

UVA LAW | Fed Soc SCOTUS

SPEAKER: Well, this was indeed a blockbuster of a term at the US Supreme Court. Was it the most momentous since 1937 as a number of people have argued? Time will tell. Today I'm going to be discussing two of the leading cases, *Dobbs v. Jackson Women's Health Organization* and *New York Rifle and Pistol Association v. Bruen*. The full ramifications of these cases are as yet only beginning to come into focus.

First, *Dobbs*. In *Dobbs*, the Supreme Court, by a vote of 6 to 3, upheld Mississippi's Gestational Age Act. Enacted in 2018, the Gestational Age Act bans abortions after the 15th week of pregnancy except-- and these are very important carve-outs-- except in cases of a medical emergency or severe fetal abnormality.

In so significantly restricting abortion prior to fetal viability, which under current medical technologies occurs at roughly 22 to 24 weeks of gestation, the law conflicted with the Court's then leading abortion precedents, *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*

Now *Dobbs* generated no fewer than five opinions from justices of the Supreme Court. The majority opinion by Justice Alito, joined in full by Justices Thomas, Gorsuch, Kavanaugh, and Barrett, a concurrence by Justice Thomas, a concurrence by Justice Kavanaugh, Chief Justice Roberts' concurrence in the judgment of the Court, and a joint dissent by Justice Breyer, Sotomayor, and Kagan. All five opinions are very important in terms of understanding what may come next, and so I will discuss each in turn.

First, Justice Alito's opinion for the Court, which was substantially similar to the draft that was leaked a bit before it was actually formally released. It upholds as constitutional Mississippi's law, of course, but there is more, much more. Alito's opinion flatly states that the Constitution does not confer a right to abortion and that *Roe* and *Casey* must be overruled. Why? Why must they then to leading precedents be overruled?

Well, Justice Alito points us to five factors. All these factors cited by Justice Alito are very well-known to everyone who follows the Court. We've seen them already in discussions of stare decisis as the Court grapples with decisions about which opinions, which precedents to overrule, substantially overhaul, or let stand.

And these five factors are, the nature of the precedent's error, the quality of their reasoning, the workability of the rules imposed, their disruptive effect on other areas of the law, and finally, the absence or presence of concrete reliance. The Court found *Roe* and *Casey* wanting along all five of these dimensions.

With respect to the first two factors, the nature of the precedents error and the quality of the precedential reasoning, the court said that *Roe* ignored constitutional text, history, and precedent and that *Casey* had perpetuated the errors of *Roe*. There is no right to abortion to be found in the text of the Constitution, the Court tells us, and abortion rights are in no way deeply rooted in the nation's history or traditions on the contrary. The practice of abortion has never been widely accepted.

This portion of the majority's analysis is, I would argue anyway, a shout-out to Originalist methodologies, but while I'm far from alone in reading the *Dobbs* majority opinion as being grounded in Originalist commitments, bear in mind that not everyone agrees with me.

My colleague Larry Solum, for example, has argued that *Dobbs* is not an originalist opinion or not in certain respects in Originalist opinion stating that *Dobbs* fails to pinpoint the precise original public meaning of the three relevant clauses of the 14th Amendment, the Due Process Clause, the Privileges or Immunities Clause, and the Equal Protection Clause.

Regardless of whether one views the core analysis in *Dobbs* as Originalist, it is very important to note that the three other factors invoked to justify overruling *Roe* and *Casey* are not obviously at least grounded in Originalism. Workability of rules, distortion of many unrelated legal doctrines, reliance.

One can make a strong argument that the rules crafted by *Roe* as modified by *Casey* had led to an enormous mess in the lower courts as courts struggled with the meaning of undue burden. One can also point that a lot of-- there have been a lot of distortions of unrelated legal doctrines, and particularly in the area of standing.

And one can argue that there had been no reliance on rights to abortion, at least no reliance in the way that reliance is generally used in legal argument. Those are all perfectly fine arguments. They're not, however, terribly Originalist.

So I would say the majority opinion shows us not only strong commitments to Originalist methodologies on the part of the majority, but also a strong commitment to prudential considerations about the functionality of the legal system, at least as the Court sees it.

Two additional important points about the majority opinion in *Dobbs*. First, going forward, Justice Alito states that laws regulating abortion, quote, "Like other health and welfare laws will be entitled to strong presumptions of validity." Strong presumptions, this is important language. Not near-total deference, but strong presumption-- but how strong? What sort of standard?

In the *New York Pistol and Rifle* case in New York-- and the gun control case I'll be discussing shortly, real questions are raised about the viability of the tiers of scrutiny framework. These questions about the viability of the Court's tiers of scrutiny framework are also raised, albeit more obliquely in its majority opinion in *Dobbs*.

