

Supreme Court Update

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Overview of Presentation

- Changes on the Court
- Handful of cases of interest to local governments

Our Court through the end of July

Conservative

- Chief Justice Roberts
- Kennedy*
- Thomas
- Alito
- Gorsuch

Liberal

- Ginsburg
- Breyer
- Sotomayor
- Kagan

Million Dollar Question

- What does Justice Kennedy leaving the Court (and being replaced by someone predicted to be a reliable conservative) mean for local governments and for the Court in general?

Where did Justice Kennedy Provide the Critical 5th Vote?

- Anything, everything
 - Gun rights
 - Death penalty
 - Affirmative action
 - Abortion
 - Same sex marriage
 - Land use
 - *Citizens United*
 - Public employment

Where Was Justice Kennedy “Liberal”?

- LGBTQI issues
- Death penalty
- Race (sometimes)
- Abortion (sometimes)

Who is Justice Kavanaugh?

- We know three things about him for sure
 - Very conservative (could be an even more reliable conservative)
 - In between Thomas and Gorsuch/Alito
 - Over 1/3 of his opinions involve administrative law
 - He hasn't ruled on a lot of cases involving bread and butter issues for local governments because he has been on the D.C. Circuit

On the D.C. Circuit

- Pro-employer
- Pro-law enforcement (qualified immunity, Fourth Amendment)
- Pro-gun
- Pro-free speech
- Anti-agency deference
- Anti-environmental regulation

What We Can Guess

- Pro-property rights
- Pro-religion in public spaces
- Pro-closing the courthouse door
- Anti-race-based decision making

Big Issues Discussed at Confirmation Hearings

- Abortion
- Presidential power
- Guns

Conservatives Often Good for Local Governments

- Except:
 - More skeptical of government generally
 - Social issues
 - Disfavor environmental regulation
 - Takings/land use/property rights
 - First Amendment free speech (liberals are no better)

Five Solid Conservatives

- We have had a conservative Supreme Court for my **entire lifetime**
- Never a **reliable** conservative Supreme Court
 - Powell ('71-'87)
 - O'Connor ('81-'06)
 - Kennedy ('87-08)

Three Big Questions

- What will such a Court do?
- How long will it last?
- From Orin Kerr, USC Gould School of Law
- How is it playing out already?

How is it Playing Out

- Have only a handful of ruling on the merits (in not particularly interesting case) since Kennedy left the Court
- A few decisions to take case or not take cases that are interesting
- Even more decisions where the Court decides to allow a law to stay in place or be put on hold while further litigation happens
 - Not a ruling on the merits of the law
 - Practically speaking are an indication of how the Justices view the law at a glance

Conservatives will Push their Causes

- Expect a lot of people with **conservative causes to push their cases to SCOTUS** to see what the new Court will do. These ideological windows may stay open only for a few years; think 1962-68, when there was a strong liberal majority and a whole lot happened...
- **Gun case**
- Abortion
- Expect to see the Court taking more **land use** cases and local governments to lose

June Medical Services v. Gee

- Louisiana law requires physicians who perform abortions in the state to have “active admitting privileges”
- Supreme Court struck down a similar requirement from Texas in 2016
- 5th Circuit held law constitutional—only one of the 6 abortion doctors in the state can’t get admitting privileges
- Three of the four challenging doctors say they can’t get admitting privileges
- Roberts and the liberal voted to prevent the law from going into effect
- Kavanaugh and the rest of conservatives would have allowed the law to go into effect to see if all the doctors could get admitting privileges

Liberals will Fight back

- A justice to watch: Elena Kagan. She's brilliant, and she has some centrist impulses. She'll presumably be looking to create a centrist block with Roberts to push for narrower rulings
 - Liberals will do damage control by pushing for narrow rulings
 - Too early to see how this plays out
- Death penalty case?

Roberts Will be Stuck in the Middle

- The **common wisdom that Roberts will be a check on this is correct**, I think. But note that the **conservative 4** excluding Roberts **are enough to get cert granted** -- and Roberts in most areas has been a reliable conservative.
 - Roberts is a moderate conservative; pragmatic conservative; **he as not been a conservative on social issues**
 - Sees himself as the institutional guardian of the Court
 - All Justices will now vote in controversial cases with the President who nominated him unless Roberts strays
 - What ever pressure he felt before Kavanaugh has doubled!
 - Four conservatives will try to push Roberts right by voting to grant petitions

All Eyes on Roberts

- Ian Millhiser, Think Progress, Chief Justice Roberts tells right-wing judges to slow their roll
- Bradford Betz, Fox News, Chief Justice Roberts' recent votes raise doubts about 'conservative revolution' on Supreme Court

