Dean Chemerinsky Reviews U.S. Supreme Court's October 2018 Term, Previews Upcoming Blockbuster Cases for 2019 Term

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On October 3, 2019, the Los Angeles Chapter of the Federal Bar Association hosted its annual "United States Supreme Court Review and Judge Barry Russell Federal Practice Award" luncheon. The event took place at the Millennium Biltmore Hotel in Downtown Los Angeles. Chief Judge Virginia A. Phillips began the event by swearing in the incoming Board of Directors for the Los Angeles Chapter. Judge Barry Russell then honored five local law students for achieving excellence in the study of federal practice and procedure. For the main event, Dean Erwin Chemerinsky reviewed the U.S. Supreme Court's October 2018 term and offered a preview of upcoming blockbuster cases for the October 2019 term.

1. Swearing in the New Board of Directors

The Honorable Virginia A. Phillips, Chief Judge of the U.S. District Court for the Central District of California, swore in the new Board of Directors for the Los Angeles Chapter of the Federal Bar Association. The Honorable Michael W. Fitzgerald, District Judge of the Central District of California, succeeded Lane Dilg, City Attorney for the City of Santa Monica, as President for the 2019–20 year. President Fitzgerald is joined on the Executive Committee by President-Elect Jeff Westerman of Westerman Law Corp., Treasurer Yuri Mikulka of Alston & Bird LLP, and Secretary Sandhya Ramadas of The Walt Disney Company.

2. Judge Barry Russell Federal Practice Award

The Honorable Barry Russell, Bankruptcy Judge of the U.S. Bankruptcy Court for the Central District of California, presented his annual *Federal Practice Award* to five students from local, ABA-accredited law schools. The students were honored for achieving excellence in the study of federal practice and procedure. The recipients of this year's award were Katlynn Clinich of Pepperdine University School of Law, Christopher Phillips of USC Gould School of Law, Erica Jansson of Southwestern Law School, Chelsea Aitken of UCLA School of Law, and Trevor Yedoni of Loyola Law School. Each student received a plaque recognizing their achievement, a $400 award, and a signed copy of Judge Russell's *Bankruptcy Evidence Manual*.

3. Dean Chemerinsky's Annual Supreme Court Review

Erwin Chemerinsky, Dean of Berkeley Law, then conducted his annual U.S. Supreme Court review. Dean Chemerinsky has presented to the Los Angeles Chapter of Federal Bar Association for 25 consecutive years. He began by noting the divisiveness at the Court during the October 2018 term before discussing *stare decisis* in the era of the Roberts Court and highlighting the contributions of a few individual justices. Dean Chemerinsky then discussed three of the most important decisions from the October 2018 term and previewed three of the most important issues that will be decided during the October 2019 term.

A Court divided, but less so ideologically. Dean Chemerinsky explained that the Supreme Court remains divided, but less so on ideological grounds. During the October 2017 term, the Court issued 59 signed merits opinions after oral argument. Nineteen were decided by a 5-4 (or 5-3) vote. Of those split decisions, the five Republican-appointed justices were in the majority 14 times (*i.e.*, Justice Kennedy joined Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch).

Pictured: Dean Erwin Chemerinsky, U.C. Berkley School of Law

During the October 2018 term, the Court issued 66 signed merits opinions after oral argument and 21 were decided by a 5-4 (or 5-3) vote—a similar rate of split decisions.

This time, however, the five Republican-appointed justices were together in 5-4 majorities only seven times. Notably, the four Democrat-appointed justices were able to create several 5-4 (or 5-3) majorities with the Republican-appointed justices (*e.g.*, four with Justice Gorsuch and three with Chief Justice Roberts). For example, in *Department of Commerce* v. *New York*, No. 18-966, Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, held that the Commerce Secretary's decision to reinstate a citizenship question on the 2020 census violated the Administrative Procedure Act (APA).

Dean Chemerinsky observed that the Court's ideological divisions were weaker during the October 2018 term.

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Nonetheless, he cautioned the audience about the limitations of this data: the small sample size, for instance, and the reality that the "conservative" position prevailed in many ideologically driven cases. *See, e.g.*, *Rucho* v. *Common Cause*, No. 18-422 (partisan gerry-mandering); *Bucklew* v. *Precythe*, No. 17-8151 (lethal injection); *Am. Legion* v. *Am. Humanist Ass'n*, No. 17-1717 (Establishment Clause); *Franchise Tax Bd. of Cal.* v. *Hyatt*, No. 17-1299 (sovereign immunity); *Knick* v. *Twp. of Scott, Pa.*, No. 17-647 (Takings Clause). Dean Chemerinsky also inferred that, where possible, the Court avoided taking up high-profile cases. For example, during the October 2018 term, the Court chose not to review *Department of Homeland Security* v. *Regents of the University of California*, No. 18-587—a Ninth Circuit decision that affirmed a preliminary injunction against the Trump Administration's rescission of Deferred Action for Childhood Arrivals (DACA). After the row over Justice Kavanaugh's confirmation, the justices may have simply desired a relatively quiet term with fewer blockbuster cases.