What is the Court promising us going forward? A strong presumption doesn't sound like rational basis, at least not as the court has typically enunciated rational basis. Though to be clear, of many consumers, the *Dobbs* majority opinion have understood Justice Alito's statement as promising something close to a very, very generous, very, very glancing rational base of scrutiny.

Second, key point of key-- closing point about the *Dobbs* majority opinion is that the majority takes pains to claim that its holding is a limited one. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion. Is it really possible that *Dobbs* can be hermetically sealed in this way such that what the Court has done in *Dobbs* will not be applied in other contexts? I am mildly skeptical.

Now, onto the other opinions in *Dobbs*. First, concurrence from Justice Thomas. There are no surprises. Justice Thomas is consistent in his approach to the constitutional protection of unenumerated rights. He explains, and we've heard this many times before, that in his view, the Due Process Clause does not secure any substantive rights, including rights to abortion.

And Justice Thomas goes on to urge-- again, this is not new-- that the Court should revisit its substantive Due Process precedents. This does not mean-- it is absolutely crucial to bear in mind-- that Justice Thomas means to dismiss the very idea of unenumerated rights. Not at all.

Other constitutional provisions, we are told, such as the 14th Amendment's Privileges or Immunities Clause may guarantee some of the myriad rights to the court's substantive Due Process cases have to date generated. Now how influential is Justice Thomas' approach likely to be? In looking to other constitutional provisions, particularly the Privileges or Immunities Clause, Justice Thomas has, I would say, a lot of good company these days, so stay tuned.

In his concurrence in *Dobbs*, Justice Kavanaugh takes pains to emphasize what he sees as the neutrality of the Court in the area of claims concerning abortion rights. "The issue is not," Justice as Kavanaugh writes, "the policy, considerations, or even the morality of abortion. The issue is what the Constitution says about abortion." And Kavanaugh suggests the Constitution has nothing or almost nothing-- we're not quite sure if he's willing to go that far to say about abortion.

The Constitution, Justice Kavanaugh does tell us, is neither pro-life nor pro-choice. Rather, it entrusts the issue of abortion to the people and their elected representatives to resolve through the democratic process in the states or in Congress. Obvious question-- are there any limits?

Justice Rehnquist in his famous dissent in *Roe v. Wade* memorably stated, quote, "The due process clause of the 14th Amendment undoubtedly does place a limit, albeit a broad one, on legislative power. If the Texas law at issue in *Roe*," said Justice Rehnquist, "were to prohibit an abortion even where the mother's life is in jeopardy," Justice Rehnquist said, "I have little doubt that such a statute would lack a rational relation to a valid state objective."

Justice Kavanaugh doesn't go there. He doesn't tell us if there are abortion restrictions that would be so strong that he would not sustain them as constitutional. And at the other end of the spectrum, there is the looming question, one that the Court sidestepped in *Roe*, sidestepped in *Casey*, and even, I would say, sidesteps in *Dobbs* of whether or not at some point there will be recognition of fetal life as protected under the 14th Amendment.

"That development," noted Cristina Rodriguez recently in her Supreme Court and her forward for the *Harvard Law Review*, "that idea that seemed highly improbable not too long ago may be imminent," and I think that is correct. In any event, in *Dobbs*, the Supreme Court does not seem to, as have taken pains, to set itself up for fairly foreseeable developments.

Simply put, I am skeptical that Justice Kavanaugh or the rest of the justices can stay completely out of the controversies concerning abortion. Chief Justice John Roberts' concurrence only in the judgment of the Court urged a, quote, "more measured course." He insisted that the court could uphold the 15-week line drawn by Mississippi's legislature without overruling *Roe* and *Casey*, but how?

Given that viability occurs at 22 to 24 weeks of gestation and both *Roe* and *Casey* drew firm lines at viability, how can this be? Roberts does not tell us very much, for by his own account, his chief jurisprudential commitment, at least in this case, is to minimalism. "If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more," says Chief Justice Roberts.

But many will respond to that, seriously? Seriously, Chief Justice Roberts? Do you really always do this? And he would have to admit, no, because he does understand that not even he is an entirely consistent minimalist. So he follows up his statement with the admission that perhaps we're not always perfect in following that command.

There are cases that warrant an exception, but not this one. But why not? Here, Roberts is a bit cryptic. He suggests, though, that judicial restraint is in order or may be in order where the court is repudiating a constitutional right it has not only previously recognized but has also expressly reaffirmed applying the doctrine of stare decisis. What does that mean going forward? Great question.

