THE SUPREME COURT OF THE UNITED STATES:
A COURT IN TRANSITION

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The Federal Court System

- Constitutional Basis for Federal Judiciary (Article III):
  - One Supreme Court
    - Other “inferior” courts as established by Congress.
    - First assembled in 1790
  - Appointment process:
    - Nomination by the President; and
    - Confirmation by the Senate.
    - Increasingly politicized in recent years.
  - No Constitutionally-prescribed qualifications for federal judges.
  - Institutional attributes of judicial independence:
    - Life tenure – no maximum term or age.
    - No diminution in salary.
    - The (implied) power of judicial review.
- Autonomous judicial systems in each state.
The U.S. Supreme Court

- Members of the Court:
  - Nine in all, set in 1869.
  - Chief Justice:
    - Most senior by operation of law.
    - “First among equals.”
  - Eight (8) Associate Justices.
  - Sits *en banc*, absent recusal.

- Court Term
  - Begins first Monday in October.
  - Ends late June/early July, when Court finishes its business.
The U.S. Supreme Court

- Supreme Court’s Jurisdiction:
  - Small area of “original” jurisdiction.
  - Small area of mandatory appellate jurisdiction.
  - Most cases on discretionary appeal via the writ of certiorari:
    - Cases come from U.S. courts of appeal or state courts of last resort.
WRIT OF CERTIORARI

- 8,000 (approx.) petitions filed each year
  - 80-90 petitions typically granted.
- The “Certiorari Pool”
  - Most justices pool certiorari petitions and circulate summaries for the others in the pool.
- The Rule of Four
  - Four votes in favor of review to grant writ.
  - No explanation for denials of certiorari
The (Traditional) Political Binary

• Nature of Judicial Attitudes:
  ○ “Liberal”/”Progressive” versus “Conservative”
  ○ Proxy = party of appointing President
    ▪ Liberal/Progressive = Democrat
    ▪ Conservative = Republican

• Not clear cut:
  ○ Especially in recent years
  ○ Many issues “cut both ways”
THE (TRADITIONAL) POLITICAL BINARY

• Conservative:
  o Protectionist toward big business and moneyed interests.
  o Little support for the interests of women and minorities.
  o Little concern for rights of those accused of crime.
  o Approve of religious influence in civil life.
  o Limited role for federal government/more expansive states rights.
  o Restrained judicial role; greater deference to political branches; restricted access to courts.
  o “Originalist” re Constitutional interpretation.
  o Respect for precedent and *stare decisis*. 
Liberal ("Progressive")
- Protectionist toward individual rights.
- Support for interests of women and minorities.
- Vigorous protection of Constitutional rights of those accused of crime.
- Strong separation of church and state.
- Protective of environmental interests.
- Expansive role for federal government.
- Vibrant role for the judiciary; broad access to courts
- View of a "living" Constitution.
- More willingness to undo precedent when necessary.
<table>
<thead>
<tr>
<th>Justice</th>
<th>Appointing President (Party)</th>
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SUPREME COURT AFTER JUNE 2005

- O’Connor announces retirement upon confirmation of a successor.
  - Bush nominates John Roberts as O’Connor’s successor.
- Rehnquist passes away.
  - Bush nominates Roberts to succeed Rehnquist instead.
  - Roberts handily confirmed.
  - First change to Supreme Court in 11 years.
Who will fill O’Connor’s seat?

- Harriet Miers
  - White House Counsel.
  - Opposed by right, left, and everyone else.

- Samuel Alito
  - Confirmed largely along party lines.
SUPREME COURT CHANGES – 2005
ROBERTS SUCCEEDS REHNQUIST
SUPREME COURT CHANGES – 2006
ALITO REPLACES O’CONNOR
# Supreme Court as of June 2008

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Kennedy (b. 1936)
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Alito (b. 1950)
2008 Presidential Election

- November 2008: Obama versus McCain
  - Obama Victory:
    - Ability to keep current balance on the court.
    - No realistic likelihood of dramatic shift in balance.
  - McCain Victory:
    - Could have dramatically re-shaped Court.
Why No Major Opportunity for Obama?

