Another Peter Principle

Some problems are so complex that you have to be highly intelligent and well informed just to be undecided about them

Laurence Peter
Supreme Court 2019-20
Politics, Principle, and Preference

Howard Tolley
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October 22nd, 2019 3rd Class
2nd Class Review

• *Habeas corpus* an order to bring a detainee into court to either release or establish grounds for incarceration.

• The Warren commission misled by FBI director

• Warren, Black, Blackmun changed over time

• Take back the court—back to 1960, 1920, 1840?

• Pp slides on OLLI Website
Critical Numbers + Dates

• 7,000 to 8,000 appeals per year
  *amicus curiae* friend of the court briefs
• Rule of 4: required to grant *certiorari*
• 70-80 cases per year (1%) selected for argument
• 2019 Term 1st Monday in Oct. –June 2020
• 30 minutes per side for oral argument
• Friday conference, Opinion Monday
Written Opinions

**Majority** assigned by Chief Justice, or most senior
Whether 9-0 or 5-4 sets precedent binding on lower federal and state courts.

**Concurrence**
Accepts the result based on a different rationale, may result in a fragmented *plurality* decision *Bakke*

**Dissent**
Partial or total, appeal to future court
Roberts/Kennedy Court 2005—2017

4 Moderate to Liberal Dem. Appointees
   Ginsberg, Breyer, Sotomayor, Kagan
1 Centrist Republican     Kennedy
4 Conservative Republican Appointees
   Scalia, Thomas, Roberts, Alito
Inter-Agreement Index

- 57% Unanimous
- 14%-22% 5-4 or 5-3 decisions
- 2 Justice Inter-Agreement Index: 63% to 96%
- Scalia and Ginsburg agree in 63% of cases
- Kennedy with majority in 75% - 90% of 5-4 decisions.
- 0 in final term Roberts central
Liberal to Conservative 2005-2017

Ginsburg
Sotomayor
Kagan
Breyer

Kennedy

Roberts
Alito
Scalia
Thomas
Liberal Roberts Court Decisions

*National Federation of Independent Business v. Sebelius, 2012 (5-4 decision)*
Upheld the mandate that most Americans have health insurance. Roberts

*United States v. Windsor, 2013 (5-4 decision)*
Federal government must provide benefits to legally married same-sex couples. Kennedy

*Obergefell v. Hodges, 2015 (5-4 decision)* Kennedy
Same-sex marriage is legalized across all 50 states.
Standard of Review in LGBT Cases

**Strict Scrutiny** requiring a compelling state interest and the least restrictive means since
A. “suspect classification” = to race  Equal Protect
B. a “fundamental right” to privacy  Due Process

**Heightened Scrutiny** requiring a significant government interest and substantially related means impacting a “quasi-suspect” class
A rational basis, not arbitrary or capricious
Conservative Roberts Court Decisions

District of Columbia v. Heller, 2008 (5-4)
   Citizens have a 2d Amendment right to possess firearms at home for self-defense. Scalia

Citizens United v. Federal Election Commission, 2010 (5-4)
   Corporations and unions can spend unlimited amounts in elections. $=Speech   Kennedy

Shelby County v. Holder, 2013 (5-4 decision)
   States and localities do not need federal approval to change voting laws.   Roberts
Roberts Court 2017—2020

April 2017     Gorsuch/Kennedy
October 2018   Kavanaugh/Scalia

5 Conservative Republicans + 4 Democrats
6 Catholics and 3 Jews
6 Men and 3 Women
4 New Yorkers
4 Yale, 4 Harvard, 1 Harvard/Columbia Law
Roberts’ Court 2017-2020

