

## Contemporary Supreme Court Cases Paper- Analysis of the Court's Decision Making

There is much conjecture on what drives Supreme Court Justices' decision making. Despite being the politically isolated branch of government, the political leanings of the justices are apparent in many decisions. These individually held ideals emerge clearly in "hot button" issue decisions such as those regarding abortion, federalism, gun control, and religion.<sup>1</sup> The traditional conservative to liberal spectrum is helpful in explaining some case outcomes, in others these decisions are better explained through conflicting judicial philosophies which tend to fall into liberal and conservative camps, such as pragmatism (liberal) and textualism (conservative).<sup>2</sup> However, this spectrum often falls short of explaining the Court's decision-making process, particularly in unanimously decided cases.

This paper proposes that the Supreme Court's mode of decision making is based not only upon political ideology and judicial philosophy, but also upon the Justices' internal characterization of the government's role in the life of its citizens. This characterization will vary from case to case and helps explain apparent inconsistencies in the Court's reasoning. The framework is simple, first the decision maker characterizes the role of the government at issue in the present case. These roles include protective, investigatory, punitive and others. After characterizing the government's role the decision maker forms a bias about that role and applies it to the current case to assist in the decision making process. The first section of this paper will examine the most contentious cases to identify areas of conflict that split the dissent and the majority. The second section will examine the unanimously-decided cases to both identify cases that provide neutral ground for unanimous decision making and identify contentious cases containing areas of agreement that predominate the conflicts. This paper will conclude with an application of this framework to predict the outcome of two undecided cases.

### **I. Contentious Cases**

This section will examine cases with large divisions, either 5-4 or 6-3 splits. These cases reveal the common fault lines between decision makers and reveal specific areas of conflict. They also demonstrate that identifying the way the government's role is characterized in a specific case sheds light on the Justices decision making.

*McCutcheon v. Federal Election Commission* is an excellent example of the traditional conservative to liberal split. Justice Roberts, joined by Alito, Kennedy and Scalia, writes for the plurality holding that aggregation limits are unconstitutional under the First Amendment and that caps on individual contributions are sufficient to combat *quid pro quo* corruption. Justice Breyer, joined by Ginsburg, Sotomayor and Kagan, not only wrote the dissent but also gave an oral summary from the bench, signaling the sharp disagreement between the two sides. The Justices' primary source of disagreement was the type of corruption subject to regulation. Roberts posits that *quid pro quo* is the only type of political process corruption subject to regulation while Breyer maintains that large contributions inherently contain an element of undue influence on the political party.

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<sup>1</sup> See e.g. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>2</sup> See e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002). Stevens, writing for the majority in this pragmatist opinion, notes that the "independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter." On the other hand, Scalia writes for the dissent noting that the majority "finds no support in the text or history of the Eighth Amendment" and is "rested upon nothing but the personal views" of the justices.

The primary conflict in *McCutcheon* seems to arise from the Justices' differing perspectives on the government's relationship to the individual. Both sides see themselves as safeguarding First Amendment rights: the majority is protecting the individual right to speech regardless of means<sup>3</sup> while the dissent is protecting the public interest in collective speech unimpeded by one large voice.<sup>4</sup> An examination of the oral argument reveals that this conflict contains elements of both the textualist-pragmatist division and levels of comfort with government regulation of individuals. For example, Ginsburg voiced the opinion that by regulating individual speech the government encourages democratic participation across the board by encouraging the candidate to raise money broadly rather than focus on the affluent.<sup>5</sup> Also, Kagan voiced concerns that even though a *quid pro quo* arrangement may not be explicit, party members will feel indebted to large donors.<sup>6</sup> The dissent finds government intervention favorable to promote the democratic process while the plurality is only comfortable allowing intervention in clearly defined instances of corruption. This kind of split arises when the role of government is characterized as protective. The conservative Justices will view government intervention in these instances as oppressive while the liberal Justices will view it as protecting individual rights through regulation.

The majority-dissent split in *Navarette v. California* does not precisely match traditional divisions. The majority, written by Thomas and joined by Breyer, Alito, Roberts and Kennedy, held that an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion for an investigatory stop. Scalia dissents in this case joined by Ginsburg, Sotomayor and Kagan. Scalia contends that this decision is "freedom-destroying" in that it allows police to interfere with our freedom of movement based upon an uncorroborated phone tip.<sup>7</sup> Scalia's unlikely pairing with the most liberal Justices can be explained through a shared hostility to police interference.

