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Contemporary Supreme Court Cases
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Suppose Hypotheticals Matter:

A Discussion of Hypothetical Questions & Their Impact in Contemporary Supreme Court Cases

Introduction

Hypothetical reasoning forms a major bedrock of "common law decision making," the Socratic method and thus, modern legal reasoning generally.[1] As we have seen over the course of the semester, the Justices on the Supreme Court of the United States also rely on the use of hypotheticals during oral arguments to either advance or clarify their perspectives. From a high-level vantage point, the question of whether oral arguments "matter" with regards to influencing the outcome of Supreme Court cases remains largely unanswered for both scholars and practitioners. After all, given the presence of detailed and holistically-argued briefs, the clear ideological preferences of each Justice, and the highly truncated length of modern oral arguments themselves, it seems unlikely that an hour-long back-and-forth would make a discernible impact.[2]

Yet, hypotheticals offer us a glimpse into the minds of the Justices and they are often revealing of how each Justice perceives the questions before the Court. This Paper will explore the role that these hypotheticals play in Supreme Court oral arguments, as well as how the Justices employ them. The analysis in this Paper will be primarily qualitative, and I will demonstrate how certain kinds of cases breed certain kinds of hypotheticals that serve different purposes. Namely, this Paper will focus on hypotheticals in two primary case categories: those that center around challenging or unwieldy legal doctrines, and those that deal with contentious socio-cultural issues.

I. The Prevalence of Hypotheticals: Current Scholarly Landscape

By their very nature, hypotheticals are a powerful and compelling method through which the Justices can use to support or attack an advocate's proposed interpretation of the case at hand. At times, it is apparent that Justices use hypotheticals to directly bolster or harm a particular advocate's side, either setting them up for an easy, reasonable reply or trapping them in situations where their arguments would appear particularly dubious. In other instances, the Justices seem to present hypotheticals in order to address their peers on the Court, or examine

[1] Kevin Ashley et al., *A Process Model of Legal Argument with Hypotheticals* 1–10, JURIX (2008), *available at* https://people.engr.ncsu.edu/cflynch/Papers/AshleyJurix08.pdf.
[2] *But see* Timothy R. Johnson, *Information, Oral Arguments, and Supreme Court Decision Making*, 29 AM. POL. RES. 346–47 (July 2001) (suggesting that "justices use oral arguments to gain specific information about a case and that they use this information when making their final substantive decisions").

ways in which their decisions—which are, of course, binding on all American federal and state courts—could be applied in future jurisprudence.[3]

Qualitatively, it would seem that asking easy or bolstering hypotheticals to advocates whose side a Justice may support would have a weaker effect compared to the impact that tripping up an advocate they disagree with would have. The Justices are human after all, and like all of us, are affected by egocentric bias. It would be much easier for them to dismiss a Justice on the "other side of the bench" for handholding an advocate compared to facing a hypothetical that fundamentally damages the side they support.[4]

Over the years, many scholars have studied the extent to which oral arguments actually impact the way Justices vote,[5] but there has been far less focus on the Justices' use of hypotheticals specifically. The last highly-cited piece on the Supreme Court hypotheticals was written in 1984,[6] and that scholar focused primarily on the categories of inquiries that an advocate could expect.[7] However, his conclusion—wherein he posits that the Justices' practice of using hypotheticals as a "probing technique" will continue to trend upward—still holds true more than three decades later with an entirely new Court composition.[8]

II. Key Examples of Hypotheticals in Contemporary Supreme Court Cases

Although the Justices asked hypotheticals in every oral argument that we covered this semester, certain instances stand out as particularly noteworthy and telling. The most interesting hypotheticals generally spring from two categories of cases: those that center around particularly challenging or unwieldy legal issues, and those that deal with highly controversial topics. Yet the posited hypotheticals in each group are serve divergent purposes: the former invites hypotheticals that are focused on the Justices' personal interest and desire for further elucidation, while the latter prompts scenarios that address broader implications and external influences.

