Supreme Court Preview

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Overview of the Presentation

- Death of Justice Ginsburg
- Court reform
- Justice Barrett
- SCOTUS and the COVID-19 docket
- Will SCOTUS decide the election
- New SCOTUS grants
Death of Justice Ginsburg

• What does it mean for:
  • Our country
  • State legislatures
  • Supreme Court
  • Chief Justice Roberts

• Why did she wait?
Our Country

- Who has seen the documentary and/or the Hollywood movie of her life?
- Second female Justice
- True feminist hero
  - Endured overt sexism women of my generation couldn’t dream of
  - Argued six gender discrimination cases before SCOTUS
  - Most famous SCOTUS majority opinion lead to VMI accepting women
- Famous for her dissents
- Cultural icon when most people can’t name one Supreme Court Justice
States Legislatures

• All Justices are a mixed bag
• She was a pragmatist who wanted fairness and common sense to prevail
• Three cases I will remember her by:
  • South Dakota v. Wayfair
  • Barr v. American Association of Political Consultants
  • Gobeille v. Liberty Mutual Insurance Company
Calls into Question Courts Refusal to Get Involved in Two Huge Issues

- Qualified immunity
  - Not enough conservatives on the Court who wanted to join the liberals in modifying the doctrine?

- Guns
  - 4 votes on the record to do something with guns; Roberts reticent?

- Did the Justices know/suspect Justice Ginsburg’s death was imminent?
  - Too much uncertainty
  - Too much pressure for a new Justice
The Court’s Shift Right—Overall

- Adam Liptak of the NYT: she will move the Court “slightly but firmly to the right, making compromise less likely”
- Why only slightly?
- Chief Justice Roberts is pretty conservative, and he is at the center of the Court
- Most SCOTUS cases aren’t decided 5-4 on ideological lines
Conservative/Liberal More Important in the Big Case

• Many cases aren’t decided on ideological lines; but most big cases have been in the recent past
  • While I am sure there are more…I can only think of two big cases decided in the last 10 years that weren’t 5-4

• Over the last decade
  • About 50% of cases are unanimous
  • About 20% of cases are 5-4
    • About half of the 5-4 cases have been “big” cases
Last Term was Supposed to be the First Full Term with Five *Real* Conservative Justices

Conservative
- Chief Justice Roberts
- Thomas
- Alito
- Gorsuch
- Kavanaugh

Liberal
- Ginsburg
- Breyer
- Sotomayor
- Kagan
Gone were the Unreliable** Conservatives

- Powell (’71-’87)
- O’Connor (‘81-’06)
- Kennedy (’87-’18)
- Now Kennedy (unreliable conservative) has been replaced by Kavanaugh (expected-to-be reliable conservative)
  - ** Many wondered how reliable Chief Justice Roberts would be
What Happened Last Term?

- Chief Justice Roberts joined the liberal Justices in numerous rulings
  - DACA
  - Abortion
  - Title VII sexual orientation/gender identity
- Most prevalent theory: did it for the institution
- Counter theory—did it to help conservatives by making SCOTUS less of an issue in the election
It Paid Off!!

- Gallup poll August 2020
  - 58% of people approve of the job SCOTUS is doing
  - Highest since 2009
  - 60% Republicans approve
  - 56% Democrats approve
  - 57% Independents approve
This Time the Shift Right Will be Real—Big, Controversial Cases

• Now we will have a 6-3 Court in the big controversial cases
  • Justice Kavanaugh will be at the center of the Court
  • Neither he nor Justice Gorsuch will do much swinging
  • So far Justice Kavanaugh has been a reliable conservative vote in big controversial cases
Justice Kavanaugh and Justice Gorsuch

- We still don’t know them all that well; last term was Kavanaugh’s first full term on SCOTUS
- They are different
- BUT in the big controversial cases only Gorsuch has strayed once (Title VII sexual orientation/transgender)
A Moment on Gorsuch

