor and pleasure to be here as part of this wonderful symposium and as part of this distinguished group of scholars and journalists.

I believe we've now entered the era of the Anthony Kennedy Court. I know that the tradition, in deference to the Chief, would call it the Roberts Court, and no doubt there will be a point in time when it's appropriate to speak of a Roberts Court. We have to remember, though, that John Roberts was 50 years old when he was sworn in last fall. If he remains on the Court until he's 86 years old, the current age of Justice John Paul Stevens, he will be on the Court until the year 2041. How the Roberts Court is thought of is much more likely to be based on who the justices are in the 2020s and the 2030s, than who was on the Court's October term 2005.

I think in the current Court there are four very conservative justices, Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. There was only one instance last year where Chief Justice Roberts did not vote in what would be identified as the conservative result. There was not a single instance last year where Justice Alito did not vote in a conservative direction.

There are no liberals on the current Court in the mold of William Douglas, William Brennan, Thurgood Marshall, but there are four moderate liberal justices, and more often than not they vote together in 5-4 cases, and those would be Justices Stevens, Souter, Ginsburg, and Breyer. That so often leaves Anthony Kennedy in the middle.

---

* After earning a B.S. from Northwestern University and a J.D. from Harvard Law School, Mr. Chemerinsky practiced as a trial attorney with the United States Department of Justice, and at Dobrovir, Oakes & Gebhardt in Washington D.C. He then joined the faculty at DePaul College of Law from 1980-83, followed by a twenty-one year term teaching at the University of Southern California Law School, where he was the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science. Professor Chemerinsky joined the faculty of Duke Law School, where he is now the Alston & Bird Professor of Law and Professor of Political Science, in 2004.

Last year there were twelve 5-4 decisions.[2] Anthony Kennedy was the majority in eight,[3] more than any other justice. If you include the 5/3 decisions, Justice Kennedy's influence becomes even greater.[4] Justice Kennedy seems quite self-conscious about this role. In a number of the most important cases of the term where Justice Kennedy was in the majority in a five to four decision, he wrote a separate opinion that determined the scope of the holding. Speaking as a lawyer, who often writes briefs to the Court and occasionally argues them, I realize that now it is often a matter of arguing to an audience of one.

I am currently in the process of writing an amicus brief in two cases before the Supreme Court where the schools can use race in assigning students as part of achieving desegregation. My brief is a shameless attempt to pander to Justice Kennedy. If I could put his picture on the front of my brief, I would do so. And I do not think this case is atypical.

I have been asked to talk about civil rights and Doug has assigned me to talk about three free speech cases,[5] one religion case,[6] one abortion case,[7] and one criminal procedure case.[8] He said to do it in twenty minutes and find common themes that unite these cases. The only common thing that I could find in any of these cases is the petitioners won some and respondents won others.

---

2. Brown v. Sanders, 126 S. Ct. 884 (2006); Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006); Day v. McDonough, 126 S. Ct. 1675 (2006); Garcetti v. Ceballos, 126 S. Ct. 1951 (2006); Empire Healthchoice Assurance, Inc. v. McVeigh, 126 S. Ct. 2121 (2006); Hudson v. Michigan, 126 S. Ct. 2159 (2006); Rapanos v. United States, 126 S. Ct. 2208 (2006) (While Justice Kennedy voted with the majority in order to send the case back to the lower court, he proposed a standard much closer to that of the minority); Kansas v. Marsh, 126 S. Ct. 2516 (2006); United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006); League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006); Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006) (Justice Ginsburg, while concurring with the majority, joined the dissenters as to part II of their opinion); Clark v. Arizona, 126 S. Ct. 2709 (2006) (Justice Breyer filed an opinion concurring in part and dissenting in part; he joined the majority except as to parts III- B and III-C and the ultimate disposition).

3. *See Brown*, 126 S. Ct. at 887-88; *Day*, 126 S. Ct. at 1678; *Garcetti*, 126 S. Ct. at 1954; *Hudson*, 126 S. Ct. at 2161; *Rapanos*, 126 S. Ct. at 2214; *Marsh*, 126 S. Ct. at 2519; *Perry*, 126 S. Ct. at 2603; *Sanchez-Llamas*, 126 S. Ct. at 2673.

4. There were four 5-3 decisions last term: Georgia v. Randolph, 126 S. Ct. 1515 (2006); Jones v. Flowers, 126 S. Ct. 1708 (2006); House v. Bell, 126 S. Ct. 2064 (2006); and Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). Justice Kennedy wrote or joined the majority opinion in three of the four. *See Randolph*, 126 S. Ct. at 1518; *House*, 126 S. Ct. at 2068; *Hamdan*, 126 S. Ct. at 2758.

5. Garcetti v. Ceballos, 126 S. Ct. 1951 (2006); Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S. Ct. 1297 (2006); Beard v. Banks, 126 S. Ct. 2572 (2006).

6. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 126 S. Ct. 1211 (2006).