- Likely vacancies are progressive:
  - Souter (retired summer 2009).
  - Stevens (aged 90; retired summer 2010).
  - Ginsburg (aged 76; may not be well).

- Conservative justices’ dates of birth:
  - 1936 (Scalia and Kennedy).
  - 1950 (Alito)
  - 1948 (Thomas)
  - 1955 (Roberts, C.J.)
2009 Membership Change

- Souter Resigns, Summer 2009.
- Obama Nominates Sonia Sotomayor:
Justice Sotomayor

- Confirmation:
  - Supported by all Democrats
  - Opposed by most Republicans
    - “Wise Latina” comment.
- First Hispanic ever on the Court
- Third woman in history of the Court.
COURT CHANGE (2009)
SOTOMAYOR REPLACES SOUTER
2010 Membership Change

- Justice Stevens, aged 90, announces retirement.
  - Bulwark of progressive arm of the Court
- Obama nominates Elena Kagan:
  - Solicitor General of the United States.
  - Former Dean of Harvard Law School.
  - Confirmed largely along party lines.
COURT CHANGE (2010)
KAGAN REPLACES STEVENS
MEMBERSHIP CHANGES: THE MATH

- Roberts Succeeding Rehnquist:
  - Change in style but not ideology.
- Alito Replacing O’Connor:*
  - O’Connor = swing voter.
  - Alito = solid conservative.
- Sotomayor Replacing Souter:
  - Similar ideology.
- Kagan Replacing Stevens:
  - Similar ideology.
### Supreme Court as of Today

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Scalia (b. 1936)
Thomas (b. 1948)
Gonsburg (b. 1933)
Breyer (b. 1938)
Alito (b. 1950)
Sotomayor (b. 1954)
Kagan (b. 1960)
**IMPACT OF CHANGES IN COURT MEMBERSHIP**

- **2005 Term:**
  - Roberts new Chief Justice.
  - Alito joins term midway through.
  - Boring term – few interesting cases or rulings of major importance.
**Impact of Changes in Court Membership**

- 2006 Term:
  - Court bitterly divided on issues of extreme importance.
  - Stormy term with scathing dissents.
  - 13 out of 41 decisions decided by votes of 5-4.
    - Largest number of 5-4 decisions in modern history.
  - One progressive victory:
    - Standing/Access to Courts/Environmental Law: *Massachusetts v. EPA.*
IMPACT OF CHANGES IN COURT MEMBERSHIP

• 2006 Term:
  ○ Major Conservative Victories:
    ▶ Criminal Procedure/Access to Courts: *Bowles v. Russell*.
    ▶ Employment Discrimination/Access to Courts: *Ledbetter v. Goodyear*
    ▶ Abortion: *Gonzales v. Carhart*.
    ▶ Freedom of Speech: *Morse v. Frederick*
2007 Term:
- Again, many deeply polarizing cases:
  - Detainee Rights -- *Boumediene v. Bush*
  - Voting Rights -- *Indiana Democratic Party v. Rokita*.
  - Death Penalty -- *Baze v. Rees; Kennedy v. Louisiana*.
  - Federalism/International Law -- *Medellin v. Texas*.
  - Second Amendment right to bear arms -- *District of Colombia v. Heller*.
Impact of Changes in Court Membership

- **2007 Term:**
  - Court Not as Bitterly Divided.
    - Fewer 5-4 decisions.
  - Several Victories for Progressive Bloc:
    - Detainee Rights -- *Boumediene v. Bush*
    - Death Penalty -- *Kennedy v. Louisiana*. 
Impact of Changes in Court Membership