- More of a Scalia-Thomas-Alito than a Roberts-Kennedy
- Likes his isms: textualism, originalism
- Idiosyncratic in a way I don’t fully understand (relative youth, libertarianism, random)
  - Tribal cases
  - Title VII transgender/sexual orientation
  - Didn’t join Thomas and Alito in their recent criticism of the same-sex marriage decision
A Moment on Kavanaugh

• More of a Roberts-Kennedy than a Scalia-Thomas-Alito
• Likes his pragmatism
• Strikes a kinder, gentler tone (Title VII, DACA)
• Partial term (Fall 2018-June 2019)
  • Justice most in the majority
  • Only agreed with Justice Gorsuch about 70% of the time
  • Only big cases were census and partisan gerrymandering—voted conservative
• First full term (Fall 2019-2020)
  • Voted conservative in all the big cases
Why Did She Stay?

- Thought Hillary would win
- Workaholic
- Senior Justice in the majority after Kennedy left
  - Chief in the majority = Chief decides writer
  - Chief not in the majority = most senior Justice picks
- Kennedy in the majority in 2016 abortion case
- Assigns opinion to Breyer
- Justice Ginsburg is not happy
What it Means for Chief Justice Roberts?

• He can no longer “save” the institution if he wants in the big, controversial cases
• He can signal” to his conservative colleagues not to take a case because he might not vote with them—guns—but his views won’t matter
• He can’t control the pace at which his conservative colleagues move the Court to the right
Will He Dissent for Institutional Reasons?

- My guess is rarely
  - His dissents will make no practical difference
  - No one will remember them or thank him for trying to save the institution but failing
  - By staying in the majority he controls who writes the majority opinion
I Think He Never Had to Make the Hardest Choice

• I think the hardest choice he ever would have had to make is between race and the Supreme Court as an institution
• Kennedy disliked using race as a factor in decision making but at the twilight of his time on the Court he voted to uphold an affirmative action plan
• The Court didn’t hear a case taking race-based decision-making head after Kennedy left
• Color of Law, Richard Rothstein
Is A 6-3 Conservative Court What He Really Wants?

• Same as asking is he more a conservative or an institutionalist
• We don’t know; we will probably never know
• And remember…he could have been a minority Justice in the 7-2 Hillary Court
Court Reform

• I have never presented on this topic until October 2020
• *Soul of America*, John Meacham, Democrats opposed Court packing
• Didn’t think it was likely or even really mainstream until now
• Still not sure I think it is likely, but I now think it is mainstream
• Democrats, if only for the sake of *pride* must try to do something
• Interest in this may only grow—always many generation gaps with SCOTUS Justices
Solution in Search of a Problem?

- Paul Clement, no problem when the constitution was adopted
  - No judicial review
  - Role of federal government was much more limited
  - Founders (must) have envisioned a more active, vibrant, functional legislature
Supreme Court Reform Offers Nine Options

- Adding seats
- Balanced bench
- Bipartisan/merit selection
- Jurisdictional stripping
- Legislative override
- Lottery system
- Partisan balance
- Term limits
- Voting rules
Adding Seats

Pros
• Popular
• Seats have been added in the past
• Could be done by statute; no constitutional problem

Cons
• Where would the tit-for-tat end?
• Where would the additional Justices sit?
Term Limits—18 and Out

Pros
- Regularity—retirement and death would no longer be the only way for vacancies
- Can this be done by statute? Constitution says judges how office “during good behavior”

Cons
- No immediate effect
- Proposal in Congress exempts current Justices
- Presidential election (tainted by electoral college) would be the decider
A Closer Look at Justice Barrett

- Personally and professionally
- Approach and style
- Big three—ACA, abortion, and guns
- Other hot button issues
- Mine-run cases of interest to state legislatures
Personally and Professionally

• Not an Ivy league East Coaster who worked for the federal government
• Clerked for Justice Scalia
• Doesn’t have a really long appellate court record
• Influence of religion in decision-making
Approach and Style

- Textualist
- Originalist
- Judicial restraint
- Social conservative
- Writing style: clear, focused, not flamboyant
The Big Three

