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What Lies Beneath

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I came cold to the Supreme Court's most recent decision, by which I mean that I hadn't read the briefs or the argument transcript, let alone attended the argument itself. In fact, I confess to having known nothing about the case, Marvin M. Brandt Revocable Trust v. United States, before I downloaded the opinion from the court's website.

In that state of ignorance — and in contrast to my past professional life as a reporter, during which I knew at least enough about every case on the court's docket to know which ones I didn't have to care about — I was like most people who might encounter a stray Supreme Court decision without any prior buildup and wonder what it was that the justices had done. The experience, a natural experiment in a way, was instructive enough to share.

After reading the 17-page majority opinion by Chief Justice John G. Roberts Jr., I had only a vague sense what the case was about and none whatsoever of its significance, if any. The case was a property dispute between a Wyoming landowner and the federal government that posed the question, as the chief justice put it, of "what happens when a railroad abandons its right of way." Does the right

of way go to the property owner whose land it traverses, or does it revert to the United States, which had originally conveyed it to a railroad (in this case, the Laramie, Hahn's Peak and Pacific Railroad) under the terms of the General Railroad Right of Way Act of 1875?

I won't get into the facts of the case except to say that the landowner won and the government lost. That outcome would have been predicted by anyone who attended the argument; the transcript shows the justices reacting with unreserved skepticism to the government's argument that it regained at least the "surface rights" to the 400-foot-wide right of way following the railroad's final abandonment of its line in 1996. The United States had taken the opposite position in a case the Supreme Court decided in 1942. That bit of history evidently clinched it for the court in the new case. "The government loses that argument today, in large part because it won when it argued the opposite before this court more than 70 years ago," Chief Justice Roberts wrote.

The vote was 8 to 1. I turned to Justice Sonia Sotomayor's solitary dissenting opinion seeking enlightenment. She argued that the old case shouldn't govern the outcome of this one because it had involved subterranean rights — the right to drill for oil — rather than the simple surface rights now at issue. I have no idea who has the better of the argument. But in Justice Sotomayor's final paragraph, I came at last to a clue about why the decision might matter.

"The court undermines the legality of thousands of miles of former rights of way that the public now enjoys as means of transportation and recreation," she wrote, adding: "And lawsuits challenging the conversion of former rails to recreational trails alone may well cost American taxpayers hundreds of millions of dollars."

Aha - rails to trails. And indeed, that's what the media outlets that covered the decision emphasized. My point isn't that the potential impact made Justice Sotomayor right and the majority wrong as a matter of law. Rather, it would have been nice if the majority had given the readers of its opinion a clue that something more was at stake beyond a debate about "implied reversionary interests," "bare common law easements," and other principles of property law. (So deeply did the oral argument dive into this territory that Justice Stephen G. Breyer, acknowledging that "I'm somewhat in the dark," summoned the spirit of his old

Harvard Law School property professor, A. James Casner: “A great class. Real expert.”)

How far the Supreme Court should go to acknowledge the real-world context of its decisions is a question worth considering. Notice that I said context rather than consequences. The court is often in a rather poor position to assess consequences (not always, of course: see Bush v. Gore. That point was brought home to me years ago when the court issued a criminal procedure decision so ambiguous that the Washington Post reporter and I interpreted it in diametrically opposite ways. (One of us called the decision a victory for the police and the other said it was a victory for criminal suspects, I forget which.) Days later, my press corps colleague and I found ourselves standing near one of the justices at a court event. We approached him. Which of us got that decision right, we asked. “I really don’t know,” the justice replied. How could that be, we asked. The answer, and it has stuck with me, was that the ultimate meaning of the decision lay in how the lower courts interpreted and applied it.

But context is another matter. It took only a quick perusal of the briefs (available through the court’s website) to see that the roots of the dispute between the Wyoming landowner and the government lie deep in the property-rights movement. The property owner had lost in the lower courts, and briefs urging the justices to hear his appeal were filed by leading libertarian and property-rights-friendly organizations. The lawyer who argued on the landowner’s behalf, Steven J. Lechner, is the chief legal officer of the Mountain States Legal Foundation, long a prominent defender of Western land interests.

Indeed, this case was only the latest iteration of a dispute that goes back to the 1980s, when Congress responded to the abandonment every year of thousands of miles of rail lines by enacting the National Trails System Act Amendments of 1983. The law gave states and localities the authority, acting under a federal umbrella, to convert the abandoned lines to public recreational use. Property-rights groups challenged the law’s constitutionality, but the Supreme Court upheld it in a unanimous 1990 decision. The battle, clearly, didn’t end then, and goes on still. I’m grateful to Justice Sotomayor for cluing us in to what it’s about.

The Supreme Court, meanwhile, has done something of a disappearing act these past few weeks and even months. Nearly six months into the term, none of the important cases have been decided, most notably including four that were

argued in early fall. The two undecided cases remaining from the October argument sitting are McCutcheon v. Federal Election Commission, a free-speech challenge to the aggregate limits on how much money an individual can contribute federal candidates and political committees, and Schuette v. Coalition to Defend Affirmative Action, a challenge to a Michigan voter referendum that barred affirmative action in public higher education.

The only two justices who haven't written an opinion from among the October arguments are Chief Justice Roberts and Justice Anthony M. Kennedy. It's an understatement to observe that neither justice is a fan of either campaign finance regulations or affirmative action. But expressing their distaste in the form of a majority opinion is evidently easier said than done.

Likewise, only two cases remain from the court's November argument sitting: Town of Greece v. Galloway, an Establishment Clause case about the constitutionality of clergy-led prayer at local government meetings, and Bond v. United States, a politically inflected case about congressional authority to enact laws that carry out treaties. Once again, Chief Justice Roberts and Justice Kennedy are the only two justices who haven't been heard from. The court is in recess until next week. But beneath the surface, I assume it's no vacation.

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