This hostility is consistent with Scalia's alignment on the *McCutcheon* decision in that both reject government interference with individual rights. However, in this sense Ginsburg, Sotomayor and Kagan appear to be inconsistent. In the *McCutcheon* case, the dissent seemed willing to impair some individual First Amendment rights to promote the public interest in collective speech, it is unclear why a public safety interest would warrant a different outcome. This could be a reflection of personal values, the government regulations at issue in *McCutcheon* still allow for the practice of First Amendment rights and, according to the dissent, enhances individual rights by encouraging collective speech. The police interference in this case, however, directly violates the individual's Fourth Amendment rights and give the police power to continuously interfere with these rights. This comes through in Kagan's comments during oral argument; she seems particularly concerned that the seriousness of the offense would increase or decrease the threshold for what meets the reasonable suspicion standard.<sup>8</sup> It is more easily explained, however, by characterizing the government's role and viewing the opinion through this lens. In this case, rather than protective, the government is acting in an investigatory role. So, unlike *McCutcheon*, the individual needs protection from government intrusion.

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<sup>3</sup> *McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434, 1448 (2014).

<sup>4</sup> *Id.* at 1467 (Breyer, J., dissenting) "Where enough money calls the tune, the general public will not be heard."

<sup>5</sup> Transcript of Oral Argument at 19, *McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434 (2014).

<sup>6</sup> *Id.* at 24.

<sup>7</sup> *Navarette v. California*, —S.Ct.—, 13 (2014).

<sup>8</sup> Transcript of Oral Argument at 37-38, *Navarette v. California*, —S.Ct.—, 13 (2014).

On the other side of the coin, the majority ruling also seems at odds with *McCutcheon*. Police interference on an individual level is acceptable, however, large scale government regulation is not. This could be a reflection of federalist ideals. *McCutcheon* was about limiting the power of the federal government whereas this case is about empowering state police to enforce laws. The characterization of the government's role is also helpful on the majority side; when faced with an investigatory government role, some Justices will choose the public safety interest over individual rights. This is supported by the nearly identical split present in *Fernandez v. California*, with only Scalia changing sides. Scalia explains his departure from his normal stance on property and privacy by pointing out the law is unsettled regarding a cotenant's right to admit visitors over another cotenant's objection. Scalia appears to be an outlier from the because of his sacrosanct view of property rights.

*Kaley v. U.S.* is a particularly unique split. Kagan writes for the majority joined by Alito, Ginsburg, Kennedy, Scalia and Thomas. Roberts writes the dissent and is joined by Breyer and Sotomayor. This case decided that a defendant is not entitled to challenge a grand jury's probable cause determination at a pre-trial post-restraint hearing in order to unfreeze assets so that the defendant may hire an attorney. The majority focuses on the reliability of the grand jury, if its probable cause determination is sufficient for detaining a person then it must be adequate to freeze assets. This expresses the Court's discomfort with calling the grand jury's probable cause determination into question. The majority is also concerned with the inconsistencies that may arise from two proceedings, thus undermining the criminal justice system's integrity.<sup>9</sup>

The primary place of disagreement for the dissent is the weight given to a defendant's right to secure counsel of his choice. Because this choice ultimately affects whether a person will be imprisoned, it implicates a much greater right.<sup>10</sup> The dissent also disagrees that the grand jury's probable cause determination would necessarily be at odds with another pretrial hearing because the issue at stake would be whether the assets are forfeitable, not whether the defendant may be tried.<sup>11</sup> The split in this case cannot be explained by traditional alignment, either politically or philosophically but may be described as a difference in legal methodology. The dissent is much more driven by the factual issues in this particular case, that a separate hearing for the Kaleys would not produce incongruous results. The majority is hesitant to do this and is primarily concerned with the bigger picture, ensuring that grand jury determinations maintain validity. The characterization of the government's role in this case is a complicated one. It can be described as adjudicative, thus freeing the Justices to place themselves in the government's role and base their decision-making on personal values regarding procedure. Each side maintains that they are preserving the integrity of the criminal justice system: the majority by preserving a grand jury's credibility and the dissent by preserving a defendant's right to council of choice. So, the Justices' alignment may be based on what they would prefer if adjudicating the case.