7. Ayotte v. Planned Parenthood of Northern New England, 126 S. Ct. 961 (2006).

8. United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006).

Let me start with the speech cases because there is a common theme of the free speech cases that I am going to talk about. Free speech lost last year in the Supreme Court. In all three of these free speech cases, the Supreme Court ruled in favor of the government and against the free speech claim. The case of these that I regard as the most important is *Garcetti v. Ceballos*.[9] Ceballos worked here in Los Angeles County as a deputy district attorney. He became convinced that a witness in one of his criminal prosecutions, a deputy sheriff, was not telling the truth. He investigated and wrote a memo to that effect. His supervisor said, "Tone down the memo. Don't be so critical of the deputy sheriff."[10]

The deputy district attorney turned over his memo to the defense lawyer. He thought that he was required to do so under *Brady v. Maryland*.[11] The deputy district attorney, according to his complaint, then suffered reprisals. He was removed from a supervisory position. He was transferred to a less desirable location. He brought a lawsuit saying that such reprisals violated his free speech rights.

The Supreme Court heard oral arguments in October and then put over the case for re-argument after Justice Alito replaced Justice O'Connor. They put over three cases last term.[12] All came out 5-4, all with the same Justices in the majority. In this case Justice Kennedy wrote the opinion for the court joined by Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito. Justice Kennedy held that speech by government employees in the performance of their duties is not protected by the First Amendment.[13] Justice Kennedy said there is a distinction when someone speaks as a citizen as compared to speaking as a government employee.[14] Justice Kennedy said the First Amendment only safeguards the former.[15]

The dissenting Justices pointed out that there could be three answers to this question. The Court could say speech by government employees in the performance of their duties is always protected, it could say that sometimes it is protected;[16] it could say that it is never protected. Justice Kennedy's answer is that it is never protected.[17]

Now, I could criticize the case based on its using a false distinction between talking as a citizen and talking as a government employee. Surely

---

9. 126 S. Ct. 1951 (2006).

10. *See id.* at 1971 (the author is paraphrasing the instructions of the supervisor).

11. 373 U.S. 83 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . .").

12. Garcetti v. Ceballos, 126 S. Ct. 1951 (2006); Hudson v. Michigan, 126 S. Ct. 2159 (2006); Kansas v. Marsh, 126 S. Ct. 2516 (2006).

13. *Garcetti*, 126 S. Ct. at 1960.

14. *Id.* at 1960-61.

15. *Id.*

16. *Id.* at 1962 (Stevens, J., dissenting).

17. *Id.* at 1960.

government employees do not give up their citizenship when they walk into the government office building. But to me there are real consequences of the case and why it is so misguided is that it is much less likely that wrongdoing will be exposed by government employees.

About six years ago when I was still living in Los Angeles, I was asked to do a report on the Los Angeles Police Department after the Rampart scandal. As part of that I interviewed between seventy-five and one hundred police officers. During these interviews, I repeatedly heard of a new phrase "freeway therapy." I was told by officers that if they filed complaints about wrongdoings by other officers, they would find themselves transferred to the precinct farthest from where they lived. So the officer down in the harbor area would find that he was transferred to the northernmost regions of the valley, a two-hour commute.

When the Christopher Commission wrote its report on the Los Angeles Police Department following the Rodney King beating in 1991, it said that the code of silence was the single greatest obstacle to dealing with problems of police abuse and police brutality.[18] The result of Justice Kennedy's opinion is that an officer who suffers from reprisals after reporting wrongdoing by other officers has no First Amendment protection at all. I think this case is not only a loss of free speech rights for millions of government employees, but it is really a loss for the general public, who are much less likely to learn of government misconduct.

The second speech case I was asked to talk about is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*[19] The American Association of Law Schools has long had a policy whereby its member schools do not allow employers to use law school career service offices if the employers discriminate on the basis of race, gender, religion, or sexual orientation. As a result of this policy, most law schools in the United States would not allow the United States military to use law school career service facilities. The reason for this is there is a federal statute that says that gays and lesbians are not allowed to serve in the military.[20] Law schools are treating the military like any other discriminatory employer.

Now, in reality the military could still recruit on campus. They could go to the ROTC building, they could go to a hotel across the street from the law school, but they couldn't use career service facilities. A representative from New York by the name of Gerald Solomon introduced a bill that said that if

18. Indep. Comm'n on the L.A. Police Dep't, Report of the Indep. Comm'n on the L.A. Police Dep't 168 (1991), *available at* http://www.parc.info/reports/pdf/chistophercommision.pdf.

19. 126 S. Ct. 1297 (2006).

20. 10 U.S.C. § 654 (2006).

any part of the university discriminates against the military, then essentially all the university will lose the entirety of its federal funds.[21] Although law schools do not get that much in the way of federal money, universities, especially those with medical schools, science departments, engineering schools, are very dependent on federal money. As a result, a group called the Forum for Academic and Institutional Rights, Inc. was formed to challenge the Solomon Amendment. I should disclose here that I am not only a member of the board of directors of the Forum for Academic and Institutional Rights, but I am also a named plaintiff in the lawsuit of *FAIR v. Rumsfeld*. I've had many roles in the almost thirty years since I graduated law school, but it was the first time that I was a plaintiff in a lawsuit.

