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## Look Back at the Rehnquist Era and an Overview of the 2004 Supreme Court Term

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## Look Back at the Rehnquist Era and an Overview of the 2004 Supreme Court Term

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## **A LOOK BACK AT THE REHNQUIST ERA AND AN OVERVIEW OF THE 2004 SUPREME COURT TERM**

*Erwin Chemerinsky\**

I will speak about last Term's Court, and Professor Schwartz and I together will talk about the coming Term of the Court. Certainly nothing that occurred in the October 2004 Term was as dramatic or important as the announcement on July 1, 2005 that Sandra Day O'Connor was resigning, or the announcement on September 3, 2005 that William Rehnquist passed away.

From 1994, when Harry Blackmun retired and was replaced by Steven Breyer, until 2005 there were no vacancies on the Supreme Court. This was the second longest stretch in American history without any change in the composition of the Court.<sup>1</sup> Byron White served on the Supreme Court with distinction and said anytime there is a new Justice it is a different Court.<sup>2</sup>

Of course that has to be right; when you replace one in a group of nine you change the small group dynamics. Now there are two new Justices to come onto the Supreme Court, and starting this

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\* Professor Erwin Chemerinsky is the Alston & Bird Professor of Law. Professor Chemersinsky is a renowned federal constitutional law scholar and has published extensively in the area of constitutional law. This article is based on a transcript of remarks from the Seventeenth Annual Supreme Court Review Program presented at Touro Law Center, Huntington, New York.

<sup>1</sup> The longest stretch was from 1811 to 1823, part of John Marshall's Chief Justiceship.

<sup>2</sup> JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME

year we will have a very different Court. Thus, it does make sense to start a review of the 2004 Term by looking back at last year and more generally, the legacy of the Rehnquist Court.

## **I. THE THREE PHASES OF THE REHNQUIST COURT**

I think that there is a tendency to look at the Rehnquist Court as if it was the same from 1986, when Rehnquist was elevated to Chief Justice to the end of June of 2005. I suggest that there are three distinct phases of the Rehnquist Court.

### **A. The First Phase: 1986-1992**

The first phase of the Rehnquist Court was from 1986, when President Ronald Reagan elevated William Rehnquist to Chief Justice, to about 1992. This was a time of great judicial deference to the other branches of government.<sup>3</sup> Rarely during these Terms did the Supreme Court strike down any federal, state, or local law. To pick one Term as an example, in the October 1988 Term, the Supreme Court decided 162 cases, which is radically different than the seventy-six cases decided last year, or the seventy-three cases decided in the year before.

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COURT BECAME ITS MOST INFLUENTIAL JUSTICE 334 (2005).

<sup>3</sup> See, e.g., *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417-19 (1992); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992); *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring); *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 19 (1990); *Solorio v. United States*, 483 U.S. 435, 447-48 (1987); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 445-47 (1987); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 233-34 (1986); *Offshore Logistics, Inc., v. Tallentire*, 477 U.S. 207, 233 (1986). See also Erwin Chemerinsky, *Foreward: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989) (describing judicial deference during October Term 1988).

One of the most significant changes during the Rehnquist Court was the dramatic downsizing of the Supreme Court's docket, with a fifty percent reduction during the time Rehnquist was Chief Justice. No court dockets other than the Supreme Court went down more than fifty percent. During the October 1988 Term, the Supreme Court rendered 162 decisions, eighty of them were non-unanimous constitutional rulings.<sup>4</sup> In the eighty cases, the government lost only twice.<sup>5</sup> The Court struck down the Texas flag burning statute and the Richmond, Virginia affirmative action program.<sup>6</sup> In all of the other cases, the government prevailed.<sup>7</sup> Frequently, the Supreme Court declared the need for judicial deference to the elected branches of the government at all levels.<sup>8</sup>

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<sup>4</sup> See *The Supreme Court, 1988 Term – Leading Cases*, 103 HARV. L. REV. 394 (1989).

<sup>5</sup> See *Texas v. Johnson*, 491 U.S. 397, 420 (1989); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989).

<sup>6</sup> See *id.*

<sup>7</sup> See *supra* note 4.

<sup>8</sup> See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978)

While “[i]t is emphatically the province and duty of the judicial department to say what the law is,” it is equally – and emphatically – the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

*Id.* at 194 (quoting *Marbury v. Madison*, (1 Cranch) 137, 177 (1803)). See also *United States v. Nixon*, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”); *Turner v. Safley*, 482 U.S. 78, 85 (1987) (discussing the importance of judicial restraint in relation to the separation of powers doctrine).

## B. The Second Phase: 1992-2002

Next, I put the second phase of the Rehnquist Court from about 1992 to 2002. This was a time of great judicial activism.<sup>9</sup> I am skeptical of the phrase “judicial activism.” I think we all tend to use it to label the decisions we don’t like.

I believe it is possible to come up with a more neutral descriptive definition of judicial activism. We could agree that a court is being active when it is overruling precedent, or following precedent. It is active if it is striking laws down laws and is restraining if it is upholding laws. By this definition, *Brown v. Board of Education*<sup>10</sup> was judicial activism, but essential judicial activism. Between 1992 and 2002, the Rehnquist Court was as active as any Supreme Court in American history. Over this ten-year period the Supreme Court struck down federal statutes at the fastest annual rate of any Supreme Court in American history and was overturning precedent almost equal to that of any time in American history.

It was during this decade that the Supreme Court revised federalism as a limit on federal power by striking down federal laws.<sup>11</sup> In addition, the Court greatly narrowed the scope of Congress’ enforcement power under Section Five of the Fourteenth

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<sup>9</sup> See, e.g., Erwin Chemerinsky, *Spending Clause Symposium: Protecting the Spending Power*, 4 CHAP. L. REV. 89, 105 (2001) (“In the last decade, and particularly in the last five years, the five most conservative Justices on the Court have engaged in great judicial activism in limiting Congress’s powers, reviving the Tenth Amendment, and expanding sovereign immunity.”). See generally Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1074-75 (2001) (describing the frequency of Supreme Court invalidations of federal laws during this period).

<sup>10</sup> 347 U.S. 483 (1954).

<sup>11</sup> See *supra* note 9.

Amendment,<sup>12</sup> the Court revised the Tenth Amendment as a limit on federal power,<sup>13</sup> and the Court greatly expanded the scope of sovereign immunity.<sup>14</sup> During the Rehnquist period, the Supreme Court overturned some precedents, even very recent precedents.<sup>15</sup>

### C. The Third Phase: 2002-2005

Finally, I put the third phase of the Rehnquist Court from about 2002 to June 27 of 2005, the last day of the October 2004 Term. Over the last few years, the Rehnquist Court acted much more in the way that we would expect a moderate or progressive Court to act as compared to a conservative Court. For instance, a couple of years ago in a case called *Grutter v. Bollinger*,<sup>16</sup> the Supreme Court upheld affirmative action by colleges and universities.<sup>17</sup> The Court said that the colleges and universities have a compelling interest in

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<sup>12</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). But see *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004).

<sup>13</sup> See *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that under the Tenth Amendment, Congress cannot commandeer the state legislative process). But cf. Erwin Chemerinsky, *Is the Rehnquist Court Really that Conservative? An Analysis of the 1991-92 Term*, 26 CREIGHTON L. REV. 987, 989-90 (1993) (discussing that the Tenth Amendment could be used to invalidate federal laws).

