

The Ripeness Resolution: An Introduction

By Travis Neal

In the email exchange between JP Lacy and Jackie Massey, Jackie offered some resolution ideas, one of which begs further exploration. I will refer to it as the Ripeness Resolution because it focuses on cases the SCOTUS finds ripe and worthy of consideration. The wording would be something like: The SCOTUS should overturn a previous SCOTUS decision using a case which has been granted cert and that has yet to have an opinion delivered. The wording would need to be rigorously examined, something that I have not yet had the time to adequately do. The Supreme Court Topic Area Report (hereafter referred to as the SCTAR) posted by Feldman, Galloway, Moore, Patrice and Steinberg raises several issues that I think this topic adequately addresses, consequently the organization of this paper follows the SCTAR's organization.

Meta-Issues

Meta-Issue #1: A stable mechanism

Ross interprets the topic committee meeting as reflecting a desire for the resolution to emphasize “the **mechanism** of Supreme Court precedent setting.” (SCTAR, 1) The Ripeness Resolution would most aptly capture this desire by not only forcing plan action on this mechanism but also by providing an easy to identify literature base which discusses the plan and this mechanism in the same environment. This specificity in literature is what is often missing in our activity and this resolution provides a unique opportunity to bridge this gap.

Meta-Issue #2: Related theme

A resolution which specifies an area of action (First Amendment, abortion, etc.) would better satisfy the desire for a *subject matter* theme over a *procedural* theme the Ripeness Resolution would. However, I contend this topic is not insufficient in this endeavor. There would be a subject matter theme of ripeness, while that is not as limiting as abortion and/or other themes, the cases involved would be extremely predictable. Since the reason many prefer the clear limits of a subject matter themes resolution is predictability of affirmative plans the Ripeness Resolution is worthy of consideration because it provides a clearly demarcated literature base. The Ripeness Resolution is preferable because it resolves the dilemma of subject matter themed resolutions raised in the Wording Issues section of the SCTAR.

Meta-Issue #3: Directionality

Again the subject themed resolutions would be better able to lock in a direction than the Ripeness Resolution, but I think this is a minor concern. As the SCTAR paper reminds us, the SCOTUS is presumed to move in a certain direction anyway because of recent changes in its composition. Because of the clear limit provided by the Ripeness Resolution predictive evidence about the decision of the SCOTUS on cases on the docket will be easy to find. While this might allow affirmatives to approach a case from both directions (liberal and conservative), negatives would be able to have uniqueness claims mitigating the need for well-developed strategies on both sides of the case. The literature

base would also guarantee easier to find negative arguments as each case on the docket (see the findlaw.com links for proof) comes with briefs on both sides of the issue.

Wording Issues

Wording Issue #1: The Agent of Action

In Wording Issue #1 Skiermont and Lee raise objections to using the SCOTUS as the agent of action. Skiermont's argument is that SCOTUS overturns are rare and the mechanism is through legislation. A legislature will pass a bill which challenges a previous ruling and then the SCOTUS will review the law and either strike it down as inconsistent or modify the previous decision to comport with the new legislation. Consequently the ability of an affirmative to adequately fiat is compromised. The Ripeness Resolution, however, absolves problem with affirmative SCOTUS fiat. The docket already has cases which are those very challenges needed for an adequate model of fiat and so the contrivance of affirmative fiat is lessened by this resolutional approach.

Lee's argument is a question of solvency evidence. Since many people do not discuss an imagined reversal of SCOTUS decisions there is a lack of appropriate solvency evidence for SCOTUS overturning, except in only the most high profile cases. However, the Ripeness Resolution would circumvent this problem. The briefs filed as part of the cases' passage from legislation to the SCOTUS docket would provide harm and solvency evidence. There would also be articles about many of the cases outside of the briefs before the SCOTUS.

Wording Issue #2: overrule vs. reverse vs. overturn

While the SCTAR raises many issues with this issue, I do not know that this resolution resolves any of the issues or complicates matters more than any of the other possible approaches. It may, however, help clarify the confusion by providing a clear literature base that calls for SCOTUS action on the case and the terms with those calls for action. While the confusion may persist, the Ripeness Resolution at least offers a clear base of affirmatively contextualized evidence written by constitutional scholars. This issue alone may make this the most preferable way to engage in a SCOTUS agent of action.

The confusion among these terms leads Gottlieb, Dunbar and Stefan to question the ability of a resolution (not limited to just SCOTUS agents) to have clear plan texts. Gottlieb provides an example of many different ways to overturn a precedent using *Bowers v. Hardwick*. These problems may still exist with the Ripeness Resolution, but the literature surrounding the case make this confusion less likely to occur (of course we may see the rise of the "As Per" criticisms, but that can be curtailed by a more detailed plan text.)

The Cases

The SCTAR spends a lot of time, and it appears effort, to recommend a list of areas and/or cases for topic inclusion. What seems to be at work is the authors combing for issues of ripeness (issues that we as a community are willing/wanting to debate and what areas have a sufficient literature base to sustain our activity for a year). While this search for ripeness will probably be successful, it seems the best way would be to deal

with issues the SCOTUS finds ripe. In an edebate post James Taylor provided a list of links to the current SCOTUS docket:

http://supreme.lp.findlaw.com/supreme_court/caseindex.html
<http://www.landmarkcases.org/index.html> <http://www.oyez.org/oyez/frontpage>
<http://www.aele.org/Hot.html>
<http://www.aclu.org/scotus/index.html>

I did a search for cases that would have still been on the docket at the time of last year's NDT and CEDA tournaments to see how large the pool of potential affirmatives might be, here are the links:

http://supreme.lp.findlaw.com/supreme_court/docket/2005/march.html
http://supreme.lp.findlaw.com/supreme_court/docket/2005/april.html

These lists are only the cases that were scheduled to be argued in March and April, which means that they would clearly qualify as 'on the docket' at the time of those tournaments. There are also many cases from previous months that had already been argued before the court and had yet to have a decision rendered. It is a safe assumption that there would be a large number of affirmatives available although repetition of subject matter (several admiralty cases, for example) does provide some limit to the potential number of affirmatives for which the negative needs to be prepared. The clearly marked literature pool would also lessen the burden on negatives with such a potentially large number of affirmatives. Another concern of the Ripeness Resolution would be a dearth of possible affirmatives. The above links show the SCOTUS is constantly granting cert to cases, so this possibility is unlikely. The other approach does not obviate this concern. If, for example, an abortion area was chosen as a potential area for action and the SCOTUS were to render a decision it could moot the area altogether.

These links also show the main areas of desired discussion exist on the docket and there seem to always be a SCOTUS concern of ripeness around these preferred areas of consideration. If the Ripeness Resolution had been the resolution at the NDT last year there would have been First Amendment debates, IPO debates, Congressional Authority/Executive Authority debates, Sovereignty debates and even debates about debate (what constitutes persuasion and credibility in a testimony.) While I did not find an abortion case on the docket, it is not a far supposition (as many scholars predict) that with two new Bush appointees there will be an abortion case on the docket during next year's debate year.

I think there would also be some value to being forced to debate what the institution of scrutiny finds important. While our attempts to have this overlap of concern (China and Europe) have had some success, it might behoove us as a community to be forced (instead of lucking into the overlap) to have this overlap of concern with our object of examination.

This is clearly not an attempt to close the debate about next year's resolution. I heard a suggestion that piqued some interest and decided to explore the possibility, and now I open up this suggestion to criticisms and hopefully improvements. The biggest issue is a potentially large and enormous affirmative pool but the ability to easily predict

the plan mechanisms might overcome this issue. I am curious to see how others' research bears out the issues.