Stare decisis *and the Roberts Court.* Next, Dean Chemerinsky discussed the force of *stare decisis* in the era of the Roberts Court. In most cases, the Court will follow *stare decisis* (*i.e.*, "to stand by things decided") because it is "more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Much to Dean Chemerinsky's surprise, however, the justices vigorously and regularly debated whether to follow or overrule precedent. Two decisions stood out during the October 2018 term.

In *Nevada* v. *Hall*, 440 U.S. 410 (1979), the Court held that the Constitution does not bar private suits against one state in the courts of another state. The Court overruled that decision in *Hyatt*, No. 17-1299. Writing for the majority, Justice Thomas explained that the decision in *Hall* was "contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution." The Court rejected contrary arguments grounded in *stare decisis*. According to the majority, that doctrine is "not an inexorable command" and is, in fact, "at its weakest when [the Court] interpret[s] the Constitution." Justice Breyer dissented, arguing that the majority "surrendered to the temptation to overrule *Hall* even though it is a well-reasoned decision that has caused no serious practical problems in the four decades since [the Court] decided it." Signaling debates to come over abortion, Justice Breyer remarked that "[t]oday's decision can only cause one to wonder which cases the Court will overrule next."

In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court held that a property owner cannot bring a Takings Clause claim in federal court until she has exhausted state remedies. The Court overruled that decision in *Knick*, No. 17-647. Writing for the majority, Chief Justice Roberts explained that "the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs" and "conflicts with the rest of [the Court's] takings jurisprudence." Relying on the text of the Constitution and analogous decisions, the majority instead held that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." Justice Kagan dissented, arguing that the majority's decision "smashe[d] a hundred-plus years of legal rulings to smithereens." Echoing Justice Breyer's dissent in *Hyatt*, Justice Kagan explained that "the entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance." She further stressed "the value, in a country like ours, of stability in the law."

The Court decided both *Hyatt* and *Knick* by a 5-4 vote, with the Republican-appointed justices in the majority. Dean Chemerinsky suggested that, if *Hyatt* and *Knick* are any indication, *stare decisis* will carry diminishing force as the Roberts Court goes forward.

Spotlight on the Justices. Dean Chemerinsky also focused on the unique roles that Chief Justice Roberts and Justices Thomas and Kagan played during the October 2018 term. Dean Chemerinsky recalled a time when it appeared as though the Honorable Merrick Garland, Circuit Judge of the U.S. Court of Appeals for the D.C. Circuit, might have been confirmed to the Supreme Court or Hillary Clinton might have become the President of the United States. In that counterfactual world, Chief Justice Roberts might have frequently found himself in dissent.

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But that did not come to pass. To the contrary, he observed that the Supreme Court is now clearly *the Roberts Court*. During the October 2018 term, Chief Justice Roberts was in the majority in 85 percent of all cases, in the majority in 75 percent of non-unanimous cases, and in the majority in many of the most important cases. See, *e.g.*, *Rucho*, No. 18-422 (partisan gerry-mandering); *Dep't of Commerce*, No. 18-966 (the 2020 census case).

Justice Thomas had a notable term, particularly concerning his views on *stare decisis*. Indeed, he was not bashful about his desire to overrule landmark decisions. *See, e.g.*, *Flowers* v. *Mississippi*, No. 17-9572 (Thomas, J., dissenting) (suggesting that *Batson* v. *Kentucky*, 476 U. S. 79 (1986), should be overruled); *McKee* v. *Cosby*, No. 17-1542 (Thomas, J., concurring in the denial of certiorari) (suggesting that *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), should be overruled); *Timbs* v. *Indiana*, No. 17-1091 (Thomas, J., concurring in the judgment) (proposing the elimination of "substantive" due process and securing only those rights protected under the Privileges and Immunities Clause); *Garza* v. *Idaho*, No. 17-1026 (Thomas, J., dissenting) (suggesting that *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), should be overruled). According to Dean Chemerinsky, Justice Thomas has established himself on the ideological frontier of a Court controlled by Republican appointees.

Justice Kagan also had a breakout term. According to Dean Chemerinsky, Justice Kagan wrote the majority opinion in some of the most important cases of the October 2018 term. *See, e.g.*, *Iancu* v. *Brunetti*, No. 18-302 (holding that a prohibition on the registration of "immoral[] or scandalous" trademarks violates the First Amendment); *Gundy* v. *United States*, No. 17-6086 (rejecting a challenge to the Sex Offender Registration and Notification Act under the non-delegation doctrine). Dean Chemerinsky also suggested that, given Justice Ginsburg's illness during the October 2018 term, Justice Kagan stepped into the role of the Court's most powerful "liberal" voice, penning "blistering" dissents in cases involving partisan gerrymandering and the Takings Clause. See, *e.g.*, *Rucho*, No. 18-422 (Kagan, J., dissenting); *Knick*, No. 17-647 (Kagan, J., dissenting).