<sup>14</sup> See *Alden v. Maine*, 527 U.S. 706, 758 (1999) (holding that state sovereign immunity predated the Eleventh Amendment and therefore, Congress cannot abrogate a state's immunity in the state's own courts). But see Erwin Chemerinsky, *Symposium on New Directions in Federalism: The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283 (2000) (criticizing the reasoning behind *Alden*).

<sup>15</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (overruling *Metro Broadcasting v. Fed. Comm'n Comm'n*, 497 U.S. 547 (1990)); *Payne v. Tennessee*, 501 U.S. 808, 829 (1991) (overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989) and *Booth v. Maryland*, 482 U.S. 496 (1987)); *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

<sup>16</sup> 539 U.S. 306 (2003).

<sup>17</sup> *Id.* at 343 (stating that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining educational benefits that flow from a diverse student body.").

establishing a diverse student body and therefore race may be used in admission decisions.<sup>18</sup> That same week in 2003, in *Lawrence v. Texas*,<sup>19</sup> the Supreme Court struck down a Texas law for private consensual same sex sexual activity.<sup>20</sup> In 2002 in *Atkins v. Virginia*,<sup>21</sup> the Supreme Court declared unconstitutional the death penalty for crimes committed by the mentally retarded.<sup>22</sup>

I spent a lot of time over the last few months thinking about the reasons for this shift in the Rehnquist Court. It is not explained by any change in the membership of the Justices. Ultimately, I have come to a simple explanation: it is easier to get one vote on the Supreme Court than it is to get two.

When William Brennan was on the Court, it is said that he began each Term by asking his new law clerks what is the most important principle of constitutional law. Some would guess judicial review, others would talk about separation of powers, and some might talk about individual rights. Brennan ultimately answered his own question by raising one hand and wiggling five fingers. The most important rule in this Court is it takes five votes to get a majority.

Over the last few years it seems that the Supreme Court has coalesced with three different Justices. There are the most conservative Justices: the late Chief Justice William Rehnquist, and

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<sup>18</sup> *Id.* at 328 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

<sup>19</sup> 539 U.S. 558 (2003).

<sup>20</sup> *Id.* at 578.

<sup>21</sup> 536 U.S. 304 (2002).

<sup>22</sup> *Id.* at 321 (“[S]uch punishment is excessive and that the Constitution ‘places a restriction on taking the life’ of a mentally retarded offender.”).



Justices Scalia, and Thomas. Over the last decade they put together ninety-five of all of the cases. Then there are the four moderate Justices: Justices Stevens, Souter, Ginsburg, and Breyer.

I intentionally used the label “moderate liberal” because I don’t think there is any Justice on the current Court as liberal as William Douglas or Thurgood Marshall. And then there are Justices O’Connor and Kennedy. To be sure, conservative is a more accurate label for them than liberal. In five-to-four decisions of the last decade Justices O’Connor and Kennedy agreed more with Chief Justice Rehnquist and Justices Scalia and Thomas than with Justices Stevens, Souter, Ginsburg, and Breyer.<sup>23</sup>

However, in the last few years, especially in the most high profile type of cases, Justices Stevens, Souter, Ginsburg, and Breyer have been more effective at getting Justices O’Connor or Kennedy on their side, than Chief Justice Rehnquist and Justices Scalia and Thomas have been at getting both on theirs.

Last Term, I argued two cases in the Supreme Court. One involved a Ten Commandments monument that sits between the Texas state capital and the Texas Supreme Court; it stood six foot high, three foot wide, right in the corner.<sup>24</sup> From the moment my

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<sup>23</sup> See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Buckhammon Board & Care Home, Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Weeks v. Angelone*, 528 U.S. 225 (2000); *Smith v. Robbins*, 528 U.S. 259 (2000); *Illinois v. Wardlow*, 528 U.S. 119 (2000) (Justice Stevens concurred in part and dissented in part); *Carter v. United States*, 530 U.S. 255 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (Justice Scalia dissented); *Calderon v. Thompson*, 523 U.S. 538 (1998); *McMillian v. Monroe County*, 520 U.S. 781 (1997); *Bd. of County Comm’rs of Bryan County v. Brown*, 520 U.S. 397 (1997).

<sup>24</sup> *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005).

client, Thomas Van Orden, called me and asked me to assert a petition to the time I stood before the Justices on March 2, 2005, I knew that the outcome was likely to depend on Sandra Day O'Connor's vote.

My brief was a shameless attempt to pander to Justice O'Connor and I was disappointed when I persuaded Justice O'Connor yet still lost five-to-four.<sup>25</sup> That case, *Van Orden v. Perry*,<sup>26</sup> was the exception. There were many cases decided last Term that came out five-to-four, with either Justice O'Connor or Kennedy joining together with Justices Stevens, Souter, Ginsburg, and Breyer to create the majority.

Now, I will review the many, major, high profile cases from this Term, which fit the description on account of the Rehnquist Court.

## II. IMPORTANT CASES FROM THE 2004 TERM

The criminal procedure cases include *Rompilla v. Beard*,<sup>27</sup> and *Roper v. Simmons*.<sup>28</sup> *Rompilla* dealt with the issue of ineffective assistance of counsel. The Supreme Court, in this very important decision that involved the death penalty, found ineffective assistance of counsel.<sup>29</sup> This case was a five-to-four decision.<sup>30</sup> Justice Souter

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<sup>25</sup> *Id.* at 2857. Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, and Breyer formed the majority. *Id.* at 2858. Justices Ginsburg, O'Connor, Souter, and Stevens formed the dissent. *Id.* at 2873, 2891.

<sup>26</sup> 125 S. Ct. 2854 (2005).

<sup>27</sup> 125 S. Ct. 2456 (2005).

<sup>28</sup> 543 U.S. 551 (2005).

<sup>29</sup> *Rompilla*, 125 S. Ct. at 2463 (relying on the fact that "the lawyers were deficient in failing to examine the court file on Rompilla's prior conviction.").

<sup>30</sup> *Id.* at 2459. Justices Souter, Stevens, O'Connor, Ginsburg, and Breyer formed the

wrote the opinion for the Court and was joined by Justices Stevens, Ginsburg, Breyer, and O'Connor.<sup>31</sup>

In *Roper v. Simmons*.<sup>32</sup> In *Roper*, the Court held that the death penalty for crimes committed by juveniles constituted cruel and unusual punishment.<sup>33</sup> It was one of the most high profile and important decisions of the Term. Justice Kennedy wrote the opinion for the Court and was joined by Justices Stevens, Souter, Ginsburg, and Breyer.<sup>34</sup>

Another major topic handled by the Court last Term dealt with the First Amendment; more specifically, religion and the Ten Commandments. *McCreary County v. ACLU*,<sup>35</sup> involved a county in Kentucky that passed a resolution to clergy of the Christian nation, stating that the Ten Commandments be posted in county buildings.<sup>36</sup> Not surprisingly the American Civil Liberties Union of Kentucky brought a challenge to the display, after which the county adopted other resolutions stating that wherever the Ten Commandments were present, there would be nine other displays of the same size.<sup>37</sup> All of the displays were about the importance of religion in American history.<sup>38</sup> One display had the words "In God We Trust," another of

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majority. Justices Kennedy, Scalia, Thomas, and Chief Justice Rehnquist formed the dissent. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 543 U.S. 551 (2005).

