

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:**
 - Protectionist toward big business and moneyed interests.
 - Little support for the interests of women and minorities.
 - Little concern for rights of those accused of crime.
 - Approve of religious influence in civil life.
 - Limited role for federal government/more expansive states rights.
 - Restrained judicial role; greater deference to political branches; restricted access to courts.
 - “Originalist” re Constitutional interpretation.
 - Respect for precedent and *stare decisis*.

THE POLITICAL BINARY (CONTD.)



- **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.

THE SUPREME COURT - JUNE 2005



Justice	Appointing President (Party)
Rehnquist, C.J.	Nixon (R); Bush I (R)
Stevens	Ford (R)
O'Connor	Reagan (R)
Scalia	Reagan (R)
Kennedy	Reagan (R)
Souter	Bush I
Thomas	Bush I
Ginsburg	Clinton (D)
Breyer	Clinton (D)

THE SUPREME COURT - JUNE 2005



Justice	Judicial Behavior
Rehnquist, C.J.	Conservative
Stevens	Progressive**
O'Connor	Swing*
Scalia	Conservative
Kennedy	Swing*
Souter	Progtessive**
Thomas	Conservative
Ginsburg	Progressive
Breyer	Progressive

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.

Supreme Court After June 2005 (contd.)



- 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

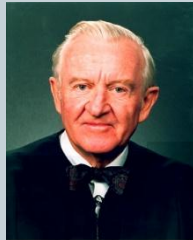


Justice	Judicial Behavior	Year of Birth
Roberts, C.J.	Conservative	1955
Stevens	Progressive**	1920
Scalia	Conservative	1936
Kennedy	Swing*	1936
Souter	Progressive**	1939
Thomas	Conservative	1948
Ginsburg	Progressive	1933
Breyer	Progressive	1938
Alito	Conservative	1950

THE COURT AS OF JUNE 2008



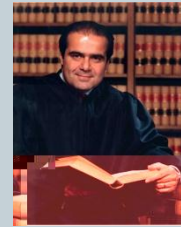
Roberts, C.J.
(b. 1955)



Stevens (b. 1920)



Kennedy
(b. 1936)



Scalia (b. 1936)



Souter (b. 1939)



Thomas
(b. 1948)



Ginsburg (b. 1933)



Breyer (b. 1938)



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.

2008 PRESIDENTIAL ELECTION



- 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:



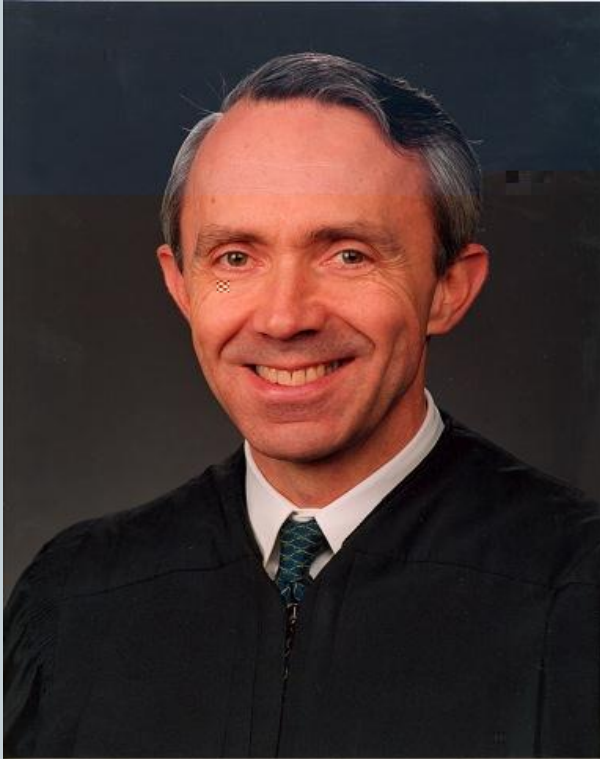
SONIA SOTOMAYOR



- **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



Justice	Judicial Behavior	Year of Birth
Roberts, C.J.	Conservative	1955
Scalia	Conservative	1936
Kennedy	Swing*	1936
Souter	Progressive**	1939
Thomas	Conservative	1948
Ginsburg	Progressive	1933
Breyer	Progressive	1938
Alito	Conservative	1950
Sotomayor	Progressive	1954
Kagan	Progressive	1960

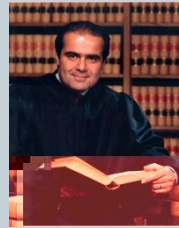
THE COURT TODAY



Roberts, C.J.
(b. 1955)



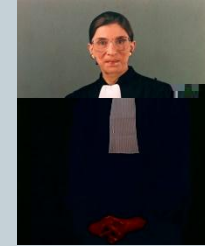
Kennedy (b. 1936)



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*.
 - ✦ Access to Courts/No Establishment Clause: *Hein v. Freedom from Religion Foundation*.
 - ✦ Freedom of Speech: *Morse v. Frederick*
 - ✦ Equal Protection/Racial Integration: *Parents Involved in Community Schools v. Seattle School District No. 1*.

IMPACT OF CHANGES IN COURT MEMBERSHIP



- 2007 Term:
 - Again, many deeply polarizing cases:
 - ✦ Detainee Rights -- *Boumediene v. Bush*
 - ✦ Voting Rights -- *Indiana Democratic Party v. Rokita*.
 - ✦ Employee Rights/Discrimination -- *Crawford v. Metropolitan Government of Nashville*.
 - ✦ Death Penalty – *Baze v. Rees*; *Kennedy v. Louisiana*.
 - ✦ Federalism/International Law – *Medellin v. Texas*.
 - ✦ Second Amendment right to bear arms – *District of Columbia 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*
 - ✦ Employee Rights/Discrimination -- *Crawford v. Metropolitan Government of Nashville*.
 - ✦ 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 Columbia v. Heller*.

IMPACT 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 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.

Impact of Changes in Court Membership



- **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.
 - ✦ Most controversial decision since *Bush v. Gore* (2000)

IMPACT OF CHANGES IN COURT MEMBERSHIP



- ***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.

THIS YEAR'S DOCKET



- **First Amendment Speech:**
 - Tort arising from protest at military funeral (*Snyder v. Phelps*)
 - Constitutionality of laws prohibiting sale of violent games to minors (*Schwartz 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.

THANK YOU!



Gracias por su atención!

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