I joined this suit as a plaintiff, and am on the board of directors for the Forum for Academic and Institutional Rights, because I think it is so important that all of our law school facilities be available to all of our students and that any employer that discriminates should not be allowed to use law school career service facilities, whether it is the United States military or a private law firm.

We won in the United States Court of Appeals for the Third Circuit.[22] The Third Circuit found that the Solomon Amendment was compelled speech by law schools, which forced law schools to convey messages from the military, perform posting announcements, sending emails, and allowing banners to be posted.[23] Additionally, the Third Circuit said this violated freedom of association from law schools, but law schools had an expressive message not to be anti-discriminatory which forced them to include employers that discriminated as violators.[24] The Supreme Court, in an eight to nothing decision, reversed the Third Circuit.

Chief Justice Roberts wrote the opinion for the Court here. He said first, with regard to compelled speech, this doesn't keep law schools, and their faculty and students, from expressing any message that they desire.[25] Law schools can still organize rallies and say anything they want to protest the military's exclusion of gays and lesbians.[26] Moreover, Chief Justice Roberts said that the freedom of association cases really had been about membership.[27] This does not involve membership at all.[28]

Now, if the Supreme Court were to follow *FAIR* in the future, I think this is a significant change of First Amendment doctrine. Never before has

21. 10 U.S.C. § 1983 (2006). This statute is known as the Solomon Amendment.

22. Forum for Academic & Institutional Rights v. Rumsfeld, 390 F.3d 219, 246 (3d Cir. 2004).

23. *Id.* at 236-37.

24. *Id.* at 230-35 (analyzing the three elements of expressive association as outlined in Boy Scouts of America v. Dale, 530 U.S. 640 (2000)).

25. Rumsfeld v. Forum for Academic & Institutional Rights, 126 S. Ct. 1297, 1307 (2006).

26. *Id.* at 1312-13.

27. *See id.*

28. *See id.*

the Supreme Court said that compelled speech is allowed so long as the compelled speaker can disagree with the message.

Think back to the most famous compelled speech case, *West Virginia Board of Education v. Barnette*,[29] where the Supreme Court said forcing children to salute the flag violates the First Amendment.[30] The Court did not say it is permissible so long as the kids can then object to the flag they saluted.

For example, in *Wooley v. Maynard*,[31] the Court declared unconstitutional a New Hampshire law requiring license plates that said "Live free or die."[32] The Court did not say, well, New Hampshire can require "Live free or die" license plates so long as drivers can have bumper stickers next to it saying they do not want that on their license plates. This is the first time the Supreme Court ever said that compelled speech was allowed—just because the speaker can disagree with the message. But I do not think this case is likely to be followed in the future. I think this is really a case about judicial deference to the military and congressional judgments about the military. At the very beginning of his majority opinion, Chief Justice Roberts put this case in that context.[33] There is a long judicial tradition—I think largely a tragic judicial tradition—of judicial deference to the military in wartime. I think here of cases like *Korematsu v. United States*[34] that involved Japanese internment during World War II. I think this is where that case fits.

One other free speech case I would mention is *Beard v. Banks*.[35] Pennsylvania has a regulation for its top security prisons. The prisoners are not allowed access to any newspaper, magazine, or photograph, including family photographs. The United States Supreme Court, in a 6-2 decision,[36]

29. 319 U.S. 624 (1943).

30. *Id.* at 633-34.

31. 430 U.S. 705 (1977).

32. *Id.* at 713.

33. Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 126 S. Ct. at 1297, 1306 (2006) (holding that Congress' power to raise an Army is "'broad and sweeping,'" and it includes "the authority to require campus access for military recruiters") (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

34. 323 U.S. 214 (1944). The *Korematsu* Court held that excluding persons of Japanese descent from the West Coast during World War II was within "the war power of Congress and the Executive[.]" *Id.* at 217-18.

35. 126 S. Ct. 2572 (2006).

36. Justice Alito took no part in the consideration or decision of the case. *Id.* at 2582.

upheld this as constitutional.[37] Justice Breyer wrote the opinion for the Court. Only Justices Stevens and Ginsburg dissented.[38]

Justice Breyer said that prisons can restrict prisoners' free speech rights so long as the prison's action is rationally related to legitimate penalogical objective.[39] Justice Breyer said the state argues that the prisoners in these facilities will have incentive for better behavior to get back the privilege of reading newspapers, magazines and having photographs, and so in order to give prisoners this incentive, the Court would defer to the prison authority.[40]

Justice Stevens, in dissent, objected and said to keep the prisoners from even having family photographs was a form of mind control unacceptable under the First Amendment.[41] And I would also note that Justices Scalia and Thomas wrote a separate concurring opinion because they thought that Justice Breyer's approach was not deferential enough. Justice Scalia and Thomas said they would eliminate judicial review of prisoner speech claims.[42]

There is one religion case that I have been asked to talk about. It is a case called *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal.*[43] It involves a very small religion that comes to the United States from the Brazilian rainforest. It has as a sacrament brewing a tea, and as part of that, a hallucinogenic substance is released, called DMT. It is banned under the Controlled Substance Act. According to the record, there are about 180 adherents to this religion in the United States.