<sup>33</sup> *Id.* at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); see U.S. CONST. amend. VIII; U.S. CONST. amend. XIV, § 1.

<sup>34</sup> *Rompilla*, 125 S. Ct. at 554.

<sup>35</sup> 125 S. Ct. 2722 (2005).

<sup>36</sup> *Id.* at 2728.

<sup>37</sup> *Id.* at 2729.

<sup>38</sup> *Id.*

the religious language in the Declaration of Independence. The Supreme Court, in a five-to-four decision, declared the displays unconstitutional.<sup>39</sup> Justice Souter wrote the opinion for the Court joined by Justices Stevens, Ginsburg, Breyer, and O'Connor.<sup>40</sup>

The third major topic dealt with by the Court last Term was the topic of federalism. In *Gonzales v. Raich*,<sup>41</sup> federal authorities caught one of the respondents with six homegrown marijuana plants.<sup>42</sup> The respondents then brought suit claiming that they used the marijuana to alleviate the ill effects of their medical conditions.<sup>43</sup> California is one of the few states where there is an exemption to state marijuana law for medical uses of marijuana.<sup>44</sup> However, there was no exemption to the federal law for medical use of marijuana; marijuana remains a Schedule-1 Controlled Substance.<sup>45</sup>

Angela Raich brought suit for declaratory judgment arguing that Congress lacked the authority under the Commerce Clause to criminally prohibit cultivation and possession of small amounts of marijuana for medicinal purposes.<sup>46</sup> The Supreme Court, in a six-to-three decision, upheld the federal statute, rejecting Raich's argument.<sup>47</sup> There were five Justices that joined the majority. Justice Stevens wrote the opinion for the majority, and was joined by

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<sup>39</sup> *Id.* at 2745 (holding that the plaintiff's third display had a "predominantly religious purpose" in violation of the Establishment Clause).

<sup>40</sup> *McCreary County*, 125 S. Ct. at 2727.

<sup>41</sup> 125 S. Ct. 2195 (2005).

<sup>42</sup> *Id.* at 2200.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2198-99; see CAL. HEALTH & SAFETY CODE § 11362.5 (West 2005).

<sup>45</sup> *Raich*, 125 S. Ct. at 2204; see 21 U.S.C.A. § 812 (West 2005).

<sup>46</sup> *Raich*, 125 S. Ct. at 2200, 2204-05.

<sup>47</sup> *Id.* at 2201.

Justices Souter, Ginsburg, Breyer, and Kennedy.<sup>48</sup>

Eminent domain was another major topic dealt with by the Supreme Court last Term in *Kelo v. City of New London, Connecticut*.<sup>49</sup> New London, Connecticut is an economically depressed city with an unemployment rate twice the state average and significant population attrition.<sup>50</sup> The city, in an attempt to foster new economic development, created a private economic development corporation.<sup>51</sup> That entity targeted an area of the city for new growth.<sup>52</sup> The corporation set out to buy property from the owners in order to sell to entities such as Pfizer, as Pfizer was going to come in and create over 1,000 new jobs. For the most part, people who lived in those areas were willing to sell.<sup>53</sup> However, a few property owners were more reluctant to do so.<sup>54</sup>

In response to the reluctant property owners, the city used its eminent domain authority to take the property and pay them just compensation.<sup>55</sup> Some of those who did not want to sell were attractive as plaintiffs. One of the plaintiffs included a woman who lived in her house since 1918 and did not want to move.<sup>56</sup> The Constitution permits the government to take private property for public use.<sup>57</sup> The plaintiffs argued that taking property from one

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<sup>48</sup> *Id.* at 2197-98.

<sup>49</sup> 125 S. Ct. 2655 (2005).

<sup>50</sup> *Id.* at 2658.

<sup>51</sup> *Id.* at 2658-59.

<sup>52</sup> *Id.* at 2659.

<sup>53</sup> *Id.* at 2660.

<sup>54</sup> *Kelo*, 125 S. Ct. at 2660.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> U.S. CONST. amend. V, states in pertinent part: “[P]rivate property [shall not] be taken

private owner and giving it to another private owner was not a “taking” as contemplated by the Constitution.<sup>58</sup>

In a five-to-four decision, Justice Stevens wrote the opinion for the Court and sided with the government, holding that the taking was valid because it was for public use.<sup>59</sup> Justices Souter, Ginsburg, Breyer, and Kennedy joined Justice Stevens’ majority opinion.<sup>60</sup> Justice Stevens stated that based on precedents a half-century-old, a “taking” is for public use as long as the government acts out of a reasonable belief that the taking will benefit the public.<sup>61</sup> Justice Stevens said the city was acting on the belief this would create thousands of new jobs and economic growth, which was enough to meet the standard for public use.<sup>62</sup>

### III. THE DOCKET FOR THE 2005 TERM

PROF. SCHWARTZ: Now, we will look at the cases currently on the docket for the upcoming Term. When looking at the array of cases included in the new docket for the 2005 Term for which certiorari has been granted, it appears that the categories of cases remain fairly constant. The docket includes: speech cases, religion cases, federalism cases, and certain criminal procedure cases,

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for public use, without just compensation.”

<sup>58</sup> *Kelo*, 125 S.Ct. at 2660.

<sup>59</sup> *Id.* at 2665.

<sup>60</sup> *Id.* at 2657-58.

<sup>61</sup> *Id.* at 2663; *see also* *Berman v. Parker*, 348 U.S. 26 (1954) (holding that property may be taken under the doctrine of eminent domain to redevelop land, in order to eliminate the conditions which cause slums).

<sup>62</sup> *Id.* at 2665.

seven of which involve the death penalty.<sup>63</sup> While the categories are fairly predictable, the issues within the categories are not.

## A. Abortion

### 1. *Ayotte v. Planned Parenthood of Northern New England*

PROF. SCHWARTZ: The case on this year's docket that has received the most media attention is *Ayotte v. Planned Parenthood of Northern New England*, the New Hampshire abortion case.<sup>64</sup> Before we discuss the case, I have one procedural question. As I understand it, the case was brought before the New Hampshire law was even enacted. Does the fact that the law was not in effect at the time suit was brought create a controversy issue?

PROF. CHEMERINSKY: Your question invokes the ripeness doctrine, which states that if somebody is going to bring a challenge to a law before it is in effect, it has to meet the ripeness burden.<sup>65</sup> If the law is certain to go into effect, then there is a standard for

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<sup>63</sup> See *McCreary County*, 125 S. Ct. 2722 (holding that a display of the Ten Commandments at a county courthouse violated the First Amendment because its purpose was to promote a religious message); *Van Orden*, 125 S. Ct. 2854 (holding that a display of a monument inscribed with the Ten Commandments at the Texas State Capitol did not violate the Establishment Clause); *Raich*, 125 S. Ct. 2195 (holding that application of the Controlled Substances Act to intrastate users and growers of medicinal marijuana did not violate the Commerce Clause); *Brown v. Sanders*, 126 S. Ct. 884 (2006) (holding that the death penalty was constitutional even where the jury considered invalid eligibility factors).

<sup>64</sup> 126 S. Ct. 961 (2006).

