

AN OVERVIEW OF THE OCTOBER 2005 SUPREME COURT TERM

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It is an honor and a pleasure to be here again. I will speak about last Term's Supreme Court, and Professor Schwartz and I together will discuss the coming Term of the Court. From 1994, when Harry Blackmun was replaced by Justice Stephen Breyer, until July 1, 2005, there was not a single vacancy on the Supreme Court. That is the second longest stretch in history without a vacancy.¹

Now, of course, there are two new Justices, Chief Justice John Roberts and Associate Justice Samuel Alito. Last year was the first year that they were on the Court. I will try to identify some themes from last Term, then Professor Schwartz and I will together preview the next Term.

I. FIVE THEMES FROM THE OCTOBER 2005 SUPREME COURT TERM

A. Theme One: A Decline in the Number of Decisions Rendered

Let me start with the statistics, the numbers regarding last

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

Term. Last year the Supreme Court decided seventy-one cases. That is remarkable in itself because throughout much of the 20th Century the Supreme Court was deciding over 200 cases a Term. For the entire decade of the 1980s, the Court answered over 150 decisions a Term. During the October Term of 1992, the Court decided 117 cases.

Yet, in recent years, the number of cases decided each Term has dwindled. Last year it was seventy-one cases; the year before that it was seventy-eight decisions; two years before that it was seventy-five. This means that there has been more than a fifty percent reduction in the size of the Supreme Court docket in a little over a decade. The reduction in the Supreme Court docket creates major implications for all judges and lawyers. It means more major legal issues go a longer time before being resolved and more splits among the circuits and states go a longer time before being settled.

This Term, the Court will likely decide about the same number of cases, around seventy. By the time the Court adjourned in June of 2006, it granted review in six fewer cases than it had by the end of June of 2005. The Court only scheduled seventy-eight slots for oral argument this Term. As always, some cases get dismissed as we go along the way. Again, the Court will likely only decide about seventy cases. For those of you who are judges in the audience, my guess is your dockets have not gone down proportionately during this time and no other court has had more than a fifty percent docket reduction in such a short period of time.

Another important aspect of last Term is that about forty-five

percent of the cases were decided unanimously, which is higher than it has been in many years. Some say that this is because of a greater spirit of unanimity and consensus that Chief Justice John Roberts brought to the Court. When reporters contacted me in January and February asking whether greater collegiality exists because cases were coming down unanimously, my response was that we should wait until June to see how the Court rules in those later cases. Subsequently, in those later decisions, the decisions about campaign finance, districting, and military commission, the Court was just as split as the Supreme Court has ever been.

I argued one case in the Supreme Court last year, a case called *Scheidler v. National Organization for Women*.² It involved many issues regarding violent protests obstructing access to abortion clinics. The Court decided it on a very narrow ground under the provisions of the Hobbs Act.³ I should disclose that I lost by a close margin of eight to nothing. This case was typical of many of the unanimous cases, the Supreme Court resolved the decision on very narrow grounds. When I went home the day the decision came down and I mentioned it to my twelve-year-old son that I lost eight-to-nothing, he said, “How did you lose eight to nothing?” I said,

² 126 S. Ct. 1264 (2006).

³ 18 U.S.C. § 1951(a) (2000). The Hobbs Act imposes criminal liability on any person who:

[O]bstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section

Id.; *Scheidler*, 126 S. Ct. at 1270, 1274 (holding that abortion clinics could not sue protesters of abortion under the Hobbs Act because “Congress did not intend to create a freestanding

“Because only eight of the Justices participated.”

In addition to the case I argued, last Term, for the first time in American history the Supreme Court decided an abortion case unanimously, a case called *Ayotte v. Planned Parenthood of Northern New England*.⁴ If this Court decides an abortion case unanimously, it really decides nothing at all. That was true of this case.

So here is my explanation for why *Ayotte*, *Scheidler*, and so many other cases were decided unanimously. It was an unusual year for the Court because Sandra Day O'Connor participated in oral arguments in October, November, December, and January before she left January 31st, the day that Samuel Alito was sworn in as a Justice. She and her colleagues knew though, that she could only participate in decisions if she was on the Court the day the case came down. Thus, the Court unanimously decided many of these cases that Justice O'Connor participated in on very narrow grounds, rather than risk having to put the cases over for reargument.

Another statistic about the last Term is of the seventy-one cases, twelve were decided by a five-four margin and four were decided five-three, so in sixteen cases only one Justice made the difference.⁵ That is typical of what it has been in recent years.

physical violence offense in the Hobbs Act.”).

⁴ 126 S. Ct. 961 (2006).