Adherents to the religion brought a lawsuit against the Attorney General seeking a declaratory judgment that they had the right to use this substance and brew their tea pursuant to the Federal Religious Freedom Restoration Act.[44] In 1990, in a case called *Employment Division, Department of Human Resources of Oregon v. Smith,*[45] the Supreme Court very much narrowed the protections of the Free Exercise Clause. In 1993 Congress passed and President Clinton signed the Religious Freedom Restoration Act which tried to restore religious freedom by statute to what it had previously been under the Constitution. The statute says whenever the government significantly burdens religion, it has to show that its action is necessary to achieve a compelling government purpose,[46] which is referred to as strict scrutiny.

---

37. *Id.* at 2576.
38. *Id.* at 2585 (Thomas, J., concurring).
39. *Id.* at 2578.
40. *Id.* at 2578-79.
41. *Id.* at 2591 (Stevens, J., dissenting).
42. *Id.* at 2583 (Thomas, J., concurring).
43. 126 S. Ct. 1211 (2006).
44. 42 U.S.C. § 2000bb-1 (2000).
45. 494 U.S. 872 (1990).
46. 42 U.S.C. §20000bb-1(b) (2000).

In 1997, in *City of Boerne v. Flores*,[47] the Supreme Court declared unconstitutional the Religious Freedom Restoration Act as applied to state and local governments.[48] The Supreme Court said it exceeded the scope of Congress's power to regulate state and local governments under Section 5 of the Fourteenth Amendment.[49] But the issue has remained open as to whether the Religious Freedom Restoration Act still is constitutional as applied to the Federal Government. I think the Court implicitly answered that question in *O Centro*. In the unanimous case, the Supreme Court ruled against the federal government and in favor of the small religion.[50] Chief Justice Roberts wrote the opinion for the Court. Chief Justice Roberts said that the government has the burden of proof under the Religious Freedom Restoration Act both at the preliminary injunction stage and at trial.[51] He said that the government failed to show that prohibiting this religion from making this tea was really unnecessary to enforce the Controlled Substance Act.[52] It is unlikely that allowing a small religion to make this tea would really undermine federal law enforcement efforts.

I think this case is important because it indicates that the Court does treat the Religious Freedom Restoration Act as constitutional as applied to the federal government. I also think it shows that the Court is using a very robust, traditional form of strict scrutiny under the law.

The abortion case that I was asked to talk about is *Ayotte v. Planned Parenthood of Northern New England*.[53] It is the first time in American history the Supreme Court has ever been unanimous in an abortion case, and that should tell you the Supreme Court decided nothing. The case involved a New Hampshire law that required parental notification before an unemancipated minor could receive an abortion. In order for a doctor to perform an abortion without parental notification, in accordance with the Supreme Court precedent, the law says that the judge could approve the abortion either by finding it in the minor's best interests or by concluding that she is mature enough to decide for herself.

The United States Court of Appeals for the First Circuit declared the law unconstitutional.[54] The First Circuit said any law like this has to have a

47. 521 U.S. 507 (1997).
48. *Id.* at 536.
49. *Id.* at 516-17, 536.
50. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 126 S. Ct. 1211, 1216 (2006).
51. *Id.* at 1219.
52. *Id.* at 1224.
53. 126 S. Ct. 961 (2006).
54. Planned Parenthood of N. New England v. Heed, 390 F.3d 53, 65 (1st Cir. 2004).

health exception.[55] It has to allow a doctor to perform an abortion without either parental notification or judicial approval if the health of the minor warrants it.[56] For example, imagine if a girl comes to a doctor's office and she's hemorrhaging the law has an exception if her life is in danger. But there is no exception, if the doctor believes that her health would be in danger by waiting for either parental notification or judicial bypassing it. The First Circuit said that without such a health exception, the law is unconstitutional.[57]

The United States Supreme Court did not decide this issue. Instead, the Court, in an opinion by Justice Sandra O'Connor, sent the case back to the First Circuit. The Court asked the First Circuit to determine if it is possible to craft an injunction or declaratory judgment as to the unconstitutional parts of the law while allowing the rest to remain.[58]

Doug, in his introduction, talked about how the great unanimity, as shown by the statistics of this term, reveals Chief Justice Roberts' influence.[59] I think it reflects something else much simpler as evident in this case.

Sandra Day O'Connor participated in the oral argument calendars in October, November, December, and January. But she and her colleagues knew that she would only be allowed to participate in decisions if she was on the Court the day that the cases came down. So I think there was an extraordinarily large number of unanimous cases early on which were decided on very narrow grounds like *Ayotte*.

There are two abortion cases before the Supreme Court next term: *Gonzales v. Carhart*[60] and *Gonzales v. Planned Parenthood*.[61] They involve the constitutionality of the Federal Partial Birth Abortion Act. I predict that these will not be unanimous.

In fact, even though I learned long ago that he who lives by the crystal ball has to learn to eat ground glass—I will give you a prediction here. I predict that both of these cases will be 5-4 decisions with Justice Kennedy on the majority.