A. The Presence & Impact of Hypotheticals in Doctrinally Difficult Cases

It probably goes without saying that challenging legal issues trigger the Justices to ask more questions simply to advance their own understanding of the case at hand. In difficult cases thus, the Justices unsurprisingly appear to ask more hypotheticals that target underlying doctrinal issues rather than trying to sway the other Justices to agree with them, as it may be the case that the questioning Justice herself may not even have picked a side yet. In general, hypotheticals in this category of cases tend to be more numerous, but less creative and interesting, as the Justices are mainly preoccupied with gathering information rather than making far-reaching extrapolations.

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[3] *See* E. Barrett Prettyman Jr., *The Supreme Court's Use of Hypothetical Questions at Oral Argument*, 33 CATH. U. L. REV. 555, 556 (1984).
[4] *See See* James C. Phillips & Edward C. Carter, *Oral Argument in the Early Roberts Court: A Qualitative and Quantitative Analysis of Individual Justice Behavior*, 11 J. APP. PRAC. & PROCESS 325, 328–30 (2010).
[5] *See, e.g.*, Ryan A. Malphurs, RHETORIC AND DISCOURSE IN SUPREME COURT ORAL ARGUMENTS: SENSEMAKING IN JUDICIAL DECISIONS (Routledge 2013).
[6] Prettyman Jr., *supra* note 3.
[7] *Id.* at 556.
[8] *Id.* at 591.

Bethune-Hill v. Virginia State Board of Elections[9] centered around the challenging issue of race-based gerrymandering. For decades, congressional redistricting cases have confounded practitioners, scholars, and judges alike, and *Bethune-Hill* was no exception. With regards to the centrally confusing "predominant factor" issue, Chief Justice Roberts asked the Petitioner's counsel a hypothetical about whether a city's population size or its location would be "predominant."[10] When the advocate attempted to evade by pointing to the Court's jurisprudence as to "this case," Roberts retorted by saying that he "[didn't] really care about this case . . . that's why this is called a hypothetical."[11] He followed that up by saying that the predominance test was questionable because it was "easy to imagine situations where you cannot say that one [factor] dominates over all the others."[12] Although the Chief Justice's tone appeared somewhat critical, it was clear that he simply did not understand how the "predominance" test could be doctrinally extended to other circumstances, though he ultimately joined the majority in the opinion in favor of the Petitioner.

Hypotheticals can also serve as a signal that a certain side is either gaining or losing momentum. Later in *Bethune-Hill*, Justice Kennedy presented a hypothetical to the Respondent's counsel concerning when race would be the "principal motivating factor" in a case with two "conventional . . . possible districts," which the district court claimed would not trigger strict scrutiny.[13] After the Respondent defended the district court's ruling (which supported his side), Justice Kagan then modified the hypothetical to a "mapmaker" who seeks "race-based redistricting," but manages to create contiguous, regularly-shaped districts: in her view, that was expressly "forbidden" by previous Supreme Court cases despite the district court's contrary ruling.[14] This hypothetical led to the Respondent speaking uninterrupted for over 3 minutes, an incredibly rare occurrence given the rapid speed at which modern oral arguments normally proceed.[15] It appears improbable that the Justices allowed him to speak for so long because his speech was so illuminating, particularly given Kagan's curt response to the Respondent's claim that ruling the other way would "send the [wrong] signal."[16] Further, in light of the Court's eventual 7-1 opinion—the silent Justice Thomas being the Respondent's lone vote—it seems more likely that Kagan's final hypothetical and his closing ramble was simply just the final nail in his side's coffin.