⁵ For the four cases decided by a five-three majority, *see Georgia v. Randolph*, 126 S. Ct. 1515, 1519 (2006) (holding, in a 5-3 decision, that a warrantless search of a shared dwelling for evidence is unreasonable and invalid under the Fourth Amendment where a physically present co-occupant expressly refuses to permit entry); *Jones v. Flowers*, 126 S. Ct. 1708, 1721 (2006) (holding, by a 5-3 margin, that the Due Process Clause of the Fourteenth Amendment requires the government to take additional steps to locate a mail recipient whose notice of property forfeiture is returned before confiscating or selling the property); *House v. Bell*, 126 S. Ct. 2064 (2006); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

For the twelve cases decided by a 5-4 majority, *see, e.g., Rapanos v. United States*, 126

B. Theme Two: The Anthony Kennedy Court

The second theme of the 2005 Term is that we are now in the era of the Anthony Kennedy Court. I know out of tradition and deference to the chief, we refer to it as the Roberts Court. To be sure, there will be a time where it would be appropriate to refer to it as John Roberts' Court. He was fifty years old when he was sworn in, and if he remains Chief Justice until he is eighty-six years old, the current age of Justice John Paul Stevens, John Roberts will be Chief Justice until 2041. How Justice Roberts is to be regarded by history probably will be more a function of who the Justices are in the 2020s and the 2030s, than whoever the Justices were in the October 2005 Term.

Of the twelve cases decided by a five-four margin last Term, Justice Kennedy was in the majority in nine of the twelve—more than any of the other Justices.⁶ He was the majority in most of the

S. Ct. 2208, 2235 (2006) (deciding, by a 5-4 margin, that the lower court should apply the following standards to determine if the Clean Water Act applies to wetlands: 1) whether the “ditches or drains near each wetland are waters in the ordinary sense of containing a relatively permanent flow” and 2) whether the wetlands are adjacent to the ditches or drains if such waters possess a “continuous surface connection that creates the boundary-drawing problem”); *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006) (holding, in a 5-4 decision, a defendant who was wrongly denied his choice of counsel is entitled to a reversal of his conviction because such error is a structural error and is not subject to harmless review); *Brown v. Sanders*, 546 U.S. 212 (2006); *Day v. McDonough*, 126 S. Ct. 1675 (2006); *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Hudson v. Michigan*, 126 S. Ct. 2159 (2006); *Kansas v. Marsh*, 126 S. Ct. 2516 (2006); *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2690 (2006) (where Justice Ginsburg concurred in judgment, making it 6-3, but also joined the dissent in a primary issue of the case, arguably making the tally 5-4); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006); *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2005).

⁶ *Brown*, 546 U.S. 212; *Day*, 126 S. Ct. 1675; *Garcetti*, 126 S. Ct. 1951; *Hudson*, 126 S. Ct. 2159; *Marsh*, 126 S. Ct. 2516; *League of United Latin Am. Citizens*, 126 S. Ct. 2594; *Rapanos*, 126 S. Ct. 2208; *Gonzalez-Lopez*, 126 S. Ct. 2557; *Sanchez-Llamas*, 126 S. Ct. 2669.

five-three decisions.⁷ From a statistical perspective you see why I say it is the Anthony Kennedy Court. I think Justice Kennedy is very self-conscious in this role.

Often in five-four decisions when he was in the majority, he wrote separate concurring or concurring of the judgment opinions to determine the scope of holdings. To pick one example, I think one of the most significant cases of the Term was *Hudson v. Michigan*.⁸ The issue before the Court was a narrow one. Does the exclusionary rule apply if the police violate the requirements of knock-and-announce before entering a dwelling?

The Court heard the oral arguments, and then to the surprise of everyone, in May they set the case over for immediate reargument. The case came down in June of 2006 with a five-four decision. Justice Scalia wrote for the majority, joined by Chief Justice Roberts, and Justices Thomas, Alito, and Kennedy. Justice Scalia said that the application of the exclusionary rule is “the last resort.”⁹ According to Justice Scalia, in deciding whether to apply the exclusionary rule, the courts have to weigh the social costs against its deterrence benefits.¹⁰ He argued that the exclusionary rule is unnecessary to deter police misconduct, but that it has great costs because it might lead to the release of guilty individuals.¹¹ His points were not arguments for

⁷ Kennedy was in the majority of three-of-the-four cases decided by a 5-3 margin. See *House*, 126 S. Ct. 2064; *Hamdan*, 126 S. Ct. 2749; *Randolph*, 126 S. Ct. 1515. Yet, Justice Kennedy was in the minority in *Jones*, 126 S. Ct. 1708.

⁸ *Hudson*, 126 S. Ct. 2159.

⁹ *Id.* at 2163.