- Most of the focus is on three issues:
  - ACA
  - Abortion
  - Guns
- Why these issues?
  - Places where Roberts has held back
In 2012 five Justices (including Chief Justice Roberts) ruled the ACA individual mandate which required uninsured who didn’t purchase health insurance to pay a “shared-responsibility” payment is a tax. As of 2019 Congress changed the “shared-responsibility” to $0 so how can the individual mandate still be a constitutional tax? Seems like a no-brainer.
Severability Test

• Can the rest of the ACA can be severed from the individual mandate?
• “Unless it is ‘evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law’”
• Think about this: Congress got rid of the individual mandate when it could have gotten rid of the entire law—isn’t that good evidence of severability?
Judge Barrett on the ACA

• Heard no ACA cases on the 7th Circuit
• No severability rulings or academic writing on the subject
• Law review article she wrote Justice Roberts’ opinion “pushed the Affordable Care Act beyond its plausible meaning to save the statute”
• Signed a petition objection to criticizing the ACA’s birth control mandate
Smart Money

• I don’t think Justice Barrett’s vote will matter in this case
• Adam Liptak NYT: arguments against severability are “more creative than convincing”
• Love letters to severability
  • Roberts and Kavanaugh wrote pro-severability opinions in cases last term
  • Roberts: severability is “a scalpel rather than a bulldozer”
• We *may* know more after oral argument—November 10, 10AM Eastern time
Standing Question

• California and a number of other states defending the ACA argue that the individual and state plaintiffs lack standing to bring this case.

• California argues the individual plaintiffs haven’t been harmed by the tax being reduced to zero because “[a] statutory provision that offers individuals a choice between purchasing insurance and doing nothing does not impose any legally cognizable harm”

• California claims that the states have failed to alleged harm because they have no proof that the shared-responsibility payment being zero will force individuals into the states’ Medicaid and CHIP programs or increase state costs for “printing and processing [certain] forms”
SCOTUS Has Avoided Gun Cases

- In the last ten years SCOTUS declined to grant review in over 150 Second Amendment cases
- Is a circuit split on whether the Second Amendment grants individuals a right to carry a gun outside the home
- Four Justices on the record they want to hear a gun case—Thomas, Alito, Kavanaugh, Gorsuch
- Only takes 4 votes to grant a petition
SCOTUS Shocker: SCOTUS Denies Petitions in 10 Gun Cases

- Roberts doesn’t want to tackle this issue *now*
- Roberts doesn’t want to commit his view to paper
- The Court knew Justice Ginsburg is going to die soon and didn’t want a case this controversial on the docket?
Guns

- **Kanter v. Barr**: owner of an orthopedic footwear company convicted of mail fraud argued federal and state laws that prohibit people convicted of felonies from having guns violate his Second Amendment right to bear arms
- Majority of the 7th Circuit disagreed
- Barrett dissented—At the time of the country’s founding legislatures took away the gun rights of people who were believed to be dangerous
- History and tradition v. intermediate scrutiny
- Professor Stephen Vladeck of the University of Texas School of Law—gun case like “candy”
Abortion

• For sure personally pro-life
• Joined a dissent from a denial to rehear an abortion case en banc where the 7th Circuit blocked a fetal burial (rather than cremation)
  • Opinion criticized another provision of the law not at issue banning abortions on the basis of race, sex, or disability
  • SCOTUS reversed the 7th Circuit ruling blocking the fetal remains law
• Voted to rehear a case where the 7th Circuit struck down an law requiring minors to seek parental consent before an abortion
  • SCOTUS send this case back to the 7th Circuit rehear the case
Roe v. Wade Has Never Been As Vulnerable

• But might it still be safe?
• Difference between thinking it is bad law, wanting it overturned, and being willing to sign your name to an opinion overturning Roe v. Wade
• Court has to agree to hear the question
• Death by 1,000 cuts?
Other Hot Button Issues

- Sexual orientation
  - Use of the term “sexual preference”
  - Thomas and Alito want to overturn the same-sex marriage case
- Climate change
  - Somewhat surprised by her answer to the question of is climate change happening?
  - Conservatives generally are skeptical of federal regulation (environmental or otherwise)
  - Kavanaugh’s views more important; more known
- Death penalty
  - Conservatives tend to be supportive
Mine Run Cases