One more case I was asked to talk about, a criminal procedure case, is *United States v. Gonzalez-Lopez*.[62] What is most interesting about this case was the split among the Justices. It was a 5-4 decision with Justice Scalia writing joined by Justices Stevens, Souter, Ginsburg, and Breyer.[63] I do not

55. *Id.* at 60.
56. *Id.*
57. *Id.* at 62.
58. *Ayotte*, 126 S. Ct. at 969.
59. Douglas Kmiec, *Overview of the Term*, 34 PEPP. L. REV. 495 (2007).
60. 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (2006).
61. 435 F.3d 1163 (9th Cir. 2006), *cert. granted*, 126 S. Ct. 2901 (2006).
62. 126 S. Ct. 2557 (2006).
63. *Id.* at 2559.

think I can identify any other case where that was the split among the Justices. What was involved here was a man who was being tried in the federal court of Missouri on a drug crime. He had obtained a lawyer, but he wanted a lawyer from California to represent him. The California lawyer came to Missouri and applied for pro hac vice status, permission to appear in that particular case. The judge denied the lawyer pro hac vice status, saying that the lawyer violated an ethical rule.[64] The case went to trial, the defendant had another lawyer, and the defendant was convicted.

On appeal, the defendant argued that the lawyer of his choice had been wrongly denied pro hac vice status and that this violated his Sixth Amendment right to the counsel of his choice. The United States Supreme Court in a 5-4 decision agreed with the criminal defendant.[65] Justice Scalia said that the Sixth Amendment right to counsel includes a right to the counsel of one's choice.[66] Justice Scalia said it is undisputed that the district court made a mistake in denying the lawyer pro hac vice status. Justice Scalia said it was "structural error."[67] The conviction has to be overturned without any need for the defendant to show that he was prejudiced.[68] Justice Alito dissented and said that the defendant should have to prove prejudice, which was not shown.[69]

The holding is more limited than it might seem. Justice Scalia said he was only talking about defendants with retained counsel, those they could afford.[70] The case does not apply to defendants who have public defenders or appointed counsel. Also Justice Scalia said this does not limit the ability of courts to set their own rules for pro hac vice status.[71] This only applies when a court wrongly denies a lawyer pro hac vice status. And maybe what this case shows is no matter how hard you study the Supreme Court, you can not always predict what they are likely to do.

Thank you.

---

64. *Id.* at 2560. The district court had denied the lawyer's motion for pro hac vice because it found that in a prior case he had violated rule 4-4.2 of the Model Rules of Professional Conduct, by communicating with a party represented by counsel. *Id.*

65. *Id.* at 2566.

66. *Id.* at 2561.

67. *Id.* at 2564.

68. *Id.* at 2562-63.

69. *Id.* at 2571 (Alito, J., dissenting).

70. *Id.* at 2561.

71. *Id.* at 2566.

QUESTIONS BY GINA HOLLAND

GINA HOLLAND: Erwin, you started with Justice Kennedy, and he is the man we're all watching. I am wondering if he gave any clues this term as to how he will fulfill this center role, and how he might be in the next term, which might have even bigger cases.

ERWIN CHEMERINSKY: I think that is the key question. To me what was most significant is how often he chose to write separately when he was in the majority in a 5-4 decision to determine the scope of the majority's holding. Let me just quickly mention a few examples.

For example, I see the significance of *Hudson v. Michigan*[72] differently than Akhil.[73] I think Justice Scalia showed that there were four votes in that case to overrule the exclusionary rule because I think all of the arguments Justice Scalia makes are arguments for eliminating the exclusionary rule, not just for creating an exception for knock and announce cases.

Now, I am going to pause here and note that Chief Justice Roberts and Justice Alito joined this. Despite all of the discussion about precedent and super-duper precedent, they are willing to overrule *Mapp v. Ohio*,[74] decided in 1961, or *Weeks v. United States*,[75] decided in 1914.

Justice Kennedy writes separately in a concurring opinion in which he says, "The continued operation of the exclusionary rule . . . is not in doubt."[76] He is showing that he knows that the continued existence of the exclusionary rule depends on him.

Another case that illustrates this is *Rapanos v. United States*,[77] which involves whether the Federal Water Pollution Control Act applies to interstate wetlands. Justice Scalia writes for the four most conservative justices, Chief Justice Roberts, Justice Thomas, and Justice Alito.[78] Justice Kennedy concurs in the judgment and articulates a totally different test for when the government can regulate water pollution.[79]

In *Hamdan v. Rumsfeld*[80] Justice Kennedy again writes a separate opinion that determines which parts of Justice Stevens' opinion is by a majority.[81]

---

72. 126 S. Ct. 2159 (2006).
73. Akhil Reed Amar, *Criminal Justice*, 34 PEPP. L. REV. 521 (2007).
74. 367 U.S. 643 (1961).
75. 232 U.S. 383 (1914).
76. *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring).
77. 126 S. Ct. 2208 (2006).
78. *Id.* at 2212.
79. See *id.* at 2249 (Kennedy, J., concurring).
80. 126 S. Ct. 2749 (2006).
81. *See id.* at 2808-09 (Kennedy, J., concurring).