All Eyes on Roberts

- Provided the 5th vote to prevent Louisiana's admitting privileges law from going into effect
- Voted with liberals in a death penalty case
- Voted to uphold precedent in *another* death penalty case where he had previously taken a position against the precedent

All Eyes on Roberts

- Spoke out against Trump calling a judge an Obama judge
- “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”
- Read: How Democracies Die by [Steven Levitsky](#) and [Daniel Ziblatt](#)

All Eyes on Roberts

- Provided the 5th vote to allow a federal district court decision ruling against Trump policy to deny asylum to those who cross the Mexican border illegally to stand when the ruling is being appealed to the Ninth Circuit
- Provided the 5th vote to allow Trump's ban on transgender persons in the military to stand while issue is being appealed to a federal appellate court

Sexual Orientation/Transgender Employment Cases

- *Zarda v. Altitude Express* (en banc 2d Circuit) (employees may bring sexual orientation discrimination claims under Title VII)
- Discrimination on the basis of transgender and transitioning status is discrimination “on the basis of sex” under Title VII, *Harris Funeral Homes v. EEOC* (6th Cir.)
- This ship has sailed, only employment not marriage
- Dictionary definition of “sex” may be different today than from the 1960s
- Hard line position of dissent in same-sex marriage case
- Vote on transgender in the military ban

Who Knows How Long it Will Last

- The conservatives have a big age advantage w/ life tenure: The **two oldest Justices are on the left**, Breyer and Ginsburg (80 and 85)
- And who knows what will happen in 2020?
 - Will the new world order be that a **Supreme Court nominees only get through the Senate if the majority of the Senate is the same party as the President?**
 - Wrinkle will continue to be that Senators up for election in states predominated by the other party may feel they must vote for a nominee picked by a president from the opposite party

Justice Ginsburg Status Update

- Who has seen both movies?
- In November she falls and breaks three ribs
- December she had surgery for lung cancer; declared cancer free
- Had to vote on asylum case from the hospital
- Missed two weeks of oral argument in January
- Fox News and others have declared her dead
- Didn't attend SOTU; cancelled speaking events in early Feb.; appeared in public on Feb. 4
- Back on the bench Feb. 19



Justice Ginsburg Status Update

Nina Totenberg (@NinaTotenberg)

3/4/19, 1:22 PM

RBG sends not so subtle message
[@Scotus](#) today, summarizing not 1
but 2 opinions she authored--including
1 in a case heard while she was home
recuperating from surgery. She now
has produced 4 opinions, more than
any other justice this term.

Will Thomas Retire?

- Retirement rumors have swirled for years
- In the past they have focused a lot on him not liking being a Justice
- Close relationship with President Trump and what a coup it would be for him to replace Thomas
 - Dinner with spouses
 - Wife met with Trump and allies
- Criticizing *Times v. Sullivan* (public officials have a higher burden to prove libel)
 - Last stand or just getting started?

Census Case

- In March 2018 Secretary of Commerce Wilbur Ross issued a memorandum stating a citizenship question would be added to the 2020 census questionnaire
- Ross stated that he “began a thorough assessment” of whether to add a citizenship question “[f]ollowing receipt” of a December 2017 letter from the Department of Justice (DOJ) requesting citizenship data to enforce the Voting Rights Act’s prohibition against diluting the voting power of minority groups

Census Case

- But after the litigation began Secretary Ross acknowledged he had begun considering adding a citizenship question long before DOJ's letter
- Challengers state that Ross asked DOJ to request inclusion of a citizenship question
- The Census Bureau "strenuously" objected warning "that adding a citizenship question would harm the quality of census data and increase costs significantly and that it would do so for no good reason because there was an alternative way to satisfy DOJ's purported needs that would not cause those harms"

Census Case

- Question has been included in the census since 1960
- Worry is many in the immigrant community won't participate
- Judge Furman summarizes the significance of having an accurate census for state and local governments in his 277-page opinion: “[The census] is used to allocate hundreds of billions of dollars in federal, state, and local funds. Even small deviations from an accurate count can have major implications for states, localities, and the people who live in them — indeed, for the country as a whole”

Census Case

- The Administrative Procedures Act prohibits federal agencies from acting in a manner that is arbitrary and capricious or not in accordance with law
- In January a federal district court found numerous APA violations in the manner in which the question was added to the census
- Struck the question from the census

Census Case

- For example, “[Ross] failed to consider several important aspects of the problem; alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices — a veritable smorgasbord of classic, clear-cut APA violations.”

