5-4: How Brett Kavanaugh’s Supreme Court Appointment Might Affect UNC Charlotte

DIVISION OF INSTITUTIONAL INTEGRITY
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SCOTUS Eras
Dean Chemerinsky believes we’ve entered into a new “era” of the Supreme Court:

- 1890s to mid-1930s (very conservative Supreme Court)
- 1937 to 1969 (progressively more liberal court, particularly in 1960s under Earl Warren)
- 1971 to today (beginning with Nixon’s appointees, always at least five ideologically conservative, Republican-appointed justices, but with a “swing justice” to effect a liberal result in high-profile cases)

Kennedy’s Appointment
- Reagan appointee (1988) following two unsuccessful nominations (Bork, Ginsburg) and extremely thorough background check
- Approved unanimously by Senate (97-0)
Kennedy: The Early Years

Until her retirement in 2005, Sandra Day O’Connor was viewed as the swing vote on the Court:
- Planned Parenthood v. Casey (1992): broke with Chief Justice Rehnquist and in affirming Roe v. Wade (Kennedy co-authored opinion)
- Lee v. Weisman (1992): finding that government-sponsored prayer is not permitted at high school graduations (Kennedy authored opinion)
- Stenberg v. Carhart (2000): overturned a Nebraska ban on “partial-birth” abortions (Kennedy dissenting)
- Grutter/Gratz v. Bollinger cases (2003): affirmed, but limited, the right of state colleges and universities to use affirmative action in admissions policies (Kennedy in majority for Gratz, dissented from Grutter)

Kennedy: The Conservative

Justice Kennedy has been solidly with conservative justices with respect to several issues:
- Campaign finance
- Church and state (accommodationist view)
- Business (free speech, environmental issues, favoring arbitration over adjudication)
- Executive authority

Kennedy: The Liberal

On other issues, however, Kennedy has sided with the SCOTUS’s liberal bloc:
- Affirmative action
- Gay rights
- Abortion rights
Kavanaugh v. Kennedy: Affirmative Action

- Metro Broadcasting (1990)/Adarand Constructors (1995): 5-4 cases in which Kennedy vehemently argued against lower standard of judicial review for race-based affirmative action
- Fisher v. Texas I (2013): Kennedy wrote 7-1 majority opinion
- Fisher v. Texas II (2014): Kennedy wrote 4-3 majority opinion, joined liberal justices

Current issues:
- Is promoting diversity (and avoiding racial isolation) a compelling state interest?
- Parents Involved in Community Schools v. Seattle School District No. 1 (2007): 4-4 decision, with Kennedy as the “1” reiterating that compelling interests exist in avoiding racial isolation and promoting diversity
- Roberts quote: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Prediction:
- Nothing on docket for next term, but eventually colleges and universities will be colorblind with respect to admission

Kavanaugh v. Kennedy: Gay Rights

- Obergefell v. Hodges (2015): 5-4, four scathing dissents, only dissent ever read from the bench by John Roberts
- United States v. Windsor (2013): 5-4 federal Defense of Marriage Act case (for purpose of federal benefits, marriage is between a man and a woman)
- Pavan v. Smith (2017): per curiam decision with Gorsuch, Alito, and Thomas dissenting (*note* no Roberts), Arkansas law re: birth certificates

Current issues:
- Circuit splits as to whether Title VII protects against discrimination for sexual orientation
- Unclear whether Title IX addresses discrimination against transgender students

Prediction:
- Title VII/Title IX will be interpreted literally
- “Compelled expression” will be ruled unconstitutional

Kavanaugh v. Kennedy: Abortion Rights

- Hodgson v. Minnesota (1989): O’Connor as swing vote striking down two-parent notification requirement for minors prior to abortion, but upholding parental notification generally with judicial bypass (Kennedy in conservative bloc)

Current issues:
- Will Roe v. Wade (1973) be overturned, returning regulation of abortion to the states?

Prediction:
- No with hesitation, and for reasons described later, BUT more stringent state restrictions will be permitted
Other Issues: Gun Rights
• Very few 2nd Amendment cases, unresolved issues:
  – Right to bear arms outside the home
  – Constitutionality of “assault weapon” bans
  – Appropriate level of scrutiny for gun control laws
• Texas enacted “campus carry” law, faculty challenged that in 5th Circuit Court of Appeals and lost
• Kavanaugh has written 2nd Circuit opinions strongly in favor of gun rights

Other Issues: Disparate Impact Analysis
• Several federal civil rights laws—such as in the areas of employment discrimination, voting rights and fair housing—allow liability upon proof of racially disparate impact.
  – Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc. (2015): Kennedy-authored 5-4 decision holding that there is disparate impact liability under the Fair Housing Act of 1964
  – Conservative justices have argued that disparate impact liability raises constitutional issues
    • Forces legislators/policymakers to take race into account in their decisions in order to avoid liability
    • Ricci v. DeStefano (2009): 5-4 Kennedy-authored decision; can’t fail to promote one race because of fear of disparate impact claims (Alito, Thomas, Scalia concurring that disparate impact liability is unconstitutional) (*note* no Roberts)
• Chief Justice Roberts
  – Institutionalist
• Potential Kavanaugh recusals on:
  – Presidential investigations/policies
  – Campus sexual assault issues
  – Partisan political matters
• Kavanaugh himself

Wildcards