¹⁰ *Id.*

¹¹ *Id.* at 2166-67.

creating an exception to the exclusionary rule;¹² these are the traditional arguments for completely eliminating the exclusionary rule.¹³

Justice Kennedy was the fifth Justice in the majority and he concurred in this part of Justice Scalia's opinion. He said, "[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt."¹⁴ He agreed though, that there is an exception to the exclusionary rule if the police do not knock-and-announce the right way.¹⁵ What he also made clear was that the continued existence of the exclusionary rule, the exceptions that will be created, all depend on Justice Kennedy.¹⁶

The reality is that in appearing before the Supreme Court, it is often a matter of appealing to an audience of one. I recently coauthored an amicus brief for the Anti-Defamation League, which involved cases that concerned the desegregation of schools. I will tell you that as I wrote the brief I felt like if I could put Justice Kennedy's picture on the front of the brief I would have done so. I and all of the other lawyers involved know it is Justice Kennedy who is going to decide the outcome of the case.

C. Theme Three: Conservative Court Members Advance the Rights of Criminal Defendants

The third theme I would identify for you is that law

¹² *Id.* at 2168.

¹³ *Hudson*, 126 S. Ct. at 2168-70.

¹⁴ *Id.* at 2170 (Kennedy, J., concurring).

¹⁵ *Id.* at 2170-71.

¹⁶ *Id.*

enforcement usually wins criminal cases, but there are a surprising number of instances where the conservatives on the Court advanced the rights of criminal defendants.¹⁷ There is no doubt that there is a solid conservative majority on this Court. Chief Justice Roberts and Justices Scalia, Thomas, and Alito, often joined by Justice Kennedy, provide that majority. Last year there was one case where Chief Justice Roberts did not vote in what would be described as the conservative result.¹⁸ There was not a single case where Justice Alito did not vote in the majority. Thus, it is not surprising that in criminal procedure cases, police generally win.

Last year there were five Fourth Amendment¹⁹ criminal procedure cases; the police won four out of five.²⁰ This continues a recent trend. Since 2003, there have been fifteen Fourth Amendment cases, and the police won thirteen out of the fifteen.²¹ However, the

¹⁷ For instance, in *Gonzalez-Lopez*, Justice Scalia delivered the majority opinion where the Court held the criminal defendant's choice to counsel was violated. *Gonzalez-Lopez*, 126 S. Ct. at 2559.

¹⁸ *Jones*, 126 S. Ct. 1708. Chief Justice Roberts delivered the opinion of the Court. Justice Thomas filed a dissenting opinion joined by Justices Scalia and Kennedy. Justice Alito took no part in the decision of this case.

¹⁹ U.S. CONST. amend. IV provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

²⁰ The police prevailed in four of the Fourth Amendment decisions. See *Samson v. California*, 126 S. Ct. 2193 (2006); *Hudson*, 126 S. Ct. 2159; *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006); *United States v. Grubbs*, 126 S. Ct. 1494 (2006). In *Randolph*, however, the defendant prevailed. *Randolph*, 126 S. Ct. 1515, 1519 (2006). Justice Kennedy was part of the five-three opinion in the only Fourth Amendment decision that ruled in favor of the defendant. *Id.*

²¹ In addition to the four cases ruling in favor of the government this past Term, the Court decided thirteen other cases in favor of the police. See *Muehler v. Mena*, 125 S. Ct. 1465 (2005); *Illinois v. Caballes*, 125 S. Ct. 834 (2005); *Devenpeck v. Alford*, 543 U.S. 146 (2004); *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004); *Thornton v. United*

other trend that I point to here is one that I have not seen much discussion about. In a surprising number of instances, it is the conservatives voting against the rights of criminal defendants. We began to see this in *Apprendi v. New Jersey*,²² which was decided in 2000. If you practice criminal law or if you are a judge in criminal cases, *Apprendi* is an important decision for you.

In *Apprendi*, the Supreme Court expanded the role of the jury in criminal cases and held that any factor other than a prior conviction that leads to a sentence greater than the statutory maximum has to be beyond a reasonable doubt.²³ *Apprendi* involved a man who fired a gun in a home owned by a black family. Thankfully no one was injured. The man was charged with the crime under New Jersey law, the sentence was five to ten years in prison. However, the judge found under the New Jersey Hate Crime Law²⁴ that since the crime was hate motivated, a twelve-year sentence was to be imposed.²⁵ The issue was whether the judge could find hate motivation by a preponderance of the evidence, or would the jury have to find the hate motivation beyond a reasonable doubt.