So to me, in answering your question, I think it shows that Justice Kennedy knows that he is often the swing vote. Now, what is that going to mean for the two abortion cases or the two school segregation cases? I think the only thing we know is that he is likely to be the swing vote.

MARCIA COYLE: I am wondering if as the swing vote he is going to be similar to Justice O'Connor in terms of crafting new standards. I mean, right now he has been writing in a way that sort of limits the scope of what a majority may be doing. But does he seem, in your opinion, to have that coming down the road as well?

ERWIN CHEMERINSKY: I think that is a terrific question. I think so. The *Rapanos* case that I briefly mentioned would be the example of that, whereas Justice Scalia's plurality opinion would be very narrow about when the Water Pollution Control Act applies. Justice Kennedy, concurring in the judgment, says he is going to articulate the test. The test is that Congress can regulate if there is a significant nexus to navigable waters.[82]

Now I think where we see the difference from the Roberts to the Rehnquist Court are those areas where Justice Kennedy is likely to be significantly more conservative than Justice O'Connor. And I think the three that I would point to are separation of church and state, abortion and affirmative action; two of the three are at least implicated cases for next term.

PROFESSOR KMIEC: Again, Kennedy's influence may be changed by Roberts' and Alito's jurisdictional efforts. On *Rapanos*, I know it is common to say that the narrowest ruling in *Rapanos* is Justice Kennedy's, as you just did. But it seems to me that, at least in some respects, Justice Kennedy's ruling is entirely different than the plurality's ruling and therefore the *Marks* Doctrine[83] is very difficult to apply and gives very little guidance to people who are trying to comply with the statute.

ERWIN CHEMERINSKY: It is not the first time I have said this, but I respectfully disagree with you.

PROFESSOR KMIEC: Why I did anticipate that?

---

82. *Rapanos v. United States*, 126 S. Ct. 2208, 2213 (2006).

83. The Marks Doctrine states that when no majority opinion is given, the holding of the Court is to be viewed as the position taken by the concurring members on the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 193 (1977).

ERWIN CHEMERINSKY: Just to put what Doug said in context, in *Marks v. United States*,[84] the Supreme Court said if there's no majority opinion, then the holding is the narrowest grounds on which the majority agrees.[85]

In *Rapanos*, the four dissenting Justices accepted authority of the Army Corps of Engineers to regulate purely interstate wetlands that connected through tributaries to interstate waters. Justice Kennedy would not go that far. He said he will allow the Army Corps of Engineers to regulate interstate waters so long as there is a significant nexus to navigable waters.[86]

Justice Scalia takes a very different approach. He said in order for a body of water to qualify as "navigable" under the statute, it has to be a permanent, standing body of water—rivers, lakes, oceans, and that's it. [87]

Now, I agree with you. What is a significant nexus to navigable waters is going to be very difficult for the lower courts to apply; but if I was, in a purely descriptive sense, having to advise lower court judges what the test is, I think that is the test that they have to use.

PROFESSOR KMIEC: Yes. Although, again, there is disagreement over what is an interstate navigable water. It's obviously a very different definition for the plurality than it is for Justice Kennedy. I see no overlap on that score.

AUDIENCE QUESTIONS FACILITATED BY PROFESSOR ROBERT PUSHAW

PROFESSOR PUSHAW: Erwin, in *Stenberg v. Carhart*,[88] as you know the Court held that states could not prohibit partial birth abortion. Professor Amar, as you probably know, argued that the majority unwisely took the most extreme pro-choice position and then told everyone who disagreed that they must obey while Congress and the majority of Americans refused to obey and passed the Partial Birth Abortion Ban Act[89].

Two questions about that. I agree with you that it is going to be a five to four opinion, but we would like you to get a little more specific. One preliminary question is, where does Congress get the power to ban partial birth abortion? What is the federal interest? The second, and more important question is, do you think the Supreme Court should uphold the law, especially because Congress found as a fact that partial birth abortions were never medically necessary?

---

84. 430 U.S. 188 (1977).
85. *See* supra *note* 83.
86. *Rapanos*, 126 S. Ct. at 2213.
87. *Id.* at 2225.
88. 530 U.S. 914 (2000).
89. 18 U.S.C. § 1531 (2000).

ERWIN CHEMERINSKY: Just so, again, everyone is on the same page, let me say a word about *Stenberg v. Carhart.*[90] It involved a Nebraska law that prohibited the procedure that is often referred to as "partial birth abortion." But I should say that even that phrase is contested. It is a phrase that was coined by opponents of abortion rights. Those who believe in abortion rights very much resist the phrase "partial birth abortion."