Finally, the dissent. This joint dissent by Justice Breyer, Sotomayor, and Kagan. This joint dissent emphasizes precedent and stare decisis, takes us through the history of *Roe* and *Casey*. "Our strong norm is to adhere to precedent, and the majority," charges the dissent, "has shown a cavalier approach to overturning this Court's precedents for *Roe* and *Casey* have been the law of the land for decades.

This emphasis on precedent is an interesting choice. The three dissenters, after all, are on the losing side. Why emphasize precedent in stare decisis when *Dobbs* is poised to become the new precedent-- the new leading precedent? There's another puzzle, too, in the joint dissent.

It doesn't do very much at all in terms of equal protection analysis, and yet, for so many defenders of strong abortion access, strong abortion rights, equal protection arguments are gaining traction. So the joint dissent doesn't give much indication of where those arguments might go.

All right. Second case that I will discuss and I will be briefer is *New York State Rifle and Pistol Association v. Bruen*, another 6-to-3 decision, this one striking down a state law. At issue, New York's strict licensing regime for the carry of handguns.

New York's regime, it's crucial to note was an outlier, for in 43 states, government issues licenses to carry based on objective criteria, but in a handful of states, including New York, that right to carry was conditioned on the issuance-- that is, the issuance of such licenses-- on demonstration of some kind of special needs, some kind of special factors.

The result was that New York's regime, as the Court pointed out, vested the authorities with vast and nearly unaccountable powers to pick and choose without much in the way of any kind of objective criteria. That meant that in the run-up to the decision in the case, New York was widely expected to lose, not only because its law was highly restrictive when it came to rights to carry handguns, but because of the very bad optics.

New York had, in essence, set up what looked like a dual system. Ordinary people, like a business owner who closes her restaurant at 2:00 AM and has to walk home through a crime-ridden area, struggled to obtain licenses to carry handguns, while the rich and famous tended to have a far easier time of it.

In his opinion for the Court, Justice Clarence Thomas, joined by the Chief Justice, along with Justices Alito, Gorsuch, Kavanaugh, and Barrett, holds that the Second and 14th Amendments protect an individual's right to carry a handgun for self-defense outside the home and that New York's gun regulation scheme does not pass constitutional muster.

In order to justify its scheme, the Court emphasizes, New York would have to show that its regulation is consistent with this nation's historical tradition of firearm regulation and New York had failed to do so. In reaching this conclusion, the court soundly rejected the two-step test, as it is often referred to, that the federal appellate courts had crafted over time.

For in the wake of *district of Columbia v. Heller* and *McDonald v. Chicago*, the Court's leading precedents on Second Amendment rights, or at least leading precedents before the New York decision, though they're still very important precedents, I emphasize, lower courts had grappled with questions relating to how vigorously they ought to be reviewing gun regulations.

The Court had provided little guidance for the lower courts. Indeed, in *Heller*, Justice Scalia's majority opinion admitted it wasn't doing so. Responding to criticisms from Justice Breyer in dissent that it had failed to establish a level of scrutiny, failed to give guidance to lower courts for evaluating Second Amendment restrictions, Justice Scalia wrote, "Since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."

Left to their own devices, courts of appeals responded by trying to fit Second Amendment rights into the-- Second Amendment rights questions into the familiar tiers of scrutiny framework. First, there would be an examination of whether the government regulation fell outside the Second Amendment scope, but if it fell within the Second Amendment scope, then the courts would move on to applying strict scrutiny or sometimes intermediate scrutiny.

Well, Thomas rejects this approach. Look to history. But what is history? Here, things are complicated as Justice Thomas acknowledges. And that there are these debates. Should courts look at the prevailing understanding of individual rights when the 14th Amendment was ratified in 1868 when it defines the scope of these Second Amendment rights? Or should it look more toward 1791 when the Bill of Rights was first added to the Constitution?

"Since we don't need to do much with this in terms of deciding this case," said the majority, said Justice Thomas, he leaves it for another day. But it is a very important question. The dissent by Justice Breyer was quite unhappy with the spectacle as the dissent saw it of the Court refusing to allow democratically elected representatives to reach very difficult-- to make difficult calls concerning public safety.

So-- and also, the Court's decision came in for a lot of brutal criticism from a number of historians-- not all historians, I emphasize, but a number of historians have rejected the Court's historical analysis, in effect saying that the Supreme Court are, well, rank amateurs when it comes to historical analysis and that they simply got it wrong.

All right. With that, I have a lot more to say about both cases, but I am out of time. So I will turn it over.