Census Case

- Supreme Court had to hear this case
- Case has only been heard by one federal district judge
- Normally his decision would be reviewed by a federal appeals court
- Forms have to be printed very soon
- Could be 5-4; could be 9-0

Guns, Guns, and More Guns

- In 2008 in *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation”
- Narrowest reading: handgun in your home for self-defense reasons is okay
- Three biggest unanswered questions
 - Does an individual have a Second Amendment right to possess a gun *outside the home*
 - What *kind of gun* does a person have a Second Amendment right to possess
 - What *level of scrutiny* applies to gun regulations

Guns, Guns, and More Guns

- State and local governments passed hundreds (thousands) of restrictions on guns
- Federal courts of appeals largely ruled the restrictions were constitutional
- Supreme Court stayed out of the controversy
 - In the last ten years, the U.S. Supreme Court has declined to grant review in at least **88 Second Amendment cases** where lower courts upheld gun safety laws
 - Giffords Law Center to Prevent Gun Violence

Why Stay Out of the Controversy?

- Wanted to see what lower courts would do with *Heller*
- Waiting for a circuit split
- Wanted to gauge Americans' reactions to mass shootings
- Takes 4 votes to get a petition granted
- Roberts and Kennedy didn't want to go there
 - Both believe in a broad interpretation of the Second Amendment
 - Wonder if it's in our country's best interests?

New York State Rifle & Pistol Association Inc. v.
City of New York, New York

- Court will decide whether New York City's ban on transporting a handgun to a home or shooting range outside city limits violates the Second Amendment, the Commerce Clause, or the constitutional right to travel
- Decision will be next term (probably sometime in early to mid-2020)
- Why now?
 - Kavanaugh, Kavanaugh, Kavanaugh
 - Roberts has to choose

*New York State Rifle & Pistol Association Inc. v.
City of New York, New York*

- A New York City administrative rule allows residents to obtain a “carry” or “premises” handgun license
- The “premises” license allows a licensee to “have and possess in his dwelling” a pistol or revolver
- A licensee may only take his or her gun to a shooting range located in the city
- Challengers want to bring their handgun to their second home and to target practice outside the city

Level of Scrutiny

- What is really at stake in this case is much more than New York's law
- This case and future cases challenging to restriction on guns will be won or lost depending on what level of scrutiny the Supreme Court applies
- Strict scrutiny—fatal scrutiny; government almost always loses
- Intermediate—50/50 scrutiny; government action “substantially related to the achievement of an important governmental interest
- Rational basis—government almost always wins; not at issue in this case

Lower Court Ruling

- The Second Circuit didn't apply strict scrutiny as a result of the challengers being unable to transport a gun to their second home
 - If they want a gun at their second home they can simply buy another gun
- The court didn't apply strict scrutiny despite the fact that the challengers could not bring their gun outside the city for target practice
 - The rule imposes “no direct restriction” on the right to “obtain a handgun and maintain it at their residences for self-protection”

Lower Court Ruling

- Applying intermediate scrutiny, the Second Circuit held the rule was “substantially related to the achievement of an important governmental interest”
 - It seeks to “protect public safety and prevent crime”
 - And the court agreed with the former Commander of the License Division that premises license holders “are just as susceptible as anyone else to stressful situations,” including driving situations that can lead to road rage, “crowd situations, demonstrations, family disputes,” and other situations “where it would be better to not have the presence of a firearm”

Best to Hope for

- Don't like gun regulation
 - Court applies strict scrutiny; law is struck down
- Like gun regulation
 - Court applies intermediate scrutiny; law is struck down (but other laws may survive)
- What Court might do
 - Strike law down under intermediate scrutiny; not commit to a level of scrutiny for other cases

Overview of the Term for Local Governments

- Lots of cases impacting local governments
- 14 SLLC *amicus* briefs (might be a record)
- 5 cases where local governments are a named party
 - In at least two more the local government will be paying the bill for money the money
- Blockbuster case (census) goes to state and local governments

Overview of the Term for Local Governments

- Only two First Amendment cases
- Only one Fourth Amendment case
- Only one qualified immunity case
- Two employment cases involving local governments as parties
- Four cases where the Court is asked to overturn precedent
- Important takings case

Partisan Gerrymandering

- What is partisan gerrymandering: redistricting in a way that one party gains as many seats as possible and the other party loses as many seats as possible
- Why should local governments care about partisan gerrymandering?
 - State legislatures determine how much authority local governments have
 - The most gerrymandered states are most likely to preempt local laws
 - Learned the hard way even more homogenous states care about partisan gerrymandering