The Court, in a five-four decision written by Justice Stevens and joined by Justices Scalia, Thomas, Souter, and Ginsberg, held

States, 541 U.S. 615 (2004); *United States v. Flores Montano*, 541 U.S. 149 (2004); *Illinois v. Lidster*, 540 U.S. 419 (2004); *Maryland v. Pringle*, 540 U.S. 366 (2003); *United States v. Banks*, 540 U.S. 31 (2003). There are only two exceptions to such one-sided rulings. See *Randolph*, 126 S. Ct. 1515; *Groh v. Ramirez*, 540 U.S. 551 (2004) (finding that execution of a search warrant requires adequate notice of the scope of the search).

²² 530 U.S. 466 (2000).

²³ *Id.* at 490.

²⁴ N.J. STAT. ANN. § 2C:44-3e (deleted by amendment, P.L.2001, c. 443).

²⁵ *Apprendi*, 530 U.S. at 471 (concluding that the lower court judge abused his discretion in enhancing the sentence of the defendant from a maximum of ten years to a twelve year sentence, because the judge alone found that the crime was motivated by racial bias).

that the jury had to find hate motivation beyond a reasonable doubt.²⁶ Other than the *Apprendi* line of cases, I cannot identify any other five-four decisions where those five Justices were in the majority.

The Court followed up the *Apprendi* opinion with *Blakely v. Washington*.²⁷ Again, the same five Justices explained that any factor other than a prior conviction, which would lead to a sentence greater than what the jury's verdict would provide or what the defendant admitted to, must be proven to the jury beyond a reasonable doubt.²⁸ Then, in *Booker*,²⁹ the same five Justices considered how that applied to the principle of federal sentencing guidelines.³⁰

Another important example is the 2004 decision of *Crawford v. Washington*,³¹ where the Supreme Court significantly expanded the rights of criminal defendants under the Confrontation Clause.³² If you are a trial lawyer in criminal cases or a trial judge dealing with criminal cases you have to deal with *Crawford* issues. Prior to *Crawford*, a statement could be used against a criminal defendant even if the person who made the statement was not available, as long

²⁶ *Id.* at 468, 490.

²⁷ *Blakely*, 542 U.S. 296.

²⁸ *Id.* at 301, 303, 313-14 (holding that the "statutory maximum," for *Apprendi* purposes, is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant).

²⁹ 543 U.S. 220 (2005).

³⁰ *Id.* at 243 (finding that *Blakely* applies to the federal sentencing guidelines).

³¹ 541 U.S. 36 (2004).

³² *Id.* at 68-69 (holding that defendants have a Sixth Amendment right to confront all testimonial statements used against them); U.S. CONST. amend. VI states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

as the statement was deemed reliable.³³ In *Crawford*, the Supreme Court overruled this precedent, holding that if the person who made the statement is not available for cross-examination, the statement cannot be used against the criminal defendant if the statement is “testimonial.”³⁴ Justice Scalia wrote the opinion for the Court in a seven-two decision.

One more example of this is a case from last Term called *United States v. Gonzalez-Lopez*.³⁵ The case involves a man being tried in Missouri for drug crimes. He wanted to hire a California lawyer to represent him. The California lawyer went to Missouri and applied for *pro hac vice* status. The federal district court judge refused to grant his status, believing that the California lawyer acted unethically in contacting the client.³⁶ The defendant was convicted and appealed, and the Eighth Circuit concluded that the district court erred in denying *pro hac vice* status to the lawyer.³⁷ The Eighth Circuit said the lawyer did nothing unethical.³⁸ The question was, does that require automatic reversal of the conviction, or should the defendant have to prove prejudice in the error?

The Supreme Court, in a five-four decision, held that

³³ *Crawford*, 541 U.S. at 62 (“The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.”).

³⁴ *Id.* at 68 (recognizing that denying the defendant an opportunity to cross-examine the person whose testimonial statement was used against him is a violation of the Sixth Amendment).

³⁵ 126 S. Ct. 2557.

³⁶ *Id.* at 2560.

³⁷ *Id.* at 2560-61.

³⁸ *United States v. Gonzalez-Lopez*, 399 F.3d 924, 931-32 (8th Cir. 2005) (pointing out that the district court incorrectly interpreted the applicable ethics rule to prohibit all attorneys from contacting already-represented clients, whereas the correct interpretation would only prohibit attorneys already involved in a matter from contacting other represented parties in the same matter).

automatic reversal is required.³⁹ This is a structural error; there is no need for the defendant to have to prove prejudice.⁴⁰ Justice Scalia wrote the opinion for the Court, joined by Justices Stevens, Souter, Ginsberg, and Breyer. Again, I can not identify any five-four decisions where those were the five Justices in the majority. Justice Alito wrote a strong dissent and explained that the defendant should have to prove that he was harmed or prejudiced by the mistake.⁴¹ But the Supreme Court said if the lawyer is wrongly denied *pro hac vice* status when he or she is retained as counsel that requires automatic reversal of the conviction.⁴² To be sure, courts can enforce the rules concerning *pro hac vice* status, but if a lawyer is wrongly denied that status, it is a basis for automatic reversal.⁴³

From a lawyer's perspective, I think these cases mean the opportunity to appeal to the conservatives on the Court to advance the rights of criminal defendants, if it can be presented as an original argument. If an attorney can argue the original meaning of the Fourth Amendment, the Fifth Amendment,⁴⁴ and the Sixth

³⁹ *Gonzalez-Lopez*, 126 S. Ct. at 2566.