SCOTT ALLEN KELLER: No, thank you very much, professor. It's great to be with you. And thank you very much for the opportunity to get back down to Charlottesville and present with these two very distinguished professors. There's so much more to say about both of those cases and I hope we can continue to talk about those cases in addition to everything else that was part of--

Well, I don't think it's hyperbole to say that this is the most consequential and biggest Supreme Court term, this past term, certainly of our lifetime. The two cases I'm going to talk about today are *National Federation of Independent Business versus OSHA* and *West Virginia versus EPA*. So we're switching gears now to administrative law.

And in particular the major question is doctrine. And before we get to those two cases, I just want to set the table a little bit about how we've been seeing over the past decade big ticket litigation coming up in administrative law and why this seems to be a new phenomenon.

The short answer to why this is happening is Congress is passing less legislation. And a lot of these administrative law challenges you're going to see in administrative agency in the federal executive branch take an action that has sweeping policy consequences.

But because an agency is doing it, there are going to be opportunities for litigants to challenge that. In particular, a lot of times litigants are coming from the states. And I think one of the unintended collateral consequences of the rise of state solicitors general are they're becoming savvy litigants in litigating against the federal government.

That's a different topic for a different day, but I think that's part of why you're starting to see these big battles happening, is that confluence of Congress is no longer passing legislation that would be the compromise that would solve some of the issues that we're going to be talking about, and then states and other litigants are becoming a better litigator against the federal government.

So to start with, *NFIB versus OSHA*, I argued this case back in January. We represented 26 business associations from across the country and we challenged the-- OSHA's vaccine or testing mandate that would have taken immediate effect for any employer that had 100 employees or more.

Employees were going to be mandated to get a COVID-19 vaccine or they would have to pay for testing once a week and wear a mask at the workplace.

Now I'll tell you, our clients in this litigation were in favor of vaccines. These businesses were trying to give bonuses to their companies-- or sorry, to their employees. They were trying to work with the government. They were taking all sorts of steps to provide a public health solution.

And at the end of the day, OSHA took action under an emergency temporary standard, which is the statutory term of a particular power that had been given to OSHA by Congress. It had been used a handful of times, less than 10 times in the last 50 years or so. And each time that OSHA previously had exercised this power, it was on a very narrow topic. It was usually about a particular chemical that happened to be in certain workplaces.

And OSHA here, though, said, through this emergency temporary standard, which, by the way, would take immediate effect without notice and comment, which is the typical process used for agency rulemaking, that for 84 million Americans, basically overnight, this mandate was going to take effect.

So I think it's safe to say that there really wasn't a disagreement over, is this a major question? Is this a question of vast economic and political significance? And that is the doctrine by which the Supreme Court over the last, call it, 30 years maybe going back a little further, has said that when an agency takes an action that is one of vast economic and political significance, that Congress has to be clear in its statutory delegation to give the agency that power.

This comes from not only a statutory context perspective is what the Court told us in the *West Virginia versus EPA* case which I'll get to, but also comes from the separation of powers, that it's Congress and the people's elected representatives that should be making the big decisions about policy in the country. And if they want to give a decision to an administrative agency to make a big sweeping policy decision, they at least have to be clear to attempt to do so.

So in the *NFIB versus OSHA* case, we were up there on emergency motions to stay this rule because, again, it came up through this emergency temporary standard procedure rather than typical notice and comment. The Supreme Court held oral argument for the first time in over 50 years on an emergency motion to stay. I remember getting the call over the Christmas period of the Court telling us that they were going to consolidate the case-- the challenge that we brought in the case that the state of Ohio and some other states had raised.

And so this was a pretty atypical posture. I guess if you want to call it that it was coming from the shadow docket, you can, although after we had a two-hour-plus oral argument, I don't think this is a pretty good vehicle to make any big sweeping pronouncements about the shadow docket or the emergency docket.

About a week after the argument, the 6-3 decision came out. It was a per curiam opinion which said that OSHA did not have the power to enter into this temporary standard. That the breadth and history of this particular power that OSHA had as an emergency temporary standard, that that was much more limited, and that this was a question of vast economic and political significance.

And so then the question really was, well, was there a clear statutory delegation? Now the per curiam majority opinion and the dissenting opinion have a back-and-forth about the textual terms of the statute.

I flagged that because, to transition now to *West Virginia versus EPA*, any time you have one of these major questions doctrines where someone is challenging an administrative agency action and they say, this is a question of vast economic and political significance, Congress didn't provide a clear statement in the statutory delegation, there's always going to be this tension, I think.

That the government's going to come in and say, well, look at this statutory term and look at that statutory term and that's a delegation. The power should be within that.

Now what *West Virginia versus the EPA* told us a few months later when the court by a 6-to-3 vote held that the EPA does not have the power to essentially order energy generation shifting as opposed to ordering a particular site to process chemicals cleaner, the Court said, look, this doctrine isn't just about hypertextualism and looking at specific terms.