Partisan Gerrymandering—A Brief History

- Partisan gerrymandering claims are justiciable--*Davis v. Bandemer* (1986)
 - Supreme Court may rule some amount of partisan gerrymandering is too much and violates the Equal Protection Clause
 - Six votes for this position
 - Weren't five votes to lay out a standard for when partisan gerrymandering is unconstitutional
- Still no standard for partisan gerrymandering cases--*Vieth v. Jubelirer* (2004)
 - Justice Kennedy: “The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering”

Last Term

- Supreme Court had an opportunity in two cases to lay out a standard for partisan gerrymandering
- Failed to do so for procedural reasons
- Neither case is over
- Many cases are following in the wake
- One is already back

Two Partisan Gerrymandering Cases This Term

- NC—Republican gerrymander
- MD—Democrat gerrymander
- Both raise the question of how much is too much
- Gerrymandering is extreme and unapologetic
- NC: Republicans held 76.9% of the seats in North Carolina's thirteen-seat congressional delegation but North Carolina voters cast only 53.22% of their votes for Republican candidates.

Is Partisan Gerrymandering Dead?

- If and as long as the Court has five solid conservatives—probably
- Conservatives are more skeptical about regulating partisan gerrymandering
 - Takes power from state legislatures

But...

- Lower courts want a standard and will continue to push the Court to give them one
- Cases exist which have much worse efficiency gaps than Wisconsin's
 - NC: The 2016 efficiency gap, was 19.4% favoring Republican candidates; the thirteenth highest in all of the United States from 1972 to 2016
- Difference between saying you offered us a standard for unconstitutional gerrymandering and we don't like it versus you can never offer us a standard we like so you can longer try
 - Roberts isn't ready to say don't keep trying (yet)
- State constitutions offer a possible remedy (Pennsylvania)

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Enormous Cross Case

- *Maryland-National Capital Park and Planning Commission v. American Humanist Association*
- Has a local government has violated the First Amendment by displaying and maintaining a 93-year-old, 40-foot tall Latin cross memorializing soldiers who died in World War I?
- Lower court rules against the county

Here it is!



Enormous Cross Case

- Prince George's County citizens and an American Legion Post raised money to build the monument. In 1925 it was dedicated at a Christian prayer service. Over the years Christian religious services have been held at the cross.
- In 1961 the Maryland-National Capital Park and Planning Commission took title of the land and the cross because it is located in the middle of a busy traffic median. The cross is part of a park honoring veterans. Other monuments are located anywhere from 200 feet to a half-a-mile from the cross. None are taller than 10 feet.

Sour *Lemon* Test

- Mixture of government and religion is okay
 - Secular purpose
 - Reasonable observer would not understand religion to be advanced
 - No excessive entanglement between government and religion
- *Lemon* on the chopping block?
- Roberts Court has taken relatively few government and religion cases

Lemon Test: Pass Prong One

- Secular purpose: maintain safety near a busy highway intersection and preserves the memorial to honor World War I soldiers

Lemon Test: Fails Prong Two

- Reasonable observer would understand this cross to advance religion
 - The Latin cross is the “preeminent symbol of Christianity”
 - While the cross has secular elements (like the words valor, endurance, courage, and devotion inscribed on its base and a plaque at the base listing the memorialized soldiers), the “immense size and prominence of the Cross” “evokes a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones”

Lemon Test: Fails Prong Three

- Excessive entanglement between government and religion
 - The Commission has spent \$117,000 to maintain and repair it; in 2008 it set aside an additional \$100,000 for renovations
 - “Second, displaying the Cross, particularly given its size, history, and context, amounts to excessive entanglement because the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and not only overwhelms all other monuments at the park, but also excludes all other religious tenets”

Dissent

- Too much focus on size
 - “Although a reasonable observer would properly notice the Memorial’s large size, she would also take into account the plaque, the American Legion symbol, the four-word inscription, its ninety-year history as a war memorial, and its presence within a vast state park dedicated to veterans of other wars.”

Oral Argument

- Without really counting heads I think the county will win and the cross will stay
- Should the Court dump the *Lemon* test aka the dog's breakfast
 - Lawyers wanted to keep it
 - Gorsuch and Kavanaugh seemed most concerned about
- Breyer--everything we have now is okay but NO MORE.
- Is the cross a secular symbol v. is it offense to say the cross is a secular symbol
- How common are these memorials?

Questions?

Thanks for attending