<sup>65</sup> In *Abbott Laboratories v. Gardner*, the Supreme Court stated that in deciding whether a case is ripe, it will consider "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. 136, 149 (1967). See also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 104 (2d ed. 2002) ("The more a plaintiff can demonstrate substantial hardship to a denial of pre-enforcement review, the more likely a federal court is to find ripeness.").

judgment before it goes into effect.<sup>66</sup>

In this case, the particular legislation adopted by New Hampshire required that before an underage minor can obtain an abortion, notice must be given to her parents.<sup>67</sup> There is a “judicial bypass” exception in the legislation that allows the minor to obtain approval from a judge without parental notice, if it can be shown that either the minor is mature enough to decide herself, or it is in the best interest of the minor to have an abortion.<sup>68</sup> Seemingly, this is consistent with the well-established Supreme Court precedent which permits a state to require parental notice and consent for an underage minor’s abortion, so long as the state creates an alternative procedure where a minor can obtain an abortion by going before a judge, and the judge decides it is in the minor’s best interest.<sup>69</sup> In addition, under the New Hampshire statute, a minor can obtain an abortion where the abortion is necessary to prevent death.<sup>70</sup>

The First Circuit Court of Appeals declared the New

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<sup>66</sup> See CHEMERINSKY, *supra* note 65, at 107.

<sup>67</sup> Parental Notification Prior to Abortion Act, N.H. REV. STAT. ANN. §§ 132:24-132:28 (Supp. 2004); see *Ayotte*, 126 S. Ct. at 964 (“The Act prohibits physicians from performing an abortion on a pregnant minor (or a woman for whom a guardian or conservator has been appointed) until 48 hours after written notice of the pending abortion is delivered to her parent or guardian.”).

<sup>68</sup> N.H. REV. STAT. ANN. §§ 132:26 (II).

<sup>69</sup> See, e.g., *Bellotti v. Baird* (II), 443 U.S. 622, 643 (1979) (holding that states requiring the consent of parents to abortions upon minors must afford minors an alternative opportunity for authorization of the abortion (“judicial bypass”) where the minor may demonstrate that either she is mature and well enough informed to make her own abortion decision, or if not mature, that the abortion would nonetheless be in her best interests); *Planned Parenthood Ass’n of Kansas City v. Ashcroft*, 462 U.S. 476, 493 (1983) (upholding requirement that a minor obtain either parental consent or a judicial waiver); *Hodgson v. Minnesota*, 497 U.S. 417, 450 (1990) (invalidating a Minnesota law requiring a two-parent notification without a procedure for judicial bypass of the notice requirement).

<sup>70</sup> N.H. REV. STAT. ANN. §§ 132:26 (I)(a).



Hampshire law unconstitutional on two grounds.<sup>71</sup> First, the court said there is no health exception in the statute.<sup>72</sup> Under the statute, a doctor is not permitted to perform an abortion without parental notification, even if the health of the minor was at stake.<sup>73</sup> Second, the First Circuit found that the statute provided no protection for the doctor who reasonably, but erroneously, believed that an abortion was necessary to prevent the death of a minor.<sup>74</sup>

There is long-standing Supreme Court precedent that says a statute should be declared facially unconstitutional only if “no set of circumstances exists under which the Act [statute] would be valid.”<sup>75</sup>

Recently in the abortion area, the Supreme Court established that a law should be struck down if it creates an undue burden for some women to get an abortion.<sup>76</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>77</sup> the Court struck down a Pennsylvania law that required parental and spousal notification for abortions.<sup>78</sup> The Court found that the requirement of obtaining spousal notification was an undue burden for some women.<sup>79</sup>

In the most recent abortion case, *Stenberg v. Carhart*,<sup>80</sup> the Court struck down a Nebraska statute, which banned partial birth

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<sup>71</sup> *Ayotte*, 126 S. Ct. at 965.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 965-66.

<sup>75</sup> *United States v. Salerno*, 481 U.S. 739, 745 (1987) (holding that the Bail Reform Act of 1984 was not facially unconstitutional).

<sup>76</sup> *See, e.g., Hodgson*, 497 U.S. at 450; *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992); *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>77</sup> 505 U.S. 833 (1992).

<sup>78</sup> *Id.* at 887-90.

<sup>79</sup> *Id.* at 892-95.

<sup>80</sup> 530 U.S. 914 (2000).

abortions. The Court held that because the procedure, in some circumstances, would be beneficial for health reasons, the statute banning partial birth abortions altogether created an undue burden for some women.<sup>81</sup> The underlying issue in abortion cases, which makes them so important, is whether the abortion law should be struck down if it creates an undue burden for some women, or should it only be struck down facially if there are no reasonable circumstances that can be constitutionally applied? This is going to be key for all of the abortion cases that come before the Court.<sup>82</sup>

## 2. Scheidler v. National Organization for Women, Inc.

Another abortion case in front of the Court this Term is *Scheidler v. National Organization for Women, Inc* (“NOW”),<sup>83</sup>

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<sup>81</sup> *Id.* at 938.

<sup>82</sup> On January 18, 2006, the Supreme Court decided *Ayotte v. Planned Parenthood of New Hampshire*, 126 S. Ct. 961 (2006). *Ayotte* was a unanimous decision with Justice O'Connor writing for the Court. In refining the issue before the Court, Justice O'Connor first stated that the issue was not the constitutionality of the New Hampshire abortion law, but rather it was whether the statute should have been invalidated *in toto*. *Id.* at 969. Justice O'Connor noted that when “confronted with a constitutional flaw in a statute [the Court prefers to] . . . enjoin only the unconstitutional applications of [the] statute while leaving other applications in force.” *Id.* at 967 (citations omitted). Therefore, the lower court erred when it invalidated the entire statute without considering whether it was possible to save any portion of it. *Id.* at 969.

Interestingly, the Court stated that it was “understandable” that the lower court invalidated the law in full, given the Supreme Court’s precedent in cases such as *Stenberg* where a law, also lacking a health exception, was found to be unconstitutional and was invalidated by the Court in its entirety. *Id.* The Court explained that “The parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn.” *Id.* (emphasis added).

The Court instructed the lower court to decide whether the legislature intended the statute to be open to such a remedy, and with this legislative intent in mind, the lower court could either invalidate the statute in full, or enjoin the unconstitutional application of the New Hampshire abortion law. *Id.*

<sup>83</sup> 396 F.3d 807 (7th Cir. 2005), *cert. granted*, 125 S. Ct. 2991 (2005), *rev’d*, No. 04-1244. 2006 U.S. LEXIS 2022 (Feb. 28, 2006).

which involves the Racketeer Influenced and Corrupt Organizations Act (“RICO”) statute.<sup>84</sup> Nineteen years ago, in *NOW v. Scheidler*, the National Organization for Women and Reproductive Health Clinics brought a lawsuit against Operation Rescue for its violent activities in obstructing access to reproductive health clinic.<sup>85</sup>

In 1998, a jury in Chicago found 121 counts of predicate acts of Operation Rescue and its leaders blocking access to abortion clinics.<sup>86</sup> The judge awarded money damages based on the jury verdict, and after additional evidence, imposed a nationwide injunction against Operation Rescue and its officials.<sup>87</sup> Twenty-one of the 121 counts were for extortion under the Hobbs Act, the federal

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<sup>84</sup> 18 U.S.C. §§ 1961-1968.

<sup>85</sup> *NOW v. Scheidler*, 510 U.S. 249, 256-62 (1994) (holding that the non-economic racketing offenses alleged by petitioners properly stated a claim against respondent under the RICO statute because the statute did not require an economic purpose or motivation).