Another legally challenging case that prompted a great deal of hypotheticals was *County of Los Angeles v. Mendez*,[17] which ostensibly dealt with the Fourth Amendment, but it combined a whole host of issues such as proximate cause, the provocation doctrine, and qualified immunity for law enforcement officials. On top of that, the case was highly fact-intensive, therefore making the prospect of settling a wider constitutional question very difficult. From beginning to end, the Justices appeared quite flummoxed by how all of these legal doctrines interacted with

[9] 580 U.S. __ (2017).
[10] Transcript of Oral Argument at 4, Bethune-Hill v. Va. State Bd. of Elections, 580 U.S. __ (2017) (No. 15-680).
[11] *Id.* at 4–5.
[12] *Id.* at 5.
[13] *Id.* at 40–41.
[14] *Id.* at 44–45.
[15] Oral Argument at 47:56–51:11, Bethune-Hill v. Va. State Bd. of Elections, 580 U.S. __ (2017) (No. 15-680), https://www.oyez.org/cases/2016/15-680.
[16] Transcript of Oral Argument at 49, Bethune-Hill v. Va. State Bd. of Elections, 580 U.S. __ (2017) (No. 15-680).
[17] No. 16-369 (2017).

one another. Over and over again, the Justices presented hypotheticals to both sides that only slightly changed the facts and circumstances, demonstrating that they were struggling to figure out even the foundational legal questions before them.[18]

Most notably however, Justice Kennedy's opening hypothetical comparing damages analyses for a man arrested for a "white collar crime" with or without a warrant dominated nearly the entire length of argument time for both of the Petitioner's counsels.[19] Chief Justice Roberts even asked one of the advocates "if [he] could get to Justice Kennedy's hypothetical" when the discussion strayed away from Kennedy's original scenario.[20] Even in the times when the advocates were not directly answering that hypothetical, it served as the basis for numerous questions from the other Justices. Justice Breyer asked why "everyone was breaking [the argument] down" from the seizure angle, when he viewed both the case and the hypothetical as a classic tort–proximate cause issue.[21] Justice Alito asked why a warrant would be necessary in the hypothetical to begin with, given that the "defendant's attorney [could] bring the defendant in and surrender" him to law enforcement.[22] The fact that these substantive questions all stemmed from Kennedy's hypothetical—which mitigated much of the case's challenging fact-specific complexities—epitomizes how convoluted the case itself was, and shows how the Justices' hypotheticals can serve as useful proxies for teasing out doctrine.

Finally, of all the cases we discussed, *Murr v. Wisconsin*[23] was probably the most apparent instance of the Justices posing hypotheticals simply to make sense of the merits of a perplexing legal issue. Similar to the racial gerrymandering issue in *Bethune-Hill*, the regulatory takings doctrine is relatively complicated to start, but the Justices in *Murr* seemed to be particularly lost in the weeds during oral argument.[24] Justice Breyer—who often poses sprawling, multi-clause questions even in cases where he is *not* discernibly confused—presented the Petitioner's counsel with a jumbled hypothetical concerning "50 columns of coal" running through some parts of "50 acres" of land owned by 50 different people.[25] In response, Petitioner's counsel bluntly stated that "that hypothetical is not analogous to this situation," which Justice Breyer—to his credit—agreed, stating that "different things make my thinking

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[18] *See, e.g.*, Transcript of Oral Argument at 17, County of L.A. v. Mendez, No. 16-369 (2017) (J. Sotomayor asking car chase hypothetical); *Id.* at 43 (J. Alito asking hypothetical comparing two knock-and-announce situations, one with a search warrant and the other without); *Id.* at 55 (J. Ginsburg asking hypothetical comparing 1983 claims if it is an attached home or a separate dwelling).

[19] Justice Kennedy asked the hypothetical at 7:51 of the oral argument, and Petitioner's counsel's final statement at 27:51 was a direct response to that original hypothetical. Oral Argument, County of L.A. v. Mendez, No. 16-369 (2017), https://www.oyez.org/cases/2016/16-369.

[20] Transcript of Oral Argument at 9, County of L.A. v. Mendez, No. 16-369 (2017).

[21] *Id.* at 15.

[22] *Id.* at 28.

[23] No. 15-214 (U.S. 2017).