*Town of Greece v. Galloway* presents an excellent opportunity to analyze areas of conflicts within the conservative-liberal camps. The opinion is split along traditional lines as is to be expected by a politically polarizing issue. However, each side is fractured with some Justices joining only particular parts. Kennedy wrote the majority opinion, joined in full by Roberts and Alito, joined except as to Part II-B by Scalia and Thomas. Alito and Thomas filed concurring opinions, both of which Scalia joined. The majority rejected to hold that prayers must be

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<sup>9</sup> *Kaley v. United States*, 134 S.Ct. 1090, 1099 (2014).

<sup>10</sup> *Id.* at 1110 (Roberts, C.J., dissenting).

<sup>11</sup> *Id.* at 1108.

nonsectarian, saying this would force courts to supervise and censor religious speech.<sup>12</sup> The majority adopted the “coercion test,” noting that courts can review a pattern or practice for coercive effect. This is where the decision fractures, Kennedy argues that coercion may occur if the town directed the public to participate in prayer, singled out dissidents or indicated that not participating would influence the board’s decision. Thomas and Scalia take a more originalist approach than the majority and conclude that coercion under the Establishment Clause only counts if it is legal coercion such as exacting financial support of the church. Peer pressure is not enough.<sup>13</sup> The majority’s overall hesitance to supervise the content of prayers parallels the reasoning used in *McCutcheon*, namely, that government interference in practicing one’s individual First Amendment rights is undesirable. This came to the surface in oral argument as well when Scalia comments that local government officials carry with them their beliefs and religious practices which includes invocation.<sup>14</sup> While taking a wide view of the individual’s right to religious speech, however, the court takes a particularly narrow view of the Establishment Clause. This signals a disconnect between the majority’s understanding of federal government interference with the First Amendment (i.e. constraining the content of legislative prayer) and the local government’s interference with the First Amendment (i.e. establishing religion through legislative prayer). This could be an indication that federalism is a driving factor in the majority’s decision.

Both Breyer and Kagan filed dissenting opinions. Kagan was joined by Ginsburg, Breyer and Sotomayor. The dissent points to what they believe the majority has ignored, that when the government performs public prayer in this way it aligns itself with a particular religion.<sup>15</sup> Furthermore, while the majority seems to have expanded the historical notion of legislative prayer, Kagan limits it to only purely legislative sessions. In this sense she is doing the opposite of Thomas and Scalia. The Establishment Clause is interpreted broadly to allow a pluralistic society while the individual right of free speech is interpreted narrowly so as not to include quasi-legislative gatherings that include the public. Characterizing the government’s role could help explain this converse treatment by both sides. If the Justices are viewing the government in its protective role, then the conservative Justices will want to restrict government interference with individual rights and the liberal Justices will want to encourage government interference that promotes a public right. Here, the majority restricted present and future government interference with the content of prayers. Underlying the resistance to a protective government is the idea of autonomy. This is apparent in Thomas’ dissent; individuals are resilient and should be more resistant to “peer pressure.” The dissent, on the other hand, sees the government’s protective role as necessary to foster religious freedom and plurality. Prayer directed to the public by a law-making body aligns the government with religion and suppresses a religiously plural society.

These contentious cases reveal that by characterizing the role of government in a particular way, Supreme Court Justices are able to resolve internal inconsistencies in their own decision making. They also demonstrate different types of roles the government takes on and the biases associated with those roles. In addition to resolving internal conflicts, role characterization may also help the Justices find common ground.

## **II. Unanimous Cases**

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<sup>12</sup> *Town of Greece, N.Y. v. Galloway*, —S.Ct.—, 10 (2014).

<sup>13</sup> *Id.* at 25.

<sup>14</sup> Transcript of Oral Argument at 42, *Town of Greece, N.Y. v. Galloway*, —S.Ct.—, 10 (2014).

<sup>15</sup> *Town of Greece*, —S.Ct.—, 33.

This section will examine cases that were decided unanimously. Specifically, it will apply the idea of characterizing the government's role to show how certain conflicts may have been resolved and how the court came to a unanimous decision.

In *Lozano v. Alvarez*, the unanimous majority held that the Hague Convention's automatic return remedy for abducted children may not be equitably tolled even in cases where the child's whereabouts were concealed throughout the one year limit.<sup>16</sup> Although the facts of this case implicate an individual parent's right to custody proceedings in his home country, the court unanimously found that this remedy was not available to him. Characterizing the government's role as an enforcer of international treaties demonstrates how the Justices found common ground. The interest in interpreting treaties consistently with other sovereign nations outweighed the interest in providing individual protection. In oral argument, Kagan specifically asked if other countries applied equitable tolling and when the answer was "no," Scalia asserted that the treaty should be interpreted uniformly by all parties.<sup>17</sup> To fulfill its obligation as treaty-enforcer, the United States must use a rule consistent with parties to the treaty. The concurrence by Alito points out that this rule favors judicial discretion as well by allowing the court to decide the issue rather than be forced to automatically return the child.<sup>18</sup> This trust in the discretion of the trial court is apparent in the next two cases as well.