2007 Term:

- Conservative Victories – (Some) Not as Strident or Definitive:
  - Death Penalty – *Baze v. Rees*.
  - Voting Rights -- *Indiana Democratic Party v. Rokita*.
  - Federalism/International Law – *Medellin v. Texas*.
  - Second Amendment right to bear arms – *District of Colombia v. Heller*.
I MPACT OF CHANGES IN COURT MEMBERSHIP

- 2007 Term: Far fewer 5-4 opinions. Why?
  - “Election effect.”
  - Public outcry over *Ledbetter*.
  - Calm after the 2006 term “storm.”
  - Scholarly criticism of Roberts.
IMPACT OF CHANGES IN COURT MEMBERSHIP

• 2008 Term:
  ○ Strong Conservative Tendencies:
    ✷ Court took incremental steps in important cases.
    ✷ Conservative justices laid groundwork for further shifts to the right.
    ✷ Justice Kennedy often sided with conservatives.
Impact of Changes in Court Membership

- 2008 Term:
  - Return to highly polarized Court.
    - Court divided 5-4 or 6-3 in almost $\frac{1}{2}$ of the cases.
    - Critical Role of Justice Kennedy:
      - Majority 92% of the time.
      - Majority in all but 5 of the 23 5-4 decisions.
      - Joined conservatives more often than liberals, and in almost all of the most important cases.
2009 Term:

- Center of Gravity has Moved to the Right:
  - Most conservative justices – Scalia, Thomas, and Alito -- cast fewest dissents.
  - Liberal justices dissented frequently.

- May no longer be the “Kennedy Court”: 
  - Kennedy in dissent in 5 of 18 cases decided by vote of 5 to 4.
  - Voted with conservatives in most divided cases.

- Chief Justice Roberts took control:
  - In majority 92% of the time, more than another justice.
IMPACT OF CHANGES IN COURT MEMBERSHIP

• Major Conservative Victories:
  - Further limits to rights of criminal defendants.
  - Extended Second Amendment rights as against limits imposed by state and local governments.
  - Many vague opinions, criticized as being unhelpful to lower courts.
Impact of Changes in Court Membership

- **Major Conservative Victories:**
  - *Citizens United v. Federal Election Commission* – no campaign spending limits for companies and labor unions.
    - Stevens in dissent: Majority “blazes through our precedents” in a “dramatic break from our past.”
    - Roberts concurring: Justifying departure from precedent.
**Citizens United Promises Important Legacy:**

- Recognizes important rights of corporations in First Amendment context.
- Could be extended to cases involving due process and equal protection rights.
Some Modest Conclusions

- Changes in membership have resulted in shift to right.
  - Obama could only keep balance.
- Chief Justice Roberts is very much in control of the Court.
  - Often in majority.
  - Kennedy’s vote less important than it was.
- Ages of new justices declining.
  - Way for nominating president to ensure longstanding impact.
  - What is the minimum likely age?
Some Modest Conclusions

- Conservative trends likely to have major impact as Obama initiatives reach Court:
  - Stem cell research.
  - Health care legislation.
  - Financial reform legislation.
First Amendment Speech:
  ○ Tort arising from protest at military funeral (*Snyder v. Phelps*)
  ○ Constitutionality of laws prohibiting sale of violent games to minors (*Schwatzenegger v. Entertainment Merchants Association*)
This Year’s Docket

- **Business Law:**
  - Federal Arbitration Act preemption of state rule that waiver of class arbitration in consumer contract may be unenforceable (*ATT v. Concepcion*).
  - Federal preemption of Arizona law imposing sanctions on employers who hire unauthorized workers (*United States v. Whiting*)
What’s Next?

- Will Obama get the chance to appoint another Justice?
  - Ruth Bader Ginsburg:
    - 77 years of age
    - Pancreatic cancer.
    - Recently widowed.

- What happens if Republicans take control of White House in 2013?
  - Possible retirement of several progressive and conservative justices.
Gracias por su atencion!

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