The Nebraska law prohibited the removal of the living fetus or a substantial part of the living fetus with the intent of ending the fetus's life. The Supreme Court in a 5-4 decision in June of 2000 struck the law down.[91] Justice Breyer wrote the opinion for the Court joined by Justice Stevens, Justice Souter, Justice Ginsburg and Justice O'Connor.[92]

Justice Breyer pointed out that there was no exception in the law to allow doctors to use the procedure that was in the best interest of the health of the woman.[93] Also, the federal district court had found as a matter of fact that at certain points of pregnancy, especially right before and after viability, this was often the safest form of abortion procedure.[94] To prevent the safest form of abortion procedure is an impermissible undue burden.[95] And finally, Justice Breyer said that though the statute was intended to prevent one particular abortion procedure, it was written in such a vague manner as to include many abortion procedures.[96]

Now, your two questions. The first is, what was Congress' authority to adopt the Partial Birth Abortion Act? I think that those on both sides probably believe that Congress has this authority pursuant to the Commerce Clause.[97] In fact, if you read the statute, it has a jurisdictional requirement[98] within it, but in addition the Supreme Court said, as recently as a year ago in *Gonzales v. Raich,*[99] that producing a commodity that is sold through interstate commerce is inherently something that can be regulated by Congress.[100] Likewise, doctors who are providing a service that is bought

90. 530 U.S. 914 (2000).
91. 18 U.S.C. §§ 918-19, 946.
92. *Id.* § 918.
93. *Id.* § 937-38.
94. Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1122-27 (D. Neb. 1998).
95. Stenberg v. Carhart, 530 U.S. 914, 938 (2000).
96. *Id.* at 939.
97. U.S. CONST. art. 1, § 8, cl. 3.
98. 18 U.S.C. § 1531(a) (2000).
99. 125 S. Ct. 2195 (2005).
100. *Id.* at 2205-06.

and sold through interstate commerce can be regulated by the Commerce Clause authority.

Second, what is the Supreme Court likely to do and what do I think they should do? I think this case is so important on many levels. I think it will show whether the Roberts Court really cares about precedent and stare decisis. As I alluded to, there was so much discussion, much of it in the context of abortion, about precedent, super-precedent, and super-duper precedent.

Well, *Stenberg v. Carhart* is right on point. It was decided six years ago. Will the Court follow precedent? What about Justice Kennedy? What is his view with regard to precedent going to be?

PROFESSOR KMIEC: Who has dissented?

ERWIN CHEMERINSKY: Justice Kennedy wrote a vehement, even a vitriolic, dissent in *Stenberg v. Carhart*.[101]

Now, let me say one other thing about Justice Kennedy and then answer the final part of the question.

Justice Kennedy has an interesting history on the Supreme Court with regard to abortion. When he first voted in an abortion case, *Webster v. Reproductive Health Services*,[102] in 1989, he joined Chief Justice Rehnquist and Justice White, the two dissenters in *Roe v. Wade*[103] in calling for the overruling of *Roe*.[104] When abortion came back into the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[105] we now know, thanks to Justice Blackmun's papers being publicly available, that Justice Kennedy voted to overrule *Roe v. Wade*.[106] But sometime between the conference where he voted that way and when the decision was publicly released, Justice Kennedy changed his mind and voted as the fifth vote in the 5-4 decision to reaffirm the essential holding of *Roe v. Wade*.[107]

As Doug just pointed out, in *Stenberg v. Carhart*, Justice Kennedy wrote a strong dissent, a vehement dissent saying he never thought his vote in *Casey* would mean upholding this.[108] What is he likely to do here?

---

101. *See* 530 U.S. 914, 956-979 (2000) (Kennedy, J., dissenting).

102. 492 U.S. 490 (1989).

103. 410 U.S. 113 (1973).

104. *Webster*, 492 U.S. at 498, 518 (explaining how the rigid trimester framework in *Roe* does not comport with the general principles of the Constitution).

105. 505 U.S. 833 (1992).

106. *See, e.g., Papers Reveal Roe v. Wade Almost Overturned: Blackmun's Records Unsealed on Fifth Anniversary of His Death*, http://www.cnn.com/2004/LAW/03/04/scotus.blackmun.papers.ap/index.html.

107. *Casey*, 505 U.S. at 860.

108. *See* Stenberg v. Carhart, 530 U.S. 914, 956-57 (2000) (Kennedy, J., dissenting).

Now, you allude here to the fact that Congress says as a matter of fact that it believed that partial birth abortion was never in the health interests of the woman, so the law didn't need to provide a health exception. I cannot think that is a matter of fact-finding by the Congress. I think the Congress is giving its opinion that it wants to have this law stand, so it says it believes this is never in the health interests of a woman. If this were allowed, Congress could overturn *Roe* by saying as a matter of fact that viability begins at conception.

The question is, will the Supreme Court say, as it did in *Roe v. Wade*, that it is for a woman and her doctor to decide what is in the health interests of the woman? Justice O'Connor wrote separately in *Stenberg v. Carhart* and said any partial birth abortion law has to have within its statute an exception for the health of the woman.[109] Or will the Court here defer to Congress, thus signaling its willingness to allow much more regulation of abortion? It is my opinion—I hope with all my heart that the Supreme Court will affirm *Stenberg v. Carhart* and say that abortion should be left to the woman and her doctor to decide.