Both *Octane v. Icon* and *Kansas v. Cheever* can be understood by characterizing the government's role as adjudicatory, therefore, decisions will be informed to some extent by the Justices' view of the trial courts' competency. *Octane v. Icon* gave district courts expanded discretion when choosing to award fees under the Patent Act's fee-shifting provision.<sup>19</sup> *Kansas v. Cheever* allows the prosecution to offer evidence from a court-ordered psychological examination for rebutting the defendant's evidence.<sup>20</sup> Both of these cases indicate trust in the court's ability to fairly adjudicate issues. The Court in *Octane* overruled a Federal Circuit Court of Appeals decision through statutory interpretation, stripping away the limiting framework in favor of equitable consideration. By rejecting a rigid rule, the Court is demonstrating faith in the trial court's ability to decide when a case is exceptional. Similarly, in *Cheever*, the Court demonstrates trust in the adversarial system by allowing trial courts to hear evidence for the purpose of rebutting claims by the defendant. This is another grant of discretion to the trial court and an acknowledgment of their competency.

*Mississippi v. AU Optronics* unanimously held that when a state is the only named plaintiff the suit does not qualify as a "mass action" under CAFA.<sup>21</sup> The competing interests in this case were the state's interest in keeping these class actions in state court and the defendant's interest in curtailing abusive class actions. Typically, a state's interest claim is going to gain support from conservatives out of federalist concerns, however, conservatives are also commonly averse to class actions. It is possible that the Justices found common ground on the state government's protective role as an advocate for its citizens. Typically, conservative Justices would find a protective role undesirable, however, in this case it is intertwined with the state's interest in bringing an action in its own state court. Federalist principals overpower the distaste for paternalism. The liberal Justices would find the state's role desirable for protecting citizens

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<sup>16</sup> *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224 (2014).

<sup>17</sup> Transcript of Oral Argument at 19-20, *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224 (2014).

<sup>18</sup> *Lozano*, 134 S.Ct., 1237 (Alito J., concurring).

<sup>19</sup> *Octane Fitness, LLC v. Icon Health and Fitness, Inc.*, 134 S.Ct. 981 (2014).

<sup>20</sup> *Kansas v. Cheever*, 134 S.Ct. 596 (2013).

<sup>21</sup> *Mississippi ex rel. Hood v. AU Optronics*, 134 S.Ct. 736 (2014).

from consumer fraud. The common ground here is a combination of the government's role with the federalist ideals of trust in state discretion. It is interesting that Roberts joined in this opinion since he expressed such hostility to the government's position during oral argument. He was concerned that these actions could potentially subject defendants to multiple obligations if states chose to bring these actions after private consumer class actions.<sup>22</sup> The only answer the government provided was essentially asking the court to trust that states will not function this way, will only bring suits on their independent state interests, and will formulate fair preclusion rules.<sup>23</sup> Roberts joined fully in the majority opinion and did not file a concurrence. For this reason, it seems likely that his trust in the state court's discretion outweighed his concern for the defendants.

The final unanimous case that displays role characterization is *Burrage v. U.S.* which held that a defendant who distributes drugs cannot be liable for penalty enhancement under the Controlled Substance Act unless the use of the drugs is a but-for cause of death or injury.<sup>24</sup> This case lends itself to the characterization of the government's role as punitive. With a punitive government, the court depend heavily on the statutory language to ensure that the crime being punished is the crime intended by the law-makers. Ginsburg's concurrence makes this clear as she takes the time to point out the differences in statutory interpretation, not in policy. The court as a whole rejects policy arguments and focuses on the statutory language and meaning of "because of." This strict adherence to the language of the statute reflects the gravity of dealing with a punitive government.

The unanimous cases reveal areas that are ripe for full agreement, especially when the Justices are able to find common ground in a characterization of the government's role. They also provide insight into the types of roles the Justices view as appropriate for the government. For example, the role of treaty-enforcer is uncontroversial while the protective role is controversial and only provides ground for agreement when combined with a more conservative ideal such as federalism.