• Most of the Supreme Court’s work is pretty boring…
• Hasn’t been on the 7th Circuit that long
• Gorsuch: wrote with flair, liked to pontificate and make suggestions to the Supreme Court about precedent to overturn
• Kavanaugh: D.C. Circuit has all the tough agency cases; he had hit all the hard issues directly: guns, abortion, ACA
• Overall conclusions: she knows how to apply precedent, isn’t flashy or interested in drawing attention to herself
Conservative Supreme Court Not Bad for States

• Ideal Supreme Court Justice for local governments is a pragmatic, moderate conservative
• Who does that sounds like?
Conservatives Often Good for States

**Good**
- Public employment
- Police cases/qualified immunity
- Limiting claims
- Religion in public spaces
- Federalism, preemption

**Except**
- More skeptical of government generally
- Social issues
- Disfavor environmental regulation
- Takings/land use/property rights
- First Amendment free speech (liberals are no better)
Frequent Flyer Topics at SCOTUS

• Free speech
  • Not anti-government

• Qualified immunity
  • Denied it in a case I too would have denied it!

• Takings
  • Only one case; takings claim was crazy!!

• Public employment
  • Seen as pro-employer generally; her decision seemed reasonable to me

• Tax
  • Very few rulings; let a taxpayer challenge a property tax assessment in federal court
SCOTUS COVID-19 Docket

• SCOTUS has cases on its docket it would never otherwise have without the pandemic
• Range of topics: executions, jail conditions, public charge, abortion pill, etc.
• Of most interest to state legislatures:
  • Stay-at-home orders
  • Judge made changes to elections laws
Bottom Line

• SCOTUS has **not overturned any** lower court decisions allowing stay-at-home orders to stay in place
• SCOTUS has **overturned almost all** judge-made changes to elections rules
SCOTUS Disinclined to Overturn Lower Courts on an Emergency Basis

• Emergency request--challenger isn’t asking the Supreme Court to decide the case on the merits (though SCOTUS will never take these case on the merits)

• Stay standard: where the Court is likely to later hear the case on the merits and overturn the lower court’s decision and the party asking for it will likely experience irreparable harm without a stay

• Injunction standard: the legal rights at issue are “indisputably clear”

• It is more difficult to get an injunction than a stay because an injunction “grants judicial intervention that has been withheld by lower courts” rather than merely stops a lower court decision from taking effect
Stay-At-Home Orders

- Pennsylvania, California, Illinois and Nevada
- All (except the PA case) focused on claims religion was treated better or worse than other speech
- Challengers were seeking *injunctions which they were denied by lower courts*
- When are First Amendment rights ever “indisputably clear”?  
- Lower courts upheld the stay-at-home orders as did SCOTUS
The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” When those officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people.
Judge Made Elections Changes

- Absentee/mail ballot requirements
  - Counting them if received late
  - Sending them to everyone
  - Not requiring a witness
- Citizens initiatives
Judge-Made Election Changes

• Challengers sought and were granted stays of lower court decisions in most States disagreeing with judge-made changes have typically argued
  • “Federal courts should not ordinarily alter election rules on the eve of an election”—Purcell principle
  • State law as written doesn’t violate the Constitution (usually the First Amendment)
• Then SCOTUS allowed a PA Supreme Court decision to stand temporarily that allowed ballots to be counted if received up to three days after the election…4-4 (read Roberts joined the liberals)
We Don’t Know Why But…

• The Secretary of State supported the PA Supreme Court decision
• PA Constitution: “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government”
• No federal issue—interpretation of PA state law
• Post office is clear: not all PA ballots will be returned by Nov. 3
And Now…

- The Pennsylvania Republican Party has asked the Supreme Court to decide the merits of this case before the election
- This could be Justice Barrett’s first vote
SCOTUS and the 2020 Election: Why is Everyone so Worried?