<sup>86</sup> *NOW, Inc. v. Scheidler*, 267 F.3d 687, 695 (7th Cir. 2001).

[T]he jury found in response to special interrogatories that the defendants or others associated with [Pro-Life Action Network] committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 acts of conspiracy to violate federal or state extortion law, four acts or threats of physical violence, 23 violations of the Travel Act, and 23 attempts to commit one of these crimes.

*Id.*

<sup>87</sup> *Id.*

The jury awarded damages to both clinics; once the damages were trebled, as RICO requires, the awards totaled over \$163,000 to Summit Women's Health Organization and over \$94,000 to Delaware Women's Health Organization.

After the jury returned its verdict, the district court held three days of additional hearings and then entered a permanent, nationwide injunction prohibiting the defendants or those acting in concert with them from interfering with the rights of the class clinics to provide abortion services, or with rights of the class women to receive those services, by obstructing access to the clinics, trespassing on clinic property, damaging or destroying clinic property, or using violence or threats of violence against the clinics, their employees and volunteers, or their patients.

*Id.*

statute that prohibits extortion, robbery, or physical violence in interstate commerce.<sup>88</sup>

In 2003, in *Scheidler v. NOW*,<sup>89</sup> the Supreme Court reversed 117 of the 121 counts that were based on extortion.<sup>90</sup> The Supreme Court said extortion requires that the extorter expect personally to receive something of value.<sup>91</sup> The Court found that Operation Rescue did not expect to receive something of value, so there was no extortion.<sup>92</sup> The Supreme Court sent the case back to the Seventh Circuit.<sup>93</sup>

In January 2005, the Seventh Circuit said that the jury found four counts of violence or threats of violence to interstate commerce and those had nothing to do with extortion.<sup>94</sup> The Seventh Circuit sent the case back to the district court for a determination of “whether the four predicate acts involving ‘acts or threats of physical violence to any person or property’ [were] sufficient to support the nationwide injunction that it imposed,” and for an interpretation of the language of the Hobbs Act.<sup>95</sup> Operation Rescue sought review by the Supreme

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<sup>88</sup> *Id.*

<sup>89</sup> 537 U.S. 393 (2003), *rev'd en banc*, 396 F.3d 807 (7th Cir. 2005).

<sup>90</sup> *Id.* at 409.

<sup>91</sup> *Id.* at 405.

<sup>92</sup> *Id.*

Petitioners neither pursued nor received ‘something of value from’ respondents that they could exercise, transfer, or sell. To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.

*Id.* (citations omitted).

<sup>93</sup> *Id.* at 411.

<sup>94</sup> *NOW, Inc. v. Scheidler*, 396 F.3d 807, 811 (7th Cir. 2005).

<sup>95</sup> *Id.*

Court, and certiorari was granted on June 28, 2005.<sup>96</sup> The case is about the Hobbs Act, violence or threats of violence to interstate commerce, and whether there can be injunctive review of Civil RICO.<sup>97</sup> Furthermore, there is very much a First Amendment backlash to this case, which asks to what extent does the First Amendment protect violent protest activity.

## B. First Amendment

PROF. SCHWARTZ: If you try to rank the important and visible cases in front of the Court this Term, the campaign finance cases should be next. These cases evaluate the power of the government to place restrictions not only on campaign contributions, but also on campaign spending and ask whether those restrictions violate the First Amendment. It appears that these may be the next

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<sup>96</sup> *Scheidler v. NOW, Inc.*, 125 S. Ct. 2991 (2005); *Operation Rescue v. NOW, Inc.*, 125 S. Ct. 2991 (2005).

<sup>97</sup> On February 28, 2006 the Supreme Court decided *Scheidler v. NOW*, No. 04-1244, 2006 U.S. LEXIS 2022 (Feb. 28, 2006). The Supreme Court in an eight-to-zero opinion (Justice Alito did not take part in the decision) reversed the Ninth Circuit and held that physical violence, unrelated to extortion, falls outside the scope of the Hobbs Act. *Id.*, at \*4.

The Court granted certiorari to consider three issues. First, whether the Court of Appeals erred when holding that the injunction issued by the district court might not need to be vacated. Second, whether the Hobbs Act forbids violent conduct unrelated to extortionate activity. Finally, whether RICO authorizes a private party to obtain an injunction. *Id.*, at \*12. The Court never addressed the first or third issues and only decided the second issue: whether the phrase in the Hobbs Act, “[I]n furtherance of a plan or purpose to do anything in violation of this section,” refers to a “plan or purpose simply to affect commerce,” or whether the violence must further a plan or purpose to “affect commerce by robbery or extortion”? *Id.*, at \*12 (internal quotations omitted).

The Court found that Congress intended the phrase to refer to violence that furthers a plan or purpose to affect commerce by robbery and extortion. *Id.* The Court reasoned that a holding otherwise would “federalize ordinary criminal behavior, ranging from simple assault to murder,” behavior, which “typically is the subject of state, not federal prosecution.” *Id.*, at \*20. Therefore, the Court concluded that since the Hobbs Act did not encompass violent conduct unrelated to extortion or robbery, the conduct of the petitioners could not form the basis of a claim under the Hobbs Act. *Id.*, at \*24. The case was reversed and remanded to the lower court with instructions to enter judgment for the petitioners. *Id.*

major free speech cases with the new Court.

1. Vermont Republican State Committee v.  
Sorrell and Wisconsin Right to Life, Inc. v.  
Federal Election Commission

PROF. CHERMERINSKY: There are two campaign finance cases in front of the Court this Term, and certiorari was granted in both on September 27, 2005.<sup>98</sup> One comes out of Vermont<sup>99</sup> and the other out of Wisconsin.<sup>100</sup> They involve the constitutionality of contribution limits imposed by the Vermont state government, which imposed limits by the federal government on spending by corporations, especially directed at ideologically oriented corporations.<sup>101</sup>

In recent years the Supreme Court has voted five-to-four to uphold campaign finance regulations.<sup>102</sup> In *McConnell v. Federal Election Commission*, the Supreme Court upheld the McCain-Feingold Bipartisan Campaign Finance Reform Act of 2002 in a five-to-four decision.<sup>103</sup> Justices Stevens and O'Connor jointly wrote the majority opinion, and were joined by Justices Souter, Ginsburg, and

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<sup>98</sup> *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2002), *cert. granted, rev'd sub. nom.* Vt. Republican State Comm. v. Sorrell, 126 S. Ct. 35 (2005) (04-1530); *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, No. 04-1260, 2005 U.S. Dist. LEXIS 17226 (D.D.C. 2005), *vacated*, 126 S. Ct. 1016 (2006) (per curiam).

<sup>99</sup> *Vt. Republican State Comm. v. Sorrell*, 126 S. Ct. 35 (2005).

<sup>100</sup> *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 126 S. Ct. 1016 (2006).

<sup>101</sup> The 1997 Vermont Campaign Finance Reform Act, codified at VT. STAT. ANN. tit. 17, §§ 2801-2883, "is a comprehensive campaign finance reform package, regulating contributions, expenditures, and disclosures related to candidates for state office in Vermont and political organizations that participate in Vermont elections." *Landell*, 382 F.3d at 99.

<sup>102</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

<sup>103</sup> *Id.* at 223-24.

