

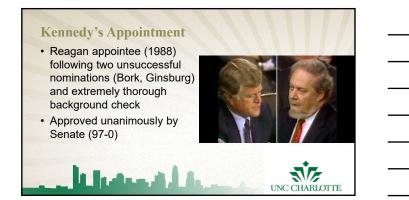
# **SCOTUS Eras**

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 idealogically conservative, Republican-appointed justices, but with a "swing justice" to effect a liberal result in high-profile cases)

UNC CHARLOTTE



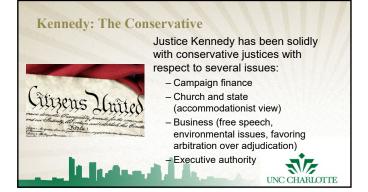
### **Kennedy: The Early Years**

I Lidan

Until her retirement in 2005, Sandra Day O'Connor was viewed as the swing vote on the Court:

- ewed 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)







### 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 6 *Crutter v. Bollinger* (2013): 5-4 case, Kennedy in majority
   Gratz v. Bollinger (2013): 5-4 case, Kennedy in majority

- 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:
- Irrent issues: Is promoting diversity (and avoiding racial isolation) a compelling state interest? Parents involved in Community Schools v. Seattle School District No. 1 (2007): 4-1-4 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 NA 1 In. UNC CHARLOTTE

#### 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 advectes against uschmataron for sexual oterination Unclear whether Title IX advectesses discrimination against transpender students Masterpiece Cakeshop (2018): 6-3, Kennedy-authored opinion, intersection of Free Speech/Free Exercise and sexual orientation



### Kavanaugh v. Kennedy: Abortion Rights

- Hodgson v. Minnesola (1988): O'Connor as swing vole striking down two-parent notification requirement for minors prior to abortion, but upholding parental notification generally with judicial bypass (Kennedy in conservative bloc) Planned Parenthood v. Casey (1992): Created "undue burden" standard, upheld "essential holding" in Roe v. Wade (1973), upheld parental consent, informed consent, and waiting period restrictions in Pennsylvania, but struck down spousal consent. Kennedy helped author 5-4 plurality opinion (dissenters argued for overturning Roe entirely). Stenberg v. Carhart (2000)/Gonzales v. Carhart (2007): "Partial-birth" abortion cases, Kennedy in 5-4 minority in Stenberg and 5-4 majority in Gonzales

- Current issues: Will Roe v. Wade (1973) be overturned, returning regulation of abortion to the states?
- PREDICTION: No (with trepidation, and for reasons described later), BUT more stringent state restrictions will be permitted



## **Other Issues: Gun Rights**

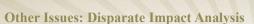
i Italaa di

- Very few 2<sup>nd</sup> 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

UNC CHARLOTTE

UNC CHARLOTTE

• Kavanaugh has written 2<sup>nd</sup> Circuit opinions strongly in favor of gun rights



- · 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

avoid maximity 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) N/