- Election may be close
  - Or not, national polls and polls in swing states are looking good for Biden
- Results may not be totally compiled by election day in key states
  - Swing states that start counting mail/absentee ballot on election day: WI, MI, and PA
  - Note: Florida is already counting
- Changes in election rules/election rules have been challenged due to COVID
- People voting differently—mail-in, absentee
  - Should the mail-in ballot not in the privacy envelop get counted?
- New Justice!
Has SCOTUS Already Decided the Election?

- Maybe?!
  - Allowed PA ballots to be counted three days after the election...for now
  - Reinstated South Carolina’s mail-in ballot witness requirement
  - Didn’t overturn 11th Circuit ruling allowing Florida to require felons to pay fines before voting
- If any courts have already decided the election it is probably lower court
  - Most pre-election cases will never get to SCOTUS
What Would it Take to Get *Trump v. Biden*?

- John E. Finn, *The Case of Biden Versus Trump – or How a Judge Could Decide the Presidential Election*, The Conversation
- Most election issues involve **state law and are decided in state court**
- Need a *federal* issue—see *Bush v. Gore* (court-ordered recount violated equal protection because Florida courts had no uniform standard for determining legal or illegal votes)
- More likely we could have a **series of state court decisions** from key states rather than one case that SCOTUS might not decide?
- Great example: Pennsylvania ballot counting case
What Would it Take to Get *Trump v. Biden*?

- Electoral Count Act
  - Barton Gellman, *The Election That Could Break America*, Atlantic—(long article)
  - Garrett Epps, *Will the Supreme Court Decide the Election*, American Prospect—(short article)
- Rick Hasen, *Trump’s New Supreme Court Is Coming for the Next Dozen Elections*, NY Magazine
Trump v. Biden: Counting the Votes

- Judge Barrett won’t say if Justice Barrett will recuse herself
- Justice Barrett recuses herself
  - 4-4 with Roberts joining the liberals means the lower court result is affirmed
- Justice Barrett doesn’t recuse herself
  - Chief Justice Roberts would be likely to side with the conservatives to avoid Justice Barrett taking the heat
Lots of Interesting New Cases on the Docket for States!
Trump v. New York

- Issue: whether the Secretary of Commerce may provide the President with a census count—for apportioning U.S. House of Representative seats—that excludes undocumented persons
- Note: the President has not indicated he wants a census count that excludes undocumented persons for calculating federal funding or state redistricting
- Worry about a slippery slope
- Some states winner other losers (California)
Brnovich v. Democratic National Committee

- First SCOTUS Voting Rights in response to *Shelby County*
- *Shelby County v. Holder* (2013) as a practical matter eliminated the requirement from the Voting Rights Act that “covered” jurisdictions must have changes to elections laws “precleared” to make sure the changes weren’t discriminatory
- Following *Shelby County*, Section 2 of the Voting Rights Act became the focus of litigation
Section 2 of the VRA

- Section 2 prohibits intentional discrimination based on race or color in voting and election practices that result in the denial or abridgment of the right to vote based on race or color.
Arizona Voting Practices Challenged

- Out of precinct voting (ballot totally discounted)
- Third party ballot collection (with limited exceptions)
  - Arizona couldn’t get this pre-cleared when *Shelby County* was in effect
Out-of-Precinct Voting

- Fails results test
  - Minority voters in Arizona cast out-of-precinct votes at twice the rate of white voters
  - Arizona rejects more provisional ballots than other states
  - Why so many out-of-precinct votes?
    - Frequent changes in polling locations
    - Confusing placement of polling locations
    - High rates of residential mobility
    - These factors disproportionately affect minority voters
Third Party Ballot Collection

• Fails results test
  • Prior to enacting the law “a large and disproportionate number of minority voters relied on third parties” to collect and deliver their early ballots
  • Lot of anecdotal evidence: In San Luis—a city that is 98 percent Hispanic—a major highway separates almost 13,000 residents from their nearest post office. The city has no mass transit, a median income of $22,000, and many households with no cars

• Fails intent test
  • The law would not have been enacted but for “unfounded and often farfetched allegation of ballot collection fraud” and a “racially tinged” video showing a man of apparent Hispanic heritage appearing to deliver ballots early narrated with “innuendo of illegality . . . [and] racially tinged and inaccurate commentary”
Arizona Republican Party Argues

• How can Section 2 be violated when voting procedures that are “race-neutral and offer all voters an equal opportunity to vote”?