Breyer.<sup>104</sup>

The dissent in *McConnell* urged a radical change in the law of campaign finance.<sup>105</sup> The dissent argued that any limit on campaign contributions to candidates or committees for candidates violates the First Amendment.<sup>106</sup> The Justices remaining on the Court, Justices Scalia, Kennedy, and Thomas, repeatedly took the view that any limit on contributions is unconstitutional.<sup>107</sup> Since 1976, with its decision in *Buckley v. Valeo*,<sup>108</sup> the Supreme Court has said the government could limit contributions to candidates and committees for candidates because large contributions generally risk corruption.<sup>109</sup>

If Chief Justice Roberts and the new Justice agree with them, *Buckley* will be overruled. This will not just be a major change in the law of campaign financing but will be a radical change in the way campaigns are conducted at all levels of government in the United States, which is why these two cases are so important.

PROF. SCHWARTZ: I would just say that some of the most important cases from the standpoint of human beings who face controversy with the government, and in terms of day-to-day litigation that lawyers are involved in, sometimes are not the most

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<sup>104</sup> *Id.* at 114.

<sup>105</sup> *Id.* at 286-341 (Kennedy, J., dissenting).

<sup>106</sup> *Id.* at 296 (Kennedy, J., dissenting).

<sup>107</sup> *See generally McConnell*, 540 U.S. at 286-341 (Kennedy, J., dissenting) (reasoning that much of Titles I and II of the Bipartisan Campaign Reform Act infringe on the First Amendment guarantee of free speech).

<sup>108</sup> 424 U.S. 1 (1976).

<sup>109</sup> *Id.* at 29 (holding that the provisions of the Federal Election Campaign Act, which impose ceilings on political contributions, did not violate First Amendment speech and association rights or invidiously discriminate against nonincumbent candidates and minority party candidates, but were supported by substantial governmental interests in limiting corruption and the appearance of corruption).

visible cases. In particular, two cases that are on the docket this Term involve First Amendment retaliation claims.

One is a case that was brought by a public employee in California.<sup>110</sup> Here, a district attorney claimed to have been retaliated against because he complained about a search warrant application that was filled out by one of the employees.<sup>111</sup> The issue in front of the Court is whether freedom of speech encompasses speech that is made part of a public employee's duties.<sup>112</sup>

There is another retaliation case that is in front of the Court this Term, which is both important and interesting. The case is *Moore v. Hartman*,<sup>113</sup> which raises the question of whether a First Amendment retaliation claim can be based on a police officer's arrest of an individual who has exercised his or her free speech rights.<sup>114</sup> Does that violate the First Amendment even though the officer had probable cause to make the arrest? Again, I think this is an issue that comes up on a recurring basis in the context of encounters between citizens and law enforcement. It is not always the high profile cases that are critical in terms of the day-to-day lives that people lead.

There is another high profile, free speech case in front of the Court this Term, and that is the Solomon Amendment case.<sup>115</sup> Of course, that affects us right here in the law school very closely.

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<sup>110</sup> *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004), *cert. granted*, 543 U.S. 1186 (2005).

<sup>111</sup> *Id.* at 1171-72.

<sup>112</sup> *Id.* at 1173.

<sup>113</sup> 388 F.3d 871 (D.C. Cir. 2004), *cert. granted*, 125 S. Ct. 2977 (2005).

<sup>114</sup> *Id.* at 878.

<sup>115</sup> *Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005), *rev'd*, No. 04-1152, 2006 U.S. LEXIS 2025 (Mar. 6, 2006).



## 2. Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)

PROF. CHEMERINSKY: Absolutely. I'm the named plaintiff in the case. The case is captioned in the Supreme Court as *Rumsfeld v. FAIR*; "FAIR" standing for "Forum for Academic and Institutional Rights."<sup>116</sup> If you read the entire caption, it says Erwin Chemerinsky; Sylvia Law, who is a professor at New York University Law School, and then two individuals who were law students at the time.<sup>117</sup>

As you know, virtually all law schools accept as an American Association of Law School policy that they will not allow employers to use school facilities if the employer discriminates on the basis of race, gender, religion or sexual orientation.<sup>118</sup> I believe that it is essential that a law school state that its facilities are open to all of its students equally, and that it will not be part of or in any way condone or facilitate discrimination.

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<sup>116</sup> *Id.* The case arose out of the controversy over the United States military's "Don't Ask, Don't Tell" policy, which excludes open homosexuals from the military. See 10 U.S.C. § 654 (1993). Most law schools, Touro Law Center included, have non-discrimination policies protecting sexual preference. Consequently, many law schools attempted to deny campus access to military recruiters. Congress responded by enacting the "Solomon Amendment," a provision requiring that universities receiving federal funds provide military recruiters with access to campus and students "that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." See 10 U.S.C. § 983(b)(1) (1996). Law professors and several law schools from around the country formed FAIR to challenge the Solomon Amendment. *FAIR*, 390 F.3d at 224-27.

<sup>117</sup> See *FAIR*, 390 F.3d 219, *cert. granted*, 125 S. Ct. 1977 (2005), *rev'd*, No. 04-1152, 2006 U.S. LEXIS 2025 (Mar. 6, 2006). The plaintiffs include FAIR, a New Jersey membership corporation; Society of American Law Teachers, Inc., a New York corporation; Coalition for Equality, a Massachusetts association; Rutgers Gay and Lesbian Caucus, a New Jersey association; Pam Nickisher, a law student and New Jersey resident; Leslie Fischer, a law student and Pennsylvania resident; Michael Blauschild, a law student and New Jersey resident; Erwin Chemerinsky, a California resident; and Sylvia Law, a New York resident. *Id.*

<sup>118</sup> *Id.* at 224-25.

As a result of this policy, most law schools in the United States would not allow the military to use its facilities for recruitment purposes. This is because of the federal statute, which states that gays and lesbians cannot serve in the United States military.<sup>119</sup> A Congressman from New York, Gerald Solomon, introduced a bill that was then passed, called the Solomon Amendment, which says that any university that does not give the military equal access will be denied federal funds.<sup>120</sup>

Law schools generally do not receive very much in the way of federal monies, but universities receive a great deal of federal money. After the Solomon Amendment was passed in 1996, the Clinton Administration took no efforts to employ this.<sup>121</sup> But when the Administration changed in 2001, the Bush Administration announced that it was going to cut off federal funds for universities that did not allow the military access to law schools.<sup>122</sup>

In fact, one of the first universities they went to was the University of Southern California, where the general counsel offices made it clear they would allow the military because they were not about to lose the millions and millions of dollars from the federal government.<sup>123</sup> A group of law professors got together and organized the Forum for Academic Institutional Rights in order to challenge the

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<sup>119</sup> 10 U.S.C. § 654 bars homosexuals from military service.

<sup>120</sup> See 10 U.S.C. § 983.

<sup>121</sup> See Clay Calvert and Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus*, 13 WM. & MARY BILL RTS. J. 205, 213 (2004); *FAIR*, 390 F.3d at 227.

<sup>122</sup> *FAIR*, 390 F.3d at 227.

<sup>123</sup> *Id.* at 227-28.