Most important decisions from the October 2018 term. Next, Dean Chemerinsky reviewed three of the most important decisions from the October 2018 term. Although the Court largely avoided high-profile cases, the majority opinions in *Rucho*, No. 18-422, *Department of Commerce*, No. 18-966, and *American Legion*, No. 17-1717, were nonetheless momentous.

First, in *Rucho*, the Court held that partisan gerrymandering claims are non-justiciable political questions. As Dean Chemerinsky pointed out, the Court was obligated to hear this appeal from a three-judge district court under 28 U.S.C. § 1253. Writing for the majority, Chief Justice Roberts explained that "[p]artisan gerrymandering is nothing new." Although "the Framers were familiar with it at the time of the drafting and ratification of the Constitution," the historical record contains no evidence "that the federal courts had a role to play." According to the majority, "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." Justice Kagan wrote a powerful dissent, emphasizing that, "[f]or the first time ever, th[e] Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities." She rebuked the majority for "throwing up its hands," and explained that the Court's analysis "reveals a saddening nonchalance about the threat [that partisan gerrymandering] poses to self-governance."

Second, in *Department of Commerce*, the Court held that the Commerce Secretary's decision to reinstate a citizenship question on the 2020 census violated the APA's reasoned explanation requirement. As Dean Chemerinsky noted, the Court granted certiorari before the Second Circuit's judgment in part because the census questionnaire needed to be finalized for printing by the end of June 2019. Writing for the majority, Chief Justice Roberts agreed with "[d]istrict [c]ourt's determination that the Secretary's decision must be set aside because it rested on a pretextual basis." The Court was presented "with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process."

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Specifically, the evidence showed that the Commerce Department's stated reason for reinstating the citizenship question (*i.e.*, enforcement of the Voting Rights Act) was "contrived." Under those circumstances, Chief Justice Roberts explained, the Court could not "ignore the disconnect between the decision made and the explanation given" and was "not required to exhibit a naiveté from which ordinary citizens are free."

Third, in *American Legion*, the Court held that the Bladensburg Peace Cross (a 32-foot-tall Latin cross on government property in Maryland) did not violate the Establishment Clause. Justice Alito delivered an opinion for the Court, where he noted that, in addition to its "widespread uses as a symbol of Christianity," the Latin cross became a "central symbol" of World War I. Since 1925, the Bladensburg Cross has "stood as a tribute to 49 area soldiers who gave their lives in the First World War." According to Justice Alito, "the presence of the Bladensburg Cross on the land where it has stood for so many years" is "fully consistent" with the aim of the Constitution's Religion Clauses, *i.e.*, "to foster a society in which people of all beliefs can live together harmoniously." Dean Chemerinsky noted that *American Legion* generated seven separate opinions, and there are now at least three views of Establishment Clause doctrine. Some justices contend that the Establishment Clause is violated only if the government coerces religious participation or discriminates between religions. Other justices believe that the Establishment Clause prevents the government from endorsing religion. And other justices maintain that the Establishment Clause was designed to erect a wall between church and state.

***Preview of the October 2019 term*.** Dean Chemerinsky predicted that the October 2019 term would be a blockbuster term. The justices have granted certiorari in several cases that involve hot-button issues, like immigration, employment discrimination, healthcare, and the free exercise of religion. These cases will be decided in the shadow of the 2020 presidential election and an impeachment trial in the Senate (where Chief Justice Roberts is currently presiding).

Dean Chemerinsky previewed three of the most important issues that will be decided during the October 2019 term. *First*, the Court will decide several cases concerning LGBT discrimination in employment. In *Bostock* v. *Clayton County, Georgia*, No. 17-1618, and *Altitude Express, Inc.* v. *Zarda*, No. 17-1623, the question presented is whether sexual orientation discrimination constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964. And, in *R.G. & G.R. Harris Funeral Homes, Inc.* v. *Equal Employment Opportunity Commission*, No. 18-107, the question presented is whether Title VII prohibits discrimination against transgender people based on their status as transgender or as sex stereotyping under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

Second, the Court will decide a significant case that concerns the free exercise of religion. In *Espinoza* v. *Montana Department of Revenue*, No. 18-1195, the question presented is whether it violates the Religion Clauses or the Equal Protection Clause of the Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.

Third, the Court will decide an immigration case with enormous human dimensions. In *Department of Homeland Security* v. *Regents of the University of California*, No. 18-587, the question presented is whether the Department of Homeland Security's decision to wind down DACA is judicially reviewable, and, if so, whether that decision was lawful.

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