It said, if they're equally plausible textual interpretations, said, when there's a major question, we can talk about identifying major questions-- it's going to be where the rubber meets the road in litigation going forward. But when there is a major question, then it really is up to Congress to be clear about this. And it's not good enough for there to be competing plausible textual interpretations.

Now, for students of administrative law, while *West Virginia EPA* did not mention or overrule *Chevron* deference directly, that is the opposite of how *Chevron* deference works. With *Chevron* deference, when you're not talking about a major question, at least under existing precedent, an administrative agency is given deference in interpreting the terms of the statute that it operates under. And that if there is ambiguity, then tie goes to the agency.

Well, with the Major Questions doctrine, it's the opposite. Tie goes against the agency. And so this is also why I guess on a very granular legal doctrinal level that this is such an important doctrine.

Because when you have now administrative agencies that are continuing to push the bounds of what their delegated powers are to try to tackle some of the biggest challenges the country faced from a policy perspective because Congress isn't, well, the more that they are trying to do that, it just means they're going to run headstrong into this Major Questions doctrine.

The dissent in *West Virginia-EPA* made the criticism that-- I mentioned the argument before that, well look, what happened to Textualism? And I do think this is an area where courts create-- call it substantive canons of statutory construction, not just grammatical canons of statutory construction. And your view on when that should occur I think is where a lot of where the dissent and the majority opinion in both *NFIB versus OSHA* and *West Virginia versus EPA* could come out.

I mean, Justice Gorsuch's concurrence in *West Virginia versus the EPA* did catalog many different substantive canons of construction-- the rule of lenity in criminal law. How you construe tax exemptions. Do you construe a congressional statute to abrogate sovereign immunity? There are other examples of that.

So it's not that courts don't ever create substantive canons of construction. I think one of the criticisms from the dissent in *West Virginia versus the EPA* was pretty strong in that-- I shouldn't say pretty strong in that it was what I would believe an effective point, but because it was being made in Justice Gorsuch's concurrence, I'm not sure there was quite the grappling of that that we saw.

And look, some of these times-- I don't know. At the end of Supreme Court terms, they have so many opinions-- they really do. I mean, this year in particular, they have, what, 30 to go with 25 days or something like that? So at the end of the term, you can understand why the opinions aren't always ships directly crashing into each other and can be ships passing in the night, and I think this is maybe one example of that.

So to put these two cases into perspective, though, the Supreme Court before *West Virginia versus EPA* had never actually called this doctrine the Major Questions doctrine. Now there had been various opinions. The *Benzene* case from 1980 about OSHA's power. You had *King versus Burwell*, an Affordable Care Act case. *Gonzales versus Oregon* about DOJ's power regarding pulling licenses from assisted suicide. Drug prescriptions.

You had the *Utility Air* case about EPA about a decade ago. You had *Brown and Williamson* about the FDA's power. So you had a series of cases over about 40 years in which the Court was not deferring to agency interpretations and some of these big questions. However, now you have an opinion that I think is really trying to put some structure to the doctrine, but the dissent also points out like, OK, well how are we going to define what is a vast economic and politically significant question that triggers this? How clear is clear? What is history and breadth mean?

And those are also questions that had popped up in these prior cases, but I think now you're going to have those teed up even more directly.

And by the way, too, I mean, this doctrine happened to be arising in challenges to Biden administration OSHA policy and Biden administration EPA policy, but this is absolutely a doctrine that could very well be used when you have a future Republican presidential administration and they can't get legislation passed through Congress, and then they direct their administrative agencies to take action.

And I think it's funny. These APA cases always come up within the context of suing against one presidential administration, but, I mean, you've already started to see the DACA rescission and census cases from the tail end of the Trump administration about what it means to do APA arbitrary and capricious review against an administrative agency that are already being used in challenging Biden administration policy.

So I would say that when we're talking about these particular policies, this doctrine, which has, again, existed for 40-some years, it will continue to exist and it's going to continue to bind federal administrative agencies regardless of what political party they are. So with that,

I'm going to stop, and I would love to turn it over to Professor Laycock, one of the foremost experts on religious liberty because I think in addition to administrative law, religious liberty is another-- it is probably the-- I would say the top two areas in which I think we're going to have a significant slate of cases from the Roberts Court probably for years to come. So thank you.

**DOUGLAS
LAYCOCK:**

Thanks, Scott. So there are two religion cases this term, *Carson versus Macon* which says if a state funds private schools, it has to include religious schools and treat them equally with secular schools. And *Kennedy versus Bremerton School District* which allowed a high school football coach to lead prayer at the 50-yard line after every game.