Solomon Amendment as violating the First Amendment.<sup>124</sup>

In November of 2004, the United States Court of Appeals for the Third Circuit, in a two-to-one decision, declared the Solomon Amendment unconstitutional.<sup>125</sup> The Third Circuit said it violated the First Amendment.<sup>126</sup> The Solomon Amendment violated free speech rights because the Universities were forced to express and accept an effort, which they did not necessarily, agree with.<sup>127</sup> Furthermore, the Third Circuit held that the amendment violated freedom of association since the Universities were forced to associate with those they did not want to associate with.<sup>128</sup> The court said there was absolutely no evidence that the military recruitment was in any way impaired by the law schools' actions.<sup>129</sup> The government sought and received certiorari.<sup>130</sup> The case was argued in the Supreme Court on December 6, 2005.<sup>131</sup>

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<sup>124</sup> *Id.* at 229.

<sup>125</sup> *Id.* at 246.

<sup>126</sup> *Id.* at 236 (“[T]he Solomon Amendment conditions funding on a basis that violates the law schools’ First Amendment rights under the compelled speech doctrine.”).

<sup>127</sup> *FAIR*, 390 F.3d at 239 (“[T]here is at least one important sense in which the law schools strenuously disagree with the very words spoken by the military recruiters that the Solomon Amendment compels them to accept and to which they have been forced to respond.”).

<sup>128</sup> *Id.* at 230 (“[T]he Solomon Amendment violates the First Amendment by impeding the law schools’ rights of expressive association . . .”).

<sup>129</sup> *Id.* at 245 (“The Government fails to offer even an affidavit indicating that enforcement of the Solomon Amendment has enhanced military recruitment efforts.”).

<sup>130</sup> *FAIR v. Rumsfeld*, 125 S. Ct. 1977 (2005).

<sup>131</sup> On March 6, 2006 the Supreme Court decided *Rumsfeld v. Fair*, No. 04-1152, 2006 U.S. LEXIS 2025 (Mar. 6, 2006). The Court, in an eight-to-zero opinion (Justice Alito took no part in the decision), reversed the Third Circuit Court of Appeals and held that the Solomon Amendment was constitutional. *Id.* First, the Court held that the Solomon Amendment was a valid exercise of Congress’ power to legislate under the Spending Clause. *Id.*, at \*20. After noting that “a funding condition cannot be unconstitutional if it could be constitutionally imposed directly,” *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)), the Court found that the First Amendment was not a bar to Congress “directly imposing the Solomon Amendment’s access requirement, [and therefore] the statute [did] not place an

### C. The Death Penalty

PROF. SCHWARTZ: Finally, I will make one point about the seven death penalty cases before the Supreme Court.<sup>132</sup> I think it is going to be extremely important to see how the new Court responds to these cases because there is certainly evidence during the last two Terms of this Supreme Court that the Court was taking a more active concern in terms of protecting death penalty defendants, and I think at this time it is an open question whether that will continue.<sup>133</sup>

PROF. CHERMERINSKY: It goes back to the theme I started with.<sup>134</sup> In recent years, the majority of the Rehnquist Court has become increasingly concerned with the how the death penalty is administered in the United States. There were numerous cases last year where the Supreme Court overturned death penalties.<sup>135</sup> In the case of *Rompilla v. Beard*,<sup>136</sup> the Supreme Court overturned the death

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unconstitutional condition on the receipt of federal funds.” *Id.*

The Court went on to state that the conduct, which the plaintiffs in *FAIR* argued was protected by the First Amendment, was, in fact, not expressive conduct contemplated by the First Amendment or Supreme Court precedent and thus “[b]ecause Congress could require law schools to provide equal access to military recruiters without violating the schools’ freedoms of speech or association,” the amendment was constitutional. *Id.*, at \*37.

<sup>132</sup> See *Brown v. Sanders*, 125 S. Ct. 1700 (2005) (this case has since been decided; see *Brown v. Sanders*, 126 S. Ct. 884 (2006)); *Kansas v. Marsh*, 125 S. Ct. 2517 (2005); *House v. Bell*, 125 S. Ct. 2991 (2005); *Holmes v. South Carolina*, 126 S. Ct. 34 (2005); *Schriro v. Smith*, 126 S. Ct. 7 (2005); *Oregon v. Guzek*, 126 S. Ct. 675 (2005); *United States v. Barnette*, 390 F.3d 775, *cert. granted*, 126 S. Ct. 92 (2005) (No. 04-10295).

<sup>133</sup> See Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. REV. 311, 336-39 (2005) (discussing the Supreme Court’s recent trend of reconsidering the application of the death penalty).

<sup>134</sup> See *supra* pp. 6-8.

<sup>135</sup> See *Rompilla v. Beard*, 125 S. Ct. 2456, 2468 (2005); *Deck v. Missouri*, 125 S. Ct. 2007, 2016 (2005); *Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005); *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005).

<sup>136</sup> 125 S. Ct. 2456 (2005).

sentence for ineffective assistance of counsel.<sup>137</sup>

In *Deck v. Missouri*,<sup>138</sup> the Supreme Court overturned the death sentence because the defendant appeared before the jury in chains and restraints.<sup>139</sup> Another important death penalty case was *Bradshaw v. Stumpf*.<sup>140</sup> In *Bradshaw*, the Court overturned the death sentence because the prosecutor used inconsistent theories for codefendants thereby violating due process.<sup>141</sup> I already mentioned *Roper v. Simmons* where the Court struck down the death penalty for crimes committed by juveniles.<sup>142</sup> Then in *Miller-El v. Dretke*,<sup>143</sup> the Court struck down the death sentence because of biased jury selection.<sup>144</sup> Put together some other cases in recent years and you can see a shift in the Rehnquist Court. Contrast these cases with cases from 1986 to 2002 where the Rehnquist Court rarely overturned a death sentence.<sup>145</sup>

There was a major reduction in capital punishment from 2002

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<sup>137</sup> *Id.* at 2460 (holding that “even when a capital defendant’s family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.”).

<sup>138</sup> 125 S. Ct. 2007 (2005).

<sup>139</sup> *Id.* at 2014 (“[C]ourts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.”).

<sup>140</sup> 125 S. Ct. 2398 (2005).

<sup>141</sup> *Id.* at 2407-08.

<sup>142</sup> 543 U.S. 551 (2005); see *supra* notes 32-34 and accompanying text.

<sup>143</sup> 125 S. Ct. 2317 (2005).

<sup>144</sup> *Id.* at 2340 (noting that the State struck jurors because they were black).

<sup>145</sup> See, e.g., *Jones v. United States*, 527 U.S. 373 (1999); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Buchanan v. Angelone*, 522 U.S. 269 (1998); *O’Dell v. Netherland*, 521 U.S. 151 (1997); *Loving v. United States*, 517 U.S. 748 (1996); *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Walton v. Arizona*, 497 U.S. 639 (1990); *Hildwin v. Florida*, 490 U.S. 638 (1989); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

to 2005.<sup>146</sup> My account for this is that the majority of the Justices are troubled by the administration of the death penalty in this country. In 2001, in a speech delivered at the University of the District of Columbia, Justice Ginsburg talked about how she had never seen a violent death penalty case where there wasn't evidence of ineffective assistance of counsel.<sup>147</sup>

In 2001, Justice O'Connor gave a speech in Minnesota and talked in detail about the problems of representation in capital cases.<sup>148</sup> Last summer, at the AVA Conference in Chicago, Justice Stevens gave a speech and referred to his concern about the representation in death penalty cases.<sup>149</sup> The interesting question we are faced with today is whether the new Court will continue this concern.