⁴⁰ *Id.* at 2564-65 ("Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternative universe.").

⁴¹ *Id.* at 2566 (Alito, J., dissenting).

⁴² *Id.* at 2562, 2566 (majority opinion) (stating that the Sixth Amendment's right to choice of counsel is violated when "deprivation of counsel [is] erroneous" and that "this violation is not subject to harmless-error analysis").

⁴³ *Id.*

⁴⁴ U.S. CONST. amend. V states in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

Amendment,⁴⁵ justified protection, there is the chance of getting the votes of Justices Scalia, Thomas, Alito, and Chief Justice Roberts.

D. Theme Four: A Poor Term for Freedom of Speech Decisions

The fourth theme that I would point to for the Term is that it was a really bad year for First Amendment⁴⁶ cases in the Supreme Court. All three speech cases were won by the government with the exception of the campaign finance case.⁴⁷ We will talk in more detail about them later, but I think the case that is most important and most representative is a case called *Garcetti v. Ceballos*.⁴⁸

Ceballos was a deputy district attorney in Los Angeles County. He was convinced that a witness in one of his cases, a deputy sheriff, was lying. He did an investigation and wrote a memo saying the deputy sheriff was not telling the truth. His supervisor, by coincidence a former student of mine at the University of Southern California, told him to soften the tone of his memo. Ceballos thought

⁴⁵ U.S. CONST. amend. VI states in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

⁴⁶ U.S. CONST. amend. I states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

⁴⁷ *Randall v. Sorrell*, 126 S. Ct. 2479, 2500 (2006) (concluding that the expenditure limits in Vermont’s campaign finance statute violated the First Amendment and Vermont’s contribution limits statute violated the First Amendment because it “burden[s] First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance”).

⁴⁸ 126 S. Ct. 1951.

he had to turn the memo over to a defense lawyer because the material could be used to impeach a prosecution witness. The supervisors were angry at him for doing that. As a result, Ceballos was removed from his supervisory position and transferred to a much less desirable location.

Ceballos brought a lawsuit saying this was retaliation for speech and violated the First Amendment. The federal district court of Los Angeles dismissed the case; the Ninth Circuit reversed and found that the allegations made by Ceballos were protected by the First Amendment.⁴⁹

The Supreme Court heard oral arguments in October, and then after Justice Alito replaced Justice O'Connor, the case was reargued. The case came down in June and was a five-four decision with Justice Kennedy writing the opinion for the court, joined by Chief Justice Roberts, Justices Scalia, Thomas, and Alito. Justice Kennedy held the First Amendment does not protect government employees for speech in the course of their employment while on the job.⁵⁰

As Justice Souter pointed out, when is a government employee's speech in the course of employment protected?⁵¹ One is that it is always protected, two is that it is never protected, and three is that sometimes it should be protected.⁵² But the majority's answer was that it is never protected; speech by a government employee in

⁴⁹ *Id.* at 1956 (quoting *Ceballos v. Garcetti*, 361 F.3d 1168, 1173 (9th Cir. 2004)).

⁵⁰ *Id.* at 1960 (“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

⁵¹ *Id.* at 1963 (Souter, J., dissenting).

⁵² *Id.* at 1963-64.

the course of his duties on the job is no longer protected by the First Amendment.⁵³ It does not matter if the speech is true, it does not matter if it is in the public interest, there is no First Amendment protection.⁵⁴

Now, on the one hand, I understand this decision because the Court was concerned about judicial intrusion in the employer-employee relationship. The Court worried that every time a government employee gets disciplined for saying something, a federal court lawsuit would result.⁵⁵ On the other hand, there is no doubt that this case is going to deter government employees from coming forward and reporting wrongdoing in the workplace.

Six years ago when I was living in Los Angeles, I was asked to do an investigation on the Los Angeles Police Department after the Rampart scandal. As part of the investigation, I interviewed almost a hundred police officers. I learned a new phrase during that investigation: “freeway therapy.” Many of the Los Angeles officers told me that officers who reported misconduct by other officers would face reprisals with the department; sometimes subtle, sometimes not subtle. I heard from many officers that officers who reported misconduct by other officers were transferred to the precinct that was furthest away from where they live, thus Los Angeles freeway therapy. An officer who lived in the South Harbor would be

⁵³ *Garcetti*, 126 S. Ct. at 1960 (majority opinion).