Most of the commentary, all the press believes that either these were two wonderful victories for religious liberty or that they were two devastating gashes in the separation of church and state. But either they're both wonderful or they were both terrible.

That's because most people view these cases as are you for religion or you against religion? Or sometimes often more precisely, are you for conservative Christians or are you against conservative Christians? I am for religious liberty for everybody. And from the perspective of liberty, one of these decisions was a terrific victory and one was a terrible gash. So let me walk you through them one at a time.

So *Carson* is about an unusual program in the state of Maine. Vermont has something similar. In rural areas in the northern part of those two states, it is difficult to fund a high school. Half of Maine's public school districts do not have a high school. Instead, they pay tuition to send their kids somewhere else. They can go to a remarkable number of other places. They go to a nearby public school. They can go to a private school. They can go to a boarding school far away.

There have been examples of kids going to school in Europe and having their Maine school district paid for it or at least pay for part of it. But the one place they could not go was to a school that teaches any religious doctrine. That was prohibited and that was thought at one time to be required by the Establishment Clause.

The deeper history here, really, in some way starts at the Founding. There was a huge fight over how do you fund the church? And there was a decision that churches should not be funded by the state. That fight in the Framers' time was about how do you build a church building? How do you pay the minister?

Without much fight at all, they also subsidized schools with heavy religious content or schools that were run by churches. And even Thomas Jefferson sent Christian missionaries to teach the Indians at public expense. It simply wasn't much of an issue. It didn't become an issue until the big Catholic immigration in the middle of the 19th century. Then it became a huge issue.

Public schools were teaching a sort of generic Protestantism with Protestant religious instruction and Protestant religious ceremonies. And Catholic kids were resisting. We have reported cases, and undoubtedly many more incidents that didn't end in litigation, Catholic students being whipped or expelled for refusing to participate in Protestant religious observances.

And one response, of course, from the Catholic side was to create their network of Catholic parochial schools. The evangelical Protestants did the same thing beginning in the '60s when their Protestant religious instruction finally dropped out of the public schools and they began to perceive the public schools as secular and hostile.

And in those Catholic-Protestant battles in the 19th century, we created a political tradition because the Protestants were the majority, that we do not provide government funds to religiously-affiliated schools. That was not actually constitutional law except for a fairly brief period.

The *Lemon* test from *Lemon versus Kurtzman* in 1971 put sharp limits on funding of religious schools, and that lasted for 14 years from 1971 to 1985. 1985 was the high watermark, and in '86, they began to chip away at it in a very appealing case, *Winters versus Washington State Services for the Blind*. They let a blind student take a scholarship to seminary.

And that was unanimous, and the liberals said, this is about helping blind people, this isn't about-- isn't about helping a religion. That transition appeared to culminate in 2002 in the Cleveland voucher case, *Simmons-Harris versus Zelman* where they held 5-to-4, but a solid 5 with no qualifications in the opinion that if a state offers vouchers to help subsidize private school education, it is not required to exclude religious schools.

It can make the vouchers available to religious and secular schools alike. So does not violate the Establishment Clause to include the religious schools.

At about the same time while this transition was going on, the Court had reinterpreted the Free Exercise Clause to focus almost entirely on discrimination. Are you treating this religious activity or interest differently from some secular interest or activity? And those two developments combined to produce what seemed like the logical next case, but the plaintiff's lawyers are champing at the bit and brought it, I think, much too soon.

In 2004 in *Locke v. Davey*, a case about scholarships in the University of Washington higher ed system, if you had a certain grade point average or above and a certain family income or below, you were automatically eligible for a scholarship. You could take it to any accredited institution in the state and you could major in any major that was offered in the state, except you could not major in religion if it were taught from a believing perspective.

And Joshua Davey was the student who said, look, it's no longer an Establishment Clause violation. Everybody on both sides agreed they could fund those religion majors if they chose to. He says, discrimination against religion, that's now violating the core of the Free Exercise Clause. I've got a free exercise right to take this scholarship and use it for my religion major.

And the Court said no, 6-to-3. It might have been 7-to-2. Rehnquist wrote the opinion, long tradition, we don't fund the church. We certainly don't fund the training of clergy. If anything at the core of the Establishment Clause, it is that. And so Washington has a very strong interest here. It would be OK if they did fund the training of clergy, but they're not required to do so. And that's now 18 years ago. There's been a lot of personnel turnover, but it was a pretty solid decision at the time.

The Court, as it does often, chipped away at that precedent intermittently. So in the early teens, we get a case called *Trinity Lutheran Church versus Comer* about a playground at a church daycare center. Missouri had a program in which they recycled old tires and turned them into soft playground surfaces.