• Over the past decade, a proliferation of lawsuits have invoked § 2 to challenge an array of ubiquitous, race-neutral “time, place, and manner” voting procedures, such as how voters may register to vote, when they can vote early or absentee, and what they must show to prove their identities. Although such rules leave the voting process equally open to everyone, the theory behind these challenges—part of a concerted effort to use the federal courts to radically transform the Nation’s voting practices for partisan advantage—is that any voting regimes that are not proportionately utilized by racial minorities are discriminatory “denials” of the right to vote. On that construction of § 2, the Voting Rights Act requires states to adopt any alternative voting rule or procedure that would maximize participation by racial minorities, even if the existing procedures are race-neutral, do not block anyone from voting, and offer all voters an equal opportunity to participate in the political process.
More Context

- Ninth Circuit’s decision was en banc decision
- Multiple judges dissenting in two different opinions
- Ninth Circuit admits it is breaking new ground
  - The jurisprudence of vote-denial claims is relatively underdeveloped in comparison to vote-dilution claims
- Judge Barrett voting rights cases?
B.P. v. Mayor and City Council of Baltimore

- What is the case about?
- Ability of state courts to decide cases involving state law
- Future of climate change litigation
Issue is a Mouthful

• Whether a federal appellate court may review all the grounds upon which a defendant claims its case should not be sent back to state court when only one of the grounds the defendant alleges is specifically listed in federal statute as a basis for federal appellate court review
The mayor and City of Baltimore sued 26 oil and gas companies in Maryland state court claiming their role in climate change has violated Maryland law. BP removed the case to federal court. The mayor and City of Baltimore want the case to be heard in state court.
Now, Back to the Law

- Federal law allows defendants to “remove” a case brought in state court into federal court if the federal court has **jurisdiction** over the case.
- BP claims that the federal court has jurisdiction to hear this case on eight grounds, including the federal officer removal statute.
- This statute allows federal courts to hear cases involving a private defendant who can show that it “acted under” a federal officer, has a “colorable federal defense,” and that the “charged conduct was carried out for [or] in relation to the asserted official authority.”
A federal district court rejected all eight grounds BP alleged supported removing this case to federal court.

The federal district court remanded the case back to Maryland state court.

28 U.S.C. §1447(d) generally disallows federal courts of appeals to review federal district court orders remanding a case back to state court which was removed to federal court.

The statute creates an exception for “an order remanding a case to the State court for which it was removed pursuant to” the federal officer removal statute or the civil-rights removal statute (not at issue in this case).
This is What BP Wants

- BP asked the Fourth Circuit to review all eight of its grounds for removing the case to federal court because one of the grounds it alleged--federal officer removal--is an exception allowing federal appellate court review.
Why Does BP Want Appellate Court Review?

- One more chance for a court to find federal court jurisdiction
- Why does it want a federal court to hear this case?
  - Federal judges will be less familiar with state law
  - Federal judges may be more skeptical of climate change case
Fourth Circuit Ruled Against BP

• Refused to review all eight grounds it claimed provided a basis for federal court jurisdiction

• Based on Fourth Circuit precedent decided in 1976, *Noel v. McCain*, holding that “when a case is removed on several grounds, appellate courts lack jurisdiction to review any ground other than the one specifically exempted from §1447(d)’s bar on review”
This Issue Has Come Up in Three Other Climate Change Cases

- Rhode Island v. Shell Oil Products Co., County of San Mateo v. Chevron Corp., and Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.
- Why?
  - States and local governments have brought climate change cases under state law because the Supreme Court has held they may not be brought under federal common law
Not About Climate Change Cases Only

- Defect in airplane
- State-law mortgage foreclosure
- Flint water crisis
- Failure of health insurance company to pay claims on time
- Defamation case against city officials
- Eminent domain
- Franchise agreement
- Health insurance company going after an individual’s recovery from a car accident
Questions???

Thanks for attending!