[24] Justice John Paul Stevens once famously said, ". . . even the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." Nollan v. California Coastal Commn., 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

[25] Transcript of Oral Argument at 28, Murr v. Wisconsin, No. 15-214 (2017). One regulatory takings expert was surprised that Petitioner's counsel was even able to comprehend Justice Breyer's line of questioning. *See* Robert H. Thomas, *Affirmed by an Equally Confused Court? Some Thoughts on the Oral Arguments in the "Larger Parcel" Case*, INVERSE CONDEMNATION (Mar. 21, 2017), http://www.inversecondemnation.com/inversecondemnation/2017/03/affirmed-by-an-equally-confused-court-some-thoughts-on-the-oral-arguments-in-the-larger-parcel-case.html.

clearer."[26] It is rare to see an advocate to even implicitly rebuke a Justice's line of questioning and even rarer to see a Justice admit that their reasoning is flawed—let alone one right after the other! This exchange is emblematic of how challenging legal doctrine can influence behavior and even upend power dynamics between the Justices and the advocates.

Relatedly, *Murr* shows how a difficult case can alter an advocate's role from one side's champion to more of a pedagogue for the Justices. Particularly in this instance, the complete absence of hypotheticals is just as telling as their overwhelming presence in a case like *Mendez*. The Justices collectively asked the Respondent's first counsel, Richard J. Lazarus—a Harvard Law professor of natural resources and environmental law—a total of *one* hypothetical throughout his entire argument time (which happened to be another rambling Breyer "columns of . . . coal" question).[27] The rest of Lazarus' time was essentially spent educating the Justices on regulatory takings doctrine and jurisprudence. The inversion of the advocate becoming the professor and the Justices taking on the role of inquisitive students was fascinating, and demonstrates how a lack of hypotheticals from the Justices can have tremendous signaling power as well.

B. The Presence & Impact of Hypotheticals in Socio-culturally Controversial Cases

The other category of cases where the Justices seem to kick their hypothetical questioning into high-gear are those that concern controversial socio-cultural matters such as racism and the rights of registered child sex offenders. The hypotheticals in these cases however, are often different in character to those outlined in Part II.A. In these cases, the Justices seem much more aware of their external implications and optics, and the hypotheticals are usually more interesting and forward-looking. After all, who could forget the infamous chain of "broccoli" hypotheticals in *Sebelius*,[28] the case that determined the constitutionality of the Affordable Care Act?

Packingham v. North Carolina,[29] which dealt with the First Amendment access rights of a registered child sex offender, was perhaps the most topically controversial case of all the ones we covered this semester. Child sex offenders are likely the most marginalized pariahs in our society, and the Justices acknowledged that fact in their hypotheticals to both advocates. Justice Breyer asked the Respondent's counsel, representing North Carolina, whether a hypothetical statute that barred "convicted swindlers" from going on social media to prevent them from defrauding people online would be constitutional.[30] The advocate said that sex offenders are an inherently different breed of criminal, but Justice Breyer responded by saying that under that loose standard, "pretty soon . . . everybody convicted of different things [will not] be able to go anywhere or discuss anything."[31] This exchange is an example of how the Justices often pose hypotheticals to "trap" advocates into overextending their arguments into circumstances that become untenable in the real world.

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[26] *Id.* at 28–29.
[27] *Id.* at 54.
[28] 567 U.S. __ (2012).
[29] No. 15-1194 (2017).
[30] Transcript of Oral Argument at 34, Packingham v. North Carolina, No. 15-1194 (2017).
[31] *Id.*