⁵⁴ *Id.* at 1962. The Court rejected “the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.” *Id.*

⁵⁵ *Id.* The Court concluded that precedent does not “support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.” *Id.*

transferred to the Northern Alley, a two-hour commute each way. When the Christopher Commission⁵⁶ examined the Los Angeles Police Department after the Rodney King beating in 1991, it said that the single largest obstacle for effective discipline is the code of silence. It would be very difficult to break the code of silence if officers do not have First Amendment protection when reporting wrongdoing by other officers.

Garcetti essentially said that there is no free speech protection for all of you who are government employees—if you report misconduct, you suffer reprisal.⁵⁷ The real losers here I think are the American people who benefit when whistleblowers come forward.

E. Theme Five: The Supreme Court’s Use of a Balancing Test in Terrorism Decisions

The fifth and final theme that I want to mention is that the Supreme Court made it clear that it is going to balance civil liberties and national security as part of the war on terrorism.⁵⁸ I think the single most important case from last Term was *Hamdan v. Rumsfeld*.⁵⁹ The issue in *Hamdan* was whether or not a military

⁵⁶ The Christopher Commission, led by Warren Christopher, former Deputy Attorney General of the United States and Deputy Secretary of State, was formed in April 1991 to examine document findings and make recommendations concerning police brutality in relation to the law enforcement practices of the Los Angeles Police Department to the Mayor of Los Angeles, the City Counsel and Police. See Dorothea Beane, *Human Rights in Transition—Freedom from Fear*, 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 1, 11 (2000).

⁵⁷ *Garcetti*, 126 S. Ct. at 1962. The Court explained that: “Exposing governmental inefficiency and misconduct is a matter of considerable significance” however, when public employees make such statements they are not speaking as citizens under the protection of the First Amendment. *Id.*

⁵⁸ See *Hamdan*, 126 S. Ct. 2749, 2795-97 (2006) (finding that military by commission raises important questions of the balance of powers in the constitutional structure).

⁵⁹ *Hamdan*, 126 S. Ct. 2749.

commission created for the presidential executive order could be used to try Hamdan. Hamdan was a driver for bin Laden. He said he was never involved in any terrorist activity; he was a poor man driving a car for \$200 a week. The United States government apprehended him. He was one of the first six individuals designated for trial by the military commission.

The federal district court granted Hamdan's petition for a writ of habeas corpus, finding that the military commissions violated the Constitution, federal statutes, and the Geneva Convention.⁶⁰ In the summer of 2005, the United States Court of Appeals for the District of Columbia Circuit reversed.⁶¹ One of the three judges on the D.C. Circuit panel was then D.C. Circuit Judge John Roberts. In November, the Supreme Court granted a review. Chief Justice Roberts recused himself. Obviously he should not be reviewing his own decisions.

In June 2006, the Supreme Court ruled 5-3 in Hamdan's favor, holding that the military commissions created by executive order did not comply with requirements of the Uniform Code of Military Justice or the Geneva Convention.⁶² The Court pointed out that under the President's executive order a person could be convicted on the basis of secret evidence; the defendant could be excluded from all of the proceedings and never know that the evidence was used for the conviction.⁶³ There were no rules of

⁶⁰ *Id.* at 2759, 2761-62.

⁶¹ *Id.* at 2759.

⁶² *Id.* at 2759-60.

⁶³ *Hamdan*, 126 S. Ct. at 2797-98.

evidence limiting admissibility.⁶⁴

I think the real significance of this case is seeing it together with another Supreme Court case in June 2004, *Rasul v. Bush*.⁶⁵ In *Rasul*, the Supreme Court held that those detained at Guantanamo Bay should have access to federal courts for habeas corpus challenges.⁶⁶ The Bush Administration took the position that those at Guantanamo should not have access to federal courts for a writ of habeas corpus. The Bush Administration took the position that individuals at Guantanamo could be tried in military commissions, which do not have to meet the requirements of the elemental aspects of due process.

I think the Court is saying that the President must comply with the law; that no one is above the law. Even in the context of fighting the war on terrorism, the rule of law applies. I think this was the most important message that the Supreme Court delivered in the October Term of 2005.

Well, let me shift to Marty to set up the discussion for a preview of next Term.

II. A PREVIEW OF THE OCTOBER 2006 SUPREME COURT TERM

PROF. SCHWARTZ: Some of the themes that you identified for the past Term are also themes that we would be looking for with respect to the coming Term. One of them is the ability or maybe the

⁶⁴ *Id.* at 2786-87 (noting that any evidence may be admitted if it is determined to have a probative value, including “testimonial hearsay and evidence obtained through coercion”).