So they posed this case as about the safety of children rather than the teaching of religion. Missouri had a fairly objective set of criteria for awarding these grants. The Church qualified until on a second look the state said, oh, wait a minute, you're a church, you're ineligible under the state constitution.

The Court reversed that 7-to-2. Ginsburg and Sotomayor dissented. They thought you were helping the Church and you were at the core of the Establishment Clause. Breyer and Kagan seemed to think it was about keeping kids safe and it was not a religious use of the money.

And in order to hold those extra votes, the chief wrote an opinion that says, "The Church has been excluded by its very identity because of who it is, not because of what it does or what it's going to do with the money." That distinction got them some extra votes, but it wasn't a distinction designed to last for very long.

A couple of years later, they cited a case called *Espinoza against the Montana Department of Revenue*. They ran the same distinction. In Montana, you get \$100 tax credit on your state income taxes if you made \$100 contribution to a scholarship fund for private schools.

And the Court said, if you're going to do that, you have to let the religious schools participate. Can't discriminate against them, that would violate the Free Exercise Clause. And again, they've been excluded by their very identity without any inquiry into how they spend the money.

Well, this idea of a religiously identified school that never does anything religious is obviously a theoretical construct. It pretty much doesn't exist in the real world. And so sooner or later, they were going to have to take that on, and they took it on this term and *Carson versus Macon*.

The state of Maine and the First Circuit, which upheld the state's program, put everything in terms of that distinction between identity and use, and they said, this evangelical school actually teaches religion. We're shocked. And therefore, the money can't go there because it would be used to teach religion.

So it was entirely premised on the identity use distinction that the Court had set forth in these two earlier cases, and no surprise, that got reversed 6-3 in the usual ideological lines, but the Court says you cannot-- the core of the Free Exercise Clause, you can't discriminate against religion. Programs that regulate religion have to be neutral and generally applicable. That may also be up for overruling, but that's the law for now.

This is obviously not neutral and not generally applicable. It's got religious discrimination on its face in the text of the statute. So it's not neutral, it's not generally applicable. It's not necessary to comply with the Establishment Clause, so there's no compelling government interest to justice to justify this rank discrimination.

That was obvious. That as in-- if you look at *Carson versus Macon* as compared to *Lemon* 40 years ago, we've gone from-- it's very suspect to let any money trickle into these places at all, and if it does, it has to be done in a way that cannot possibly be diverted from secular to religious uses.

To now, if you have such a program at all, you must include the religious schools and you cannot restrict how they use the money. It's been a revolution. But *Carson v. Macon* the last teeny tiny step at the end of that revolution. It's not all that big a decision in itself.

The next issue, and it's already been teed up, is now can Maine put strings on that money? Can it require this conservative evangelical school to admit students without regard to sexual orientation or sexual practices? Can it require a statement of faith? Can it give preference to people who sign a statement of faith?

And Maine is now trying to enforce those kinds of rules, and other states that have any variation these programs will follow. And the Court has been of two minds about that. There are cases that are extremely deferential to the state. You can put any kind of-- if you pay the money, you can put any kind of condition on it that you want.

And there are cases, including the religion area, that-- including *City of Philadelphia against Fulton* just a couple of years ago in which the Court says the state can not discriminate against religion in its contracting any more than it can discriminate in its regulation. I think the realist take on the strings on aid is the six conservatives will find a way to protect churches from those kinds of strings. But that's the new front for litigation.

The other-- and that, I think, was all rightly decided, that the best way to protect religious liberty is to treat everybody equally. If you fund the religious but not the secular, you encourage people to be more religious. If you fund the secular schools but not the religious, you encourage them to secularize.

The way to minimize government intrusion into people's religious choices is to fund religious and secular schools equally. I think *Carson* got it right and it is an important win for religious liberty.

Kennedy versus Bremerton is very, very different. Here, too, there's a history, as I mentioned, we had coercive religious instruction, Protestant religious instruction to public schools in the 19th century and lasting up into the mid 20th century. Lasting a good bit longer than that after it became unconstitutional but in parts of the country where it was underenforced.

The line-- after the Court began to police this area, the line became that between school-sponsored speech and student speech. So the school could not sponsor religious instruction that took any kind of a position on religious questions. The school could not sponsor religious observances, school could not sponsor prayers.

Children, of course, could pray on their own. There will always be prayer in math tests. Students could also organize religious groups, and they had a statutory and later a constitutional right to meet in empty classrooms on equal terms with secular student clubs. And That pushed, then, both sides to argue about where the line was.