Packingham is also a great example of a socio-culturally controversial case that speaks to both forward-looking *and* backward-looking implications. In addressing the present and the future, Justice Kagan asked the Respondent's counsel if a hypothetical registered sex offender would, under the Respondent's reading of the statute, have a "constitutional right to Snapchat, but not Twitter."[32] This hypothetical distinguishing modern social media applications allowed Kagan to drive home the point that the statute was arbitrary and not sufficiently tailored. Thus, blocking the Petitioner from "crucially important channel[s] of . . . communication" that will only continue to grow in scope and ubiquity was likely unconstitutional. In addressing the past, Justice Kennedy posed a hypothetical to the Respondent's counsel analogizing the Petitioner's loss of social media access rights to someone being barred from a "public square a hundred years ago."[33] Justice Alito asked the Petitioner's counsel if this case would be different if it would have hypothetically come to the Court in 2003 or any time prior to the proliferation of social media.[34] The advocate rightfully responded that the Court should look at the "practical terms . . . [of] people's communicative [lives]" today, and recognize that the Court does not exist in a vacuum.[35]

Lee v. Tam[36] dealt with a racial trademark issue, wherein the Respondent, "The Slants," an Asian-American music group, was denied trademark protection for their name, which is considered to be a derogatory term for people of Asian heritage. Relative to other cases surrounding controversial topics, this oral argument was relatively light-hearted, which seemed to encourage the Justices to throw around an abundance of varied and compelling hypotheticals. Chief Justice Roberts delivered perhaps the most interesting and challenging one when he asked the Respondent's counsel whether a government-run public "pro-Shakespeare . . . festival" that barred all content disparaging Shakespeare would be permissible.[37] The advocate responded that such a program would be allowed, following his argument that, using Justice Kennedy's language, the realm of trademark law is akin to a "public park."[38] Robert's Shakespeare hypothetical is a prime example of the Justices utilizing hypotheticals to pressure advocates to extrapolate their positions into new, fanciful situations, thereby testing the outer limits of their rule interpretations. In this case, it pushed the Respondent's counsel to take an unnecessarily extreme view, which Justice Kagan rightfully told him "can't be right."[39]

The noteworthiness of the hypotheticals and the overall oral argument in *Lee* stems from the Justices' transparency in the existence of significant strategy involved in the various lines of questioning. Justice Ginsburg posed a hypothetical to the Petitioner's counsel, changing the facts to ask whether the name, "Slants Are Superior" would be permissible given that that would be "a complimentary term."[40] When the advocate said that it would not be, that set up Ginsburg to make the point that the Respondent's goal was to reclaim the derogatory term and "take the sting

[32] *Id.* at 37.
[33] *Id.* at 28.
[34] *Id.* at 54.
[35] *Id.* at 55.
[36] No. 15-1293 (2017).
[37] Transcript of Oral Argument at 31, Lee v. Tam, No. 15-1293 (2017).
[38] *Id.* at 41.
[39] *Id.*
[40] *Id.* at 9.

out of it."[41] In the same vein, Justice Kennedy asked the Respondent's counsel if the government could decline to register a trademark in a factually parallel hypothetical, with the only difference being that the band members were "non-Asians" who used "makeup to exaggerate slanted eyes . . . [to] make fun of Asians."[42] When the advocate said that the government must allow that under the First Amendment, Kennedy humorously responded, "I think you have to take that position."[43] Similar to Ginsburg, Kennedy clearly asked the hypothetical to force the advocate to admit that his position was primarily informed by strategy rather than intellectual honesty.

Conclusion

Hypotheticals are a key aspect of Supreme Court oral arguments, and as this Paper has sought to show, they can manifest themselves in various forms to serve various purposes. This Paper focused on hypotheticals posed by the Supreme Court Justices in two case categories. In doctrinally challenging cases such as *Bethune-Hill*, *Mendez*, and *Murr*, hypotheticals tend to take on a more straight-forward, question-and-answer format between the Justices and the advocates. This is probably because the Justices in these cases are primarily seeking clarification or elucidation in order to properly frame their own legal analyses. In socio-culturally contentious cases like *Lee* and *Packingham*, the Justices' hypotheticals are more holistic in character, drawing upon broader implications and external influences. In all, hypotheticals remain critically important to Supreme Court jurisprudence and legal reasoning as whole: though a great deal has changed in the legal realm over the course of generations, that much has remained ever constant.

[41] *Id.* at 17.
[42] *Id.* at 27.
[43] *Id.* at 28.