### III. Undecided Cases

This section will conclude the paper by applying the characterization of the government's role to two undecided cases in order to predict the outcome. The first case is relatively straightforward with a common right-left division, *Hall v. Florida* presents the issue of whether Florida's scheme for identifying mentally retarded defendants in capital punishment cases is unconstitutional. Here, the most likely frame for the government's role is protective. Although it seems like the government is acting in a punitive capacity, the issue centers around when the government should make policy exceptions for capital punishment based on a person's mental capacity. These policy exceptions were adopted by the Supreme Court after public consensus, including state legislation, created the exception. Even Florida's rigid standard for identifying mentally retarded defendants is protective because it provides some exceptions. In protective cases Kagan, Ginsburg, Sotomayor, and Breyer tend to form one side with Thomas, Alito, Scalia and Roberts forming the other. In previous protective cases discussed (*McCutcheon* and *Town of Greece*), Kennedy has sided against the liberal Justices in favor of less protective government. This, however, is by no means an adequate indicator and would require more research into Kennedy's decision making in other protective role cases.

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<sup>22</sup> Transcript of Oral Argument at 13, *Mississippi ex rel. Hood v. AU Optronics*, 134 S.Ct. 736 (2014).

<sup>23</sup> *Id.* at 22.

<sup>24</sup> *Burrage v. United States*, 134 S.Ct. 881 (2014)

Kennedy's activity during oral argument may shed some light on his mindset. He seemed skeptical about allowing the American Psychiatric Association to set Eighth Amendment standards, however, was unsatisfied with Florida's rigid rule that prevented the court from moving on to the other prongs in the analysis.<sup>25</sup> He then seemed to signal to litigants that he was open to discussing the issue of whether spending 24 or more years on death row was consistent with the administration of justice. This seems to indicate that Kennedy is interested in narrowing the death penalty. This interest may be sufficient to overcome any distaste Kennedy may have for protective government.

*Bond v. U.S.* provides an opportunity to apply the characterization standard to a complex case and reveals some limitations with this method. The first issue in this case is whether Constitutional limits on federal authority impose constraints on the scope of Congressional authority to enact legislation to implement a treaty, particularly when the legislation goes beyond the scope of the treaty. For this question, the government can be characterized as a treaty maker and enforcer. Without the ability to implement treaties, the United States will lose its ability to negotiate treaties with other countries in the future. This is similar to the characterization in *Lozano* and it is likely that this will at least allow Congress to enact laws not traditionally within their authority to implement a treaty. The Court may, however, narrowly interpret this ability and limit implementation to only include items within the scope of the treaty. However, Federalism will also play a role in this issue since the conflict is between federal enforcement and state enforcement. So, unlike *Lozano*, this case is not as clear cut. In cases with strong political issues at stake such as federalism, role characterization plays a smaller role in understanding case outcomes.

The second issue in this case is whether the Chemical Weapons Convention Implementation Act reaches ordinary poisoning cases. This question lends itself to characterizing the government's role as punitive. The court will need to rely heavily on statutory interpretation and less on policy. The punitive characterization adds little explanation to the court's decision making methodology because the case is a statutory one so the Justices will necessarily be basing their decision on statutory interpretation. In oral argument, the Justices were particularly concerned on how to draw lines in this statute, particularly so as not include everyday item like steroids and chocolate.<sup>26</sup> The Justices were looking for a clear line to distinguish these items, but were unsatisfied by the parties' suggestions. Kagan had particular concerns with a nexus test that would force courts to get into the heads of treaty makers.<sup>27</sup> Alito suggested a test asking whether other countries would have an interest in the way the United States deals with a particular situation.<sup>28</sup> The difficulty displayed at oral argument indicates that the Justices will unlikely be able to form a bright line rule and will likely settle on a rule giving judges some limited discretion.

## **Conclusion**

Both the contentious and unanimous cases reveal that Justices frame the government's role related to the case in order to assist with decision making and produce results consistent with their individual ideologies. This framing sometimes reveals insurmountable differences while, other times, it provides common ground for unanimous decisions. Framing the government's role in a particular case can help explain Justice behavior and predict future outcomes.

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<sup>25</sup> Transcript of Oral Argument at 17 & 43-44, *Hall v. Florida*.

<sup>26</sup> Transcript of Oral Argument at 39-40, *Bond v. United States*.

<sup>27</sup> *Id.* at 15.

<sup>28</sup> *Id.* at 17.