**Thomas:** GHW Bush (R, 1991) M, Catholic, Yale, Georgia.  70

**Ginsburg:** Clinton (D, 1993), Female, Jewish, Columbia, NY.  86

**Breyer:** Clinton (D, 1994), Male, Jewish, Harvard, CA.  81

**Roberts:** GW Bush (R, 2005), Male, Catholic, Harvard, NY.  64

**Alito:** GW Bush (R, 2006), Male, Catholic, Yale, NJ.  69

**Sotomayor:** Obama (D, 2009), Female, Catholic, Yale, NY.  65

**Kagan:** Obama (D, 2010), F, Jewish, Harvard, NY.  59

**Gorsuch:** Trump (R, 2017), M, Cath/Episc, Harvard, COL  53

**Kavanaugh:** Trump (R, 2018), M, Catholic, Yale, DC.  54
2018-2019 Economic Rights Cases

1. U.S. unconstitutionally barred Weyerhauser from developing “critical habitat” for frogs no longer there. 9-0

2. Apple can be sued in class action antitrust for monopoly on iPhone apps
   5-4  Kavanaugh joins 4 liberals
1. Elderly blind, wheel chair bound, incontinent, killer unable to recall his crime. **Remand** 5-3
2. Block execution of mentally incompetent 5-3
3. Miss. excluded black jurors. 7-2 Kav v Gorsuch
4. New trial due to ineffective assistance of counsel, failure to appeal. 6-3
5. Asset forfeiture violates 8th Amendment. 8-0
2018-2019 Civil Liberties Cases

Church-State, Free Exercise
40 ft Cross in Maryland ok, WWI Memorial 5-4

Voting Rights
Political Gerrymanders not subject to judicial review. Roberts 5-4

Abortion
Indiana ban on terminating pregnancy based on disability, gender or race postponed. Uphold proper disposal of fetal remains
per curiam unsigned, Thomas and RBG dissent
2018-2019 Executive Power Cases

1. Uphold authority to bar asylum seekers 5-4

2. Can census questionnaire include new tally of citizenship? 5-4 Remand Roberts with 4 liberals

3. Staff of International Organizations, entitled to diplomatic immunity. 7-1

4. Termination of DACA Injunction cert denied
2018-2019 States Rights Cases

1. State + federal prosecutions for the same crime, no double jeopardy. 7-2 RBG + Gorsuch dissent
Dual Sovereignty. *Stare decisis*

1. W. Va. unconstitutionally waived tax on state police that applied to US Marshalls. 9-0

2. States can not be sued in a different states’ courts 5-4 Thomas overrule 1979 precedent. Sovereignty

3. Gorsuch + 4 Democratic appointees uphold Yakima and Crow exemption from state taxation and treaty right to hunt on state land no longer part of their reservation
Partisan Inter-Agreement 2018-2019

• Out of 19 5-4 Decisions,
  7 decided by five Republican appointees
  12 decided by 4 Democratic appointees + 1 R

• Chief Justice Roberts voted with Republican appointees on gerrymandering but with Democratic appointees on the citizenship census question
2019-2020 Docket

Gun Rights  *NY Rifle Assoc v. NYC*  12/2
- NYC banned transport of guns outside the city
- Repealed, but court will decide if moot

Aid to Parochial Schools  *Espinoza*
- 1\(^{st}\) + 14\(^{th}\) Amendment challenge to denying financial aid to students attending church school
- Free Exercise at odds with Establishment
Reconsidering *Roe v. Wade*

*June v Gee* cert granted on 2 Cross appeals

Admitting privileges 3 yr old precedent 5-3

**Standing** of Doctors to raise patients’ claims

*Box v Planned Parenthood*

Indiana requires ultra sound 18 hours prior to abortion

decision on grant of *certiorari* still pending after 6 months of review at 6 conferences
Executive Power: Dream Act

*Trump v. NAACP 11/12* Issues:

1) Whether the Department of Homeland Security’s decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and

2) Whether DHS’s decision to wind down the DACA policy is lawful.
Sella Law LLC v CFPB Issue(s):

(1) Based on the Constitutional separation of powers, can the President fire the director of the Consumer Financial Protection Bureau, an independent agency established by Congress?

(2) If the CFPB is unconstitutional can it be severed from the Dodd-Frank Act?
Sexual Orientation Discrimination


**Bostok v Clayton County. 10/8. 11\textsuperscript{th} Circuit NO**

**Altitude Express v Zarda 10/8. 2d Circuit YES**
Transgender Sex Discrimination

**RG Funeral Homes v EEOC 10/8**

Employee born male fired when identified as a Trans Female

Issue(s): Whether Title VII 1964 Civil Rights Act prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.

Oral argument at oyez.com
Politics, Principles and Preferences

• The court was created as a political actor
• Justices are unavoidably influenced by both legal and political principles, but should never yield to self interested personal preferences
• Court lawmaking has modified a flawed Constitution and poorly drafted legislation
• Reasonable, informed citizens when disagreeing about which lawmaking was appropriate should do so with respectful appreciation of others’ values