⁶⁵ 542 U.S. 466 (2004).

⁶⁶ *Id.* at 484.

inability of Chief Justice Roberts to build a consensus. I think that is something that is being watched, mainly because it seems to be something that Chief Justice Rehnquist in his last year became unconcerned with.

I think Chief Justice Roberts at his confirmation hearings said one of the things he hoped to do was build consensus. This may require rendering narrower decisions. But I have to say for myself, that I am dubious. When we get to issues that we can characterize as being ideological issues with respect to affirmative action or abortion, I think we are going to see splits. I do not know if it is possible to build a consensus in these areas.

PROF. CHEMERINSKY: Two cases on the docket for next Term involve the federal abortion law⁶⁷ and two cases involve the issue of using race in the assignment of students to public secondary schools.⁶⁸ I will offer you a prediction of what is going to happen in abortion and segregation cases. I think these cases are going to be five-four decisions with Justice Kennedy in the majority.

PROF. SCHWARTZ: With respect to Justice Kennedy, the reason I think this becomes so critical is that over the last five or ten years, the Court was often referred to either as the O'Connor Court or sometimes the O'Connor-Kennedy Court. Those who were arguing the contentious issues in the Supreme Court knew that they had to focus their argument on these two Justices. Now, with Justice

⁶⁷ *Gonzales v. Carhart*, No. 05-380 (U.S. argued Nov. 8, 2006); *Gonzales v. Planned Parenthood Fed'n of Am.*, No. 05-1382 (U.S. argued Nov. 8, 2006).

⁶⁸ *Parents Involved In Cmty. Sch. v. Seattle Sch. Dist.*, No. 05-908 (U.S. argued Dec. 4, 2006); *Meredith v. Jefferson County Bd. of Ed.*, Docket No. 05-915 (U.S. argued Dec. 4, 2006).

O'Connor no longer on the Court, does that mean that the power of Justice Kennedy may have been enhanced?

PROF. CHEMERINSKY: Yes, and I think it is also how you understand the Court. It is crucial to focus on the areas where Justice Kennedy is different from Justice O'Connor: abortion, affirmative action, and separation of church and state. These are the places where a shift in the law is most likely.

In all of these areas I can show you recent Supreme Court decisions that were five-four with a five Justice majority of Justices Stevens, Souter, Ginsberg, Breyer, and O'Connor, where Justice Kennedy dissented. You could see a real move by the Supreme Court in a conservative direction in these years as you move from Justice O'Connor to Justice Kennedy as a swing vote.

PROF. SCHWARTZ: One theme Professor Chemerinsky did not mention and I think it was for a good reason because we do not have enough information about it, is the extent to which the new Court will adhere to precedent. Whether the Court adheres to precedent is something to look for in this 2006 Term and in future Terms. The adherence to precedent is an absolutely huge issue. One of the hallmarks of judicial conservatism would be adhering to precedent.

But of course, one many of the issues here, precedent could mean adhering to *Roe v. Wade*⁶⁹ or *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁷⁰ and adhering to the affirmative

⁶⁹ 410 U.S. 113, 154 (1973) (finding that abortion is a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment).

⁷⁰ 505 U.S. 833, 861 (1992) (adhering to precedent from *Roe*, holding that abortion law is

action decisions. So I think that this is going to be a fascinating issue to watch.

PROF. CHEMERINSKY: I completely agree. There was so much talk at Chief Justice Roberts' confirmation hearings and at Justice Alito's confirmation hearings about the importance of precedent. The reason I think *Hudson*, which discussed the exclusionary rule, is so important is that four Justices there, Justices Scalia, Thomas, Alito, and Chief Justice Roberts clearly indicated that they are ready and willing to eliminate the exclusionary rule.⁷¹

The exclusionary rule was created in the federal government in 1914⁷² and applied to the states in *Mapp v. Ohio*⁷³ in 1961. When people made their lists last winter and last fall containing areas of law where the Court might overrule precedent, no one put the exclusionary rule on the list. Well this Term, especially with abortion and affirmative action, there is the possibility that the Court is going to reconsider recent precedent and the question will be how much weight will the Court give to it. In recent years the Court has not given much weight to precedent.

In *Stenberg v. Carhart*,⁷⁴ decided in June 2000, the Supreme Court declared unconstitutional a Nebraska law that prohibited so-called partial birth abortion.⁷⁵ Nebraska law prohibited the removal of a living fetus or the partial birth of a fetus with the intent to end the

valid under the Due Process Clause of the Fourteenth Amendment).

⁷¹ *Hudson*, 126 S.Ct. at 2163.

⁷² See *Weeks v. United States*, 232 U.S. 383 (1914).

⁷³ 367 U.S. 643 (1961).

⁷⁴ 530 U.S. 914 (2000).