It meant that conservative schools who weren't a sponsor of religion tried to pretend that it was being done by the students, and it meant that more liberal schools that didn't want to sponsor a religion tried to argue that everything the students did was really the school pulling the strings behind the scene, and the Court had to out some of that.

Most recently in a 6-3 decision in 2000, *Santa Fe Independent School District versus Doe*, a case that I argued for the plaintiffs where the Court struck down a student-- an elected student speaker who was chosen to give a message which always turned out to be a prayer over the loudspeaker at home football games. And in fact, they elected the Baptist minister's daughter.

And the Court said, this is school-sponsored all the way. The school set it up, the school controlled the election. And when the students vote, we have elections to make government collective decisions. This wasn't the individual decision of each student. Everybody was bound by the election. And even Justice Kennedy joined that. Scalia, Rehnquist, Thomas, of course, dissented.

So *Kennedy versus Bremerton* goes a good bit further. Kennedy was the head football coach in the middle school and assistant football coach in the high school. He had a practice of praying after each game. He's certainly entitled to do that, that's constitutionally protected.

He insisted on kneeling to do it at the 50-yard line. He had an earlier practice of giving religious talks in the locker room which he had reportedly stopped when the school objected. But this was background against-- this is against that background. Players would come to join him at midfield. Players from both teams eventually came to join him at midfield.

If you want to what happened in this case, do not read the opinion of the Court, it is a pack of lies. Look at the pictures in the Sotomayor dissent. He was praying with students, with large groups of students gathered around him. Students, some of whom later testified or their parents testified, they didn't really want to be there.

Bremerton, Washington is one of the most secular-- well, Northwest-- the Washington and Pacific Coast are one the most secular parts of the country. Bremerton may not be because it's got a big naval base there, so Bremerton is more mixed. But certainly not everybody in Bremerton-- on the Bremerton Football Team was an evangelical Christian, but they worried about playing time, they worried about offending the coach. There were lots of reasons for them to be there.

So really, the question is, was this a case about the religious liberty of the coach or was this a case about the religious liberty of the students? And of their parents who have a right to send their children to public school with the expectation that they will not be pressured or proselytize to join some other religion from whatever they're being taught at home?

And Kennedy's role should make that pretty clear. He was the coach. He was still on the field. The players were still on the field. The players were still under his supervision. He was still in that position of exercising governmental authority on behalf of the school in that capacity. He could not pray with students around him.

He could pray unobtrusively in a way that didn't attract the attention of students, didn't gather students around him, didn't pressure students to join him. He should not have been allowed to do what he did. And Paul Clement told a masterful story about how little was going on here.

Nothing to see here, just this poor little guy all by himself. Was utterly inconsistent with the record, utterly inconsistent with the findings of the district court that were affirmed on appeal in the Ninth Circuit. And the Court used to have a two-court rule, that if findings are made and affirmed, we won't mess with them.

The Court was eager to be fooled. The Court bought Paul's lies hook, line, and sinker. They fill the opinion. He was all by himself. It was-- and in part, they did it by just misrepresenting things.

And in part, they did it because of a blunder by the school board's not litigating lawyer, but the school board's general counsel who, in the letter when they finally suspended Coach Kennedy, mentioned only a couple of things.

And was not as confrontational as he might have been. Didn't mention the whole long history and the conflict in the community and the conflict in the school and all the chaos that had been created. And so then the majority said, well, they can't rely on anything except what was in the letter. So most of the case magically became irrelevant.

So officially, this is a case about quiet, private prayer by a school teacher or a coach. If you read it that way, it's not a big deal. But it also implicitly holds that aggressive loud public prayer with students gathered around, you will be treated as quiet and private, that's a very different thing.

And the conservative Christian movement is, of course, reading it for all its worth and telling schools, all bets are off, now they can do pretty much-- they can do pretty much whatever they want. So there will be more litigation, and we'll see whether they interpret this according to what it says or according to what the facts-- what the facts actually were.

This is, I think, a disaster. The Court has eased up on the Establishment Clause in a lot of ways. They've permitted crosses and Ten Commandments monuments. And they've insisted that a Christian cross has a secular message which is a wonderful trick if you believe it.

But the school prayer cases had held, school-sponsored events could not lead students in prayer or encourage students to pray. That had held in all kinds of context always, at least six votes and often more. This is school prayer. And the field is his classroom. If the coach can do it at the 50-yard line, I'm not sure why the fourth grade teacher can't do it at her desk. They may distinguish those cases, they may not distinguish those cases.

So what has been a bedrock of our First Amendment law for 60 years now, that schools will not lead students in prayer or pressure students to be more or less religious, is now very much up for grabs. *Kennedy* was a mistake.

[APPLAUSE]