

SUPREME COURT'S TERM HAS BEGUN. WHAT'S IN STORE?

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PINE BLUFFS — The U.S. Supreme Court opened for business on Monday, October 2. Already referred to as “the Roberts Court” after new Chief Justice, John Roberts, Jr., its docket is crammed with socially significant cases.

The 2006-2007 term promises to be the most attention-grabbing in years. Cases range from deciding the constitutionality of race-based enrollment plans in Seattle and Louisville, to whether the EPA can be forced to regulate greenhouse gas emissions from motor vehicles. In between, it'll decide whether a \$79 million verdict against Philip Morris favoring a former chain smoker's widow violates constitutional due process guarantees, whether unions may spend fees collected from nonunion members on partisan political campaigns without consent, and two abortion-related battles.

The first of these is *Cano v. Baker*. Sandra Cano was the Mary Doe of *Doe v. Bolton*, companion case to *Roe v. Wade* in 1973. The Cano case was actually decided October 11. Recall that *Roe*, overturning two centuries of precedent, ended most state restrictions against abortion. *Doe* legalized abortion throughout the entire nine months of pregnancy. Without comment, the Court refused to hear Cano's appeal, thereby affirming the previous ruling and sending an optimistic message to abortion rights supporters, but a worrisome signal to those hoping the Roberts Court would “seize the day” and begin chipping away at these lynchpin pro-abortion cases.

The second arrived before the Justices on November 8, a day after the national elections. It examines the constitutionality of the Partial Birth Abortion Act, passed by the Republican controlled Congress in 2003. The high court had previously ruled this procedure could not be banned by states unless legislatures provided an exception where the mother's health was threatened. The Justices had ignored expert medical testimony presented in two Congressional hearings by dozens of witnesses, that there was *never* a need for this procedure under *any* circumstances because other, safer procedures are available.

Reacting quickly, Congress sought to override the court-imposed requirement by declaring in its law that there were "no circumstances when a partial birth abortion is medically necessary. Since no circumstances exist, there is no need for a health exception."

Whether the Court will defer to Congressional expertise regarding what's medically necessary or attempt to set the standard itself, is an eye-popping question. If it wants to uphold this federal law, the Court could bow to Congressional factual findings. In its brief, the Bush Administration urges this course of action, citing ". . . the long-standing principle that Congress is better equipped than courts to make factual findings that inform the constitutionality of federal statutes."

Another fascinating aspect this term is the possible emergence of Justice Anthony Kennedy as a centrist power on the court. If this happens, he *could* provide the swing vote in key cases.

Former Solicitor general and Pepperdine Law School Dean, Kenneth Star is watching this development: "It's difficult to overstate [its] significance," he said. "All

eyes will be on Kennedy [this term].”

Why? In 2000, by a 5-4 decision in the case of *Stenberg v. Carhart*, the Court struck down Nebraska’s statute outlawing partial birth abortion. In his dissenting opinion, Kennedy wrote that the majority was “... closing its eyes to a law expressing the will of the people that medical procedures be governed by moral principles,” based on “the intrinsic value of human life, including the life of the unborn.” He also added, “The majority views this procedure from the perspective of the abortionist, rather than [that] of a society shocked when confronted with a new method of ending human life.”

Does this mean Kennedy will vote to uphold the Partial Birth Abortion Act? Not necessarily. His career-long adherence to *stare decisis* — the practice of affirming precedent even when disagreeing with it — might prevent that. If he follows his dissent in the Nebraska case, thumbs up for the PBAA. If he goes with *stare decisis*, thumbs down.

Enter newly-appointed Justice Samuel Alito, Sandra Day O’Connor’s replacement. During the Rehnquist years, O’Connor’s swing vote often decided abortion related cases against a pro-life outcome. Alito, pro-life, might be instrumental in tipping the balance of power *away* from the Court’s four-justice liberal wing. Stay tuned. A decision is not expected until June.

This promises to be a mesmerizing term in which the Roberts Court may clearly define itself by shifting to the right. Such a shift would involve moving *away* from strict application of *stare decisis*, and *toward* a willingness to overrule precedent when necessary.

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