⁷⁵ *Id.* at 922.

fetus' life. Justice Breyer writing the opinion, joined by Justices Souter, Stevens, Ginsberg, and O'Connor, expressed that there was no health exception in the law,⁷⁶ which would allow performance of the procedure when a physician deems it necessary to preserve the health of the mother.⁷⁷ There was fact-finding by the district court about the safest abortion procedures.⁷⁸ Also Justice Breyer said the law, being broadly drafted, affects many different abortion procedures, not simply the dilation and extraction procedure then being litigated.⁷⁹ Justice O'Connor, in writing the concurring opinion, explained that there are health exceptions in other narrowly written Nebraska laws.⁸⁰

After *Carhart*, in 2003, Congress passed the broadly written Federal Partial Birth Abortion Act.⁸¹ Three federal circuits, the Second, Eighth, and Ninth declared it unconstitutional.⁸² The Supreme Court granted certiorari in the Eighth and Ninth Circuit cases.⁸³ Both cases will be argued in the Supreme Court on the same

⁷⁶ *Id.* at 932.

⁷⁷ *Id.* at 931 (quoting *Casey*, 505 U.S. at 879).

⁷⁸ *Id.* at 928-29 ("The District Court concluded . . . that 'the evidence is both clear and convincing that Carhart's . . . [dilation and extraction] procedure is superior to, and safer than, the . . . other abortion procedures used during the relevant gestational period in the 10 to 20 cases a year that present to Dr. Carhart.'" (quoting *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1126 (D. Neb. 1998))).

⁷⁹ *Stenberg*, 530 U.S. at 939 ("Even if the statute's basic aim is to ban . . . [dilation and extraction], its language makes clear that it also covers a much broader category of procedures.").

⁸⁰ *Id.* at 947-48 (O'Connor, J., concurring). Justice O'Connor notes that portions of Nebraska's statutory scheme with respect to abortion are narrowly drafted, allowing exceptions for the health of the mother. *Id.* (citing NEB. REV. STAT. ANN. § 28-32/9 (1999)).

⁸¹ 18 U.S.C. § 1531 (2000).

⁸² See *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 281 (2nd Cir. 2006); *Carhart v. Gonzales*, 413 F.3d 791, 792 (8th Cir. 2005); *Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163, 1165 (9th Cir. 2006).

⁸³ See *Carhart*, 413 F.3d 791, *cert. granted*, 126 S. Ct. 1314 (2006); *Planned Parenthood*

day in November 2006.⁸⁴ Justice Kennedy wrote a vehement, vitriolic dissent in December.⁸⁵ If he takes that position, and if Roberts, Scalia, Thomas and Alito take that position, then the Court is going to overrule *Carhart*.⁸⁶ But will Justice Kennedy give more weight to precedent now that he is the swing Justice? That is why I think these cases are important.

PROF. SCHWARTZ: I think Justice Alito's mother spilled the beans when he was selected by President Bush when she said, "Of course he is against abortion."⁸⁷ I think we know where he will come out.

I will just point out one other factor about the abortion cases. There seems to be no challenge to the power of Congress to enact a federal ban on a particular method of abortion. It has always seemed to me that, at least an arguable point, this could be viewed as a type of local activity that deals with health or medical matters, traditionally within the purview of the states.

I think this position could be identified with the positions of conservative Justices. It does not seem to be an issue in the case, and

Fed'n of Am., 435 F.3d 1163, *cert. granted*, 126 S. Ct. 2901 (2006).

⁸⁴ *Carhart*, No. 05-380 (U.S. argued Nov. 8, 2006); *Planned Parenthood*, No. 05-1382 (U.S. argued Nov. 8, 2006).

⁸⁵ See *Stenberg*, 530 U.S. at 956 (Kennedy, J., dissenting). Justice Kennedy found that the deference paid by the majority to the opinions of physicians by requiring a health exception, misinterprets *Casey*, giving short shrift to the state's interest in promoting respect for life and effectively "award[ing] each physician veto power over the States judgment." *Id.* at 964-65.

⁸⁶ See *Stenberg*, 530 U.S. at 980 (Thomas, Rehnquist, Scalia, JJ., dissenting). Justices Scalia and Thomas both filed dissenting opinions in *Stenberg*, along with Justice Kennedy and the late Chief Justice Rehnquist. *Id.*

⁸⁷ David Kirkpatrick, *Court Nominee Presents Father as Role Model*, N.Y. TIMES, December 5, 2005, available at <http://www.nytimes.com/2005/12/05/politics/politics-special/05father.html?ex=1291438800&en=e7395821258c34b3&ei=5090&partner=rssuserland&emc=rss>.

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as you once mentioned to me maybe because we are dealing with commercial activities.