I think that judges and justices who are on the bench for a while are more likely to realize problems, such as the issue which faces the Court on the administration of the death penalty in the United States. We saw it with Harry Blackmun, where initially he

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<sup>146</sup> Thomas P. Bonczar & Tracy L. Snell, U.S. Dep't of Justice, *Bureau of Justice Statistics Bulletin: Capital Punishment* (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf>, at 3 (marking the decline in the number of persons sentenced to death in the last five years).

<sup>147</sup> Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, Joseph L. Rauh Lecture (Apr. 9, 2001), available at <http://supremecourtus.gov/publicinfo/speeches/sp04-09-01a.html> (stating she had "yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.").

<sup>148</sup> Justice O'Connor said, "Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." Editorial, *O'Connor Questions Death Penalty*, N.Y. TIMES, July 4, 2001, at A9. Furthermore, Justice O'Connor said, "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." *Id.*

<sup>149</sup> Editorial, *Justice Stevens Speaks*, WASHINGTON POST, Aug. 22, 2005, at A16.

voted quite reluctantly, yet consistently, to uphold death sentences.<sup>150</sup> Near the end of his time on the Court, he wrote: “I no longer shall tinker with the machinery of death.”<sup>151</sup> He became convinced by so many death penalty cases that it just wasn’t fair and constitutional.<sup>152</sup>

### I.      *House v. Bell*

Let me point to one case from the docket this Term involving the death penalty. I think it may be the most important one, perhaps the most important case of the Term so far. It is a case called *House v. Bell*.<sup>153</sup> It involves the question of what has to be shown by the defendant to demonstrate actual innocence.<sup>154</sup>

In 1993, in *Collins v. Herrera*,<sup>155</sup> Chief Justice Rehnquist said in a majority opinion that it does not violate the Constitution to execute an innocent person.<sup>156</sup> Two years later, in *Schlup v. Delo*,<sup>157</sup> the Court indicated that executing an innocent person would violate

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<sup>150</sup> In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held that the death penalty constituted “cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” *Id.* at 239-40. Justice Blackmun dissented, stating that the Court chose to strike down the death penalty for its own reasons when this decision was better made by the “elected representatives of the people – far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man’s dignity, than are we who sit cloistered on this Court . . .” *Id.* at 413.

<sup>151</sup> *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

<sup>152</sup> *Id.* at 1146.

<sup>153</sup> 125 S. Ct. 2991 (2005).

<sup>154</sup> Brief of Petitioner at 1, *House v. Bell*, 125 S. Ct. 2991 (2005) (No. 4-8990) (argued January 11, 2006), 2005 WL 2650980 (“What constitutes a ‘truly persuasive showing of actual innocence’ pursuant to *Herrera v. Collins* sufficiently to warrant freestanding habeas relief?”). *See also*, *Herrera v. Collins*, 506 U.S. 390 (1993) (holding that the submission of new evidence in attempt to support a claim actual innocence does not entitle a convicted defendant to relief in a habeas corpus proceeding).

<sup>155</sup> 506 U.S. 390 (1993).

<sup>156</sup> *Id.* at 393.

<sup>157</sup> 513 U.S. 298 (1995).

the Constitution.<sup>158</sup> Justice Stevens writing for the Court stated that in order to demonstrate innocence, the defendant has to prove by a preponderance of the evidence that no reasonable jury would convict with the new evidence.<sup>159</sup>

With this in mind, we turn to *House v. Bell*, which involves an individual who wants to present that he procedurally defaulted based on his argument of actual innocence.<sup>160</sup> A woman in Tennessee was murdered.<sup>161</sup> There was no confession.<sup>162</sup> The conviction was based on circumstantial evidence.<sup>163</sup> The prosecutor's theory of murder was that the victim had been raped, and in arguing for the death penalty, the prosecutor had to establish through circumstantial evidence that the victim was raped.<sup>164</sup> Semen was found on the victim's clothes.<sup>165</sup> However, DNA evidence introduced at the federal habeas proceeding years later revealed that the semen was

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<sup>158</sup> *Id.* at 326-27 (“[W]e hold that the *Carrier* ‘probably resulted’ standard rather than the more stringent *Sawyer* standard must govern the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.”); *see also* *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (“[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.”); *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) (“We . . . hold that to show ‘actual innocence’ one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.”).

<sup>159</sup> *Id.* at 327 (“To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.”).

<sup>160</sup> Brief of Petitioner at 1, *House v. Bell*, 125 S. Ct. 2991.

<sup>161</sup> *House v. Bell*, 386 F.3d 668, 669 (6th Cir. 2004), *cert. granted*, 125 S. Ct. 2991 (2005).

<sup>162</sup> *Id.* at 671.

<sup>163</sup> *Id.* at 673.

<sup>164</sup> *Id.* at 686 (Merritt, J., dissenting).

<sup>165</sup> *Id.*



from the victim's husband and not from the defendant.<sup>166</sup>

Another key piece of evidence against the defendant was the victim's blood on his jeans.<sup>167</sup> However, it was revealed that at the autopsy four vials of blood were taken from the victim and were stored in a drawer of the police lab, in the same place where the defendant's jeans were stored.<sup>168</sup> One of the vials of blood spilled out and was emptied.<sup>169</sup> That seems to explain how the blood got on the defendant's jeans.<sup>170</sup> Also there were two witnesses that said they heard the victim's husband admit he beat the victim and caused her death.<sup>171</sup> The question is whether there is enough evidence to show absolute innocence to allow for procedural claims.<sup>172</sup>

The Sixth Circuit, in an eight-to-seven ruling, said this is not enough to show actual innocence.<sup>173</sup> The judges on the Sixth Circuit split exactly along the lines of a political party and the appointments. The eight judges of the Sixth Circuit appointed by a Republican President said there is not enough actual evidence.<sup>174</sup> The judges on the Sixth Circuit appointed by a Democratic President said there was

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<sup>166</sup> *House*, 386 F.3d at 686 (Merritt, J., dissenting).

<sup>167</sup> *Id.* at 673 (majority opinion).

<sup>168</sup> *Id.* at 680-81.

<sup>169</sup> *Id.* at 686 (Merritt, J., dissenting).

<sup>170</sup> *Id.* at 680-81.

<sup>171</sup> *House*, 386 F.3d at 683.

<sup>172</sup> Brief of Petitioner at 1, *House v. Bell*, 125 S. Ct. 2991; *see also* *Schlup v. Delo*, 513 U.S. at 327 (holding that in order to defeat a procedural bar to a rehearing on the merits of his case, a defendant sentenced to death who claims actual innocence must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.").

<sup>173</sup> *House*, 386 F.3d at 678.

<sup>174</sup> *Id.* at 669. Boggs, C.J., & Norris, J., were both appointed by President Reagan; Batchelder & Siler JJ., were both appointed by President George H.W. Bush; Gibbons, Rogers, Sutton & Cook JJ., were each appointed by President George W. Bush.

enough actual evidence.<sup>175</sup>

I think this is an enormously important case to see what both Chief Justice Roberts and Justice Alito think about the death penalty.

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<sup>175</sup> *Id.* (Meritt & Martin, JJ., were both appointed by President Carter; Daughtrey, Moore, Cole, Clay & Gilman JJ., were each appointed by President Clinton.).