PROFESSOR KMIEC: Let's try and find some common ground. In the religion area, you gave a very fine analysis of the *O Centro* case,[110] which, of course, was a statutory case, the application of RFRA in a federal context. The Court's change in personnel seems to me to be somewhat significant, or possibly significant, in terms of the interpretation of the Free Exercise Clause.[111] There was a significant disagreement between Justice Scalia and Justice O'Connor on the application of the Free Exercise Clause and whether or not a generally applicable neutral law could be subjected to strict scrutiny and require a compelling governmental interest. Justice O'Connor thought it could and should, and Justice Scalia, of course, in *Employment Division v. Smith*, says quite the opposite.[112]

With the departure of Justice O'Connor and the substitution of Justice Alito, who in his lower court rulings is significantly friendly to the free exercise of religion, do you think *Smith* is open for reconsideration?

ERWIN CHEMERINSKY: That's a good question. I read over 200 of Judge Alito's Third Circuit opinions, and the one area where he was less conservative than the Supreme Court was with regard to the free exercise of

109. *Stenberg*, 530 U.S. at 947-48 (2000) (O'Connor, J., concurring).

110. *See supra* notes 43-53 and accompanying text.

111. U.S. CONST. amend. I.

112. Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 886-87, 894 (1990).

religion. But I still cannot count five votes on the current Court that are likely to overrule *Employment Division v. Smith*, but perhaps they will do that, especially if Chief Justice Roberts were to take this position.

I think the place in religion where we are going to see the change is the Establishment Clause,[113] because I think here we now have five votes—Roberts, Scalia, Kennedy, Thomas and Alito—to allow much more government aid of religion, to allow much more religious involvement in government, and to overrule the test that's controlled the Establishment Clause since 1971.

PROFESSOR KMIEC: Seven Commandments instead of Five?

ERWIN CHEMERINSKY: I argued the Texas Ten Commandments case[114] in the Supreme Court, but I lost five to four. So I think there is some pain to the jokes and the subject associated with them.

But if you remember, in *McCreary County v. ACLU*[115] the Court voted five to four to invalidate the Kentucky Ten Commandments. The five were Stevens, Souter, Ginsburg, Breyer, and O'Connor. With Justice O'Connor being replaced by Justice Alito there is a likelihood of a major change in the case.

113. U.S. CONST. amend I.
114. Van Orden v. Perry, 545 U.S. 677 (2005).
115. 545 U.S. 844 (2005).

PROFESSOR KMIEC: We are now privileged to hear from Professor Elizabeth Garrett of the University of Southern California. Professor Garrett is one of the foremost experts in the analysis of cases dealing with the political system, and there were a number of those, dealing with gerrymandering, campaign finance, and applying the challenge to the McCain-Feingold Law. As Professor Garrett takes the podium, we will hear from the Chief Justice of the United States.

(Video clip shown)[1]

---

1. From Judge Roberts's Confirmation Hearings:

JUDGE ROBERTS: And that was the position that eventually prevailed. There was no disagreement...

SENATOR EDWARD KENNEDY: Judge Roberts, the effects test was the law of the land from the Zimmer case to the Mobile case. It was the law of the land. That was the law of the land that court after court decided about the impact of the effects test. The Mobile case changed the Zimmer case.

JUDGE ROBERTS: Well, Senator, you disagree...

SENATOR EDWARD KENNEDY: And what we were...

SENATOR ARLEN SPECTER: Let him finish his answer.

SENATOR EDWARD KENNEDY: OK. Well, I'd just like to get his -- whether the Zimmer case was not the holding on the rule of the law of the land prior to the Mobile case.

JUDGE ROBERTS: Well, this is the same debate that took place 23 years ago on this very same issue. And the administration's position -- you think the Supreme Court got it wrong in Mobile against Bolden.

SENATOR EDWARD KENNEDY: No, that's not what -- I think it was wrong, but I also think the law of the land, decided by the Supreme Court in the Zimmer case, upheld in court after court after court after court, was the effects test.

JUDGE ROBERTS: Well, the Supreme Court...

SENATOR EDWARD KENNEDY: That's...

SENATOR ARLEN SPECTER: Let him finish his answer, Senator Kennedy.

JUDGE ROBERTS: The point is -- and, again, this is revisiting a debate that took place 23 years ago...

SENATOR EDWARD KENNEDY: Well, I'm interested today of your view. Do you support the law that Ronald Reagan signed into law and that was co- sponsored...

JUDGE ROBERTS: Certainly.

SENATOR EDWARD KENNEDY: ... overwhelmingly...

JUDGE ROBERTS: Certainly, and the only point I would make -- this was the same disagreement and the same debate that took place then over whether the court was right or wrong in Mobile v. Bolden. And the point I would make is twofold, that those, like President Reagan, like Attorney General Smith, who are advocating an extension of the Voting Rights Act without change, were as fully committed to protecting the right to vote as anyone.

SENATOR EDWARD KENNEDY: Right. Could I...

SENATOR ARLEN SPECTER: Let him finish his answer, Senator Kennedy.

JUDGE ROBERTS: And the articulation of views that you read from represented my effort to articulate the views of the administration and the position of the administration for whom I worked, for which I worked 23 years ago.

SENATOR EDWARD KENNEDY: Well, after President Reagan signed it into law, did you agree with that position of the administration?

JUDGE ROBERTS: I certainly agreed that the Voting Rights Act should be extended. I certainly