Supreme Court Update

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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 the Court?
Where did He Provide the Critical 5\textsuperscript{th} Vote?

- Anything, everything
  - Gun rights
  - Death penalty
  - Affirmative action
  - Abortion
  - Same sex marriage
  - Land use
  - \textit{Citizens United}
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 states 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
- Okay with capital punishment?
Big Issues Discussed at Confirmation Hearings

- Abortion
- Guns
- Presidential power
Conservatives are Often Good for the States

- Except:
  - More skeptical of government generally
  - Social issues
  - 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)
Two Big Questions

• What will such a Court do?
• How long will it last?
• From Orin Kerr, USC Gould School of Law
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…
  - Takings/land use/property rights
  - Abortion
  - Race-based affirmative action
  - Restrictions on guns
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
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
Petitions on Hold

- *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.)

- Whether New York City’s ban on transporting a licensed, locked and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause and the constitutional right to travel, *New York State Rifle & Pistol Association Inc. v. City of New York, New York*

  - 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.
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
Overview of the Term for States

- Not much “red” meat
- Lots and lots of “white” meat
- Most controversial case accepted so far involves states and a party—census case
Interesting But I Won’t Cover in Any Detail

- Three Indian law cases
- Two death penalty cases
- One redistricting case
- Two preemption cases
Census Goes to the SCOTUS

• In March 2018 Secretary of Commerce Wilbur Ross issued a memorandum stating a citizenship question would be added to the 2020 census questionnaire.
• A number of states and local governments and nonprofits sued the Secretary claiming that adding this question is arbitrary and capricious in violation of the Administrative Procedure Act.
• In In Re Department of Commerce the Supreme Court will not be deciding whether this question may be legally added.
• Instead, the Court will decide—among other things—whether Secretary Ross may be deposed as to his motives for adding this question.
Why do States Care about this Case?

- Whether the Court allows this testimony and additional discovery into the record may influence how a court will rule on the ultimate question.
- States and local governments receive some federal funding based on population as determined by the census.
- Worry is undocumented persons and others won’t complete the census form because of the question.
- State legislatures don’t want to be deposed about their motives!
In Re Department of Commerce

• In the 2018 memorandum Secretary Ross stated that he “began a thorough assessment” of whether to add a citizenship question “following 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.

• But after the litigation began Secretary Ross acknowledged in another memorandum he had begun considering adding a citizenship question long before DOJ’s letter.

• And according to the challengers “DOJ had not submitted the December 2017 letter on its own initiative, as the Secretary’s March 2018 memorandum suggested. Instead, the Secretary and his staff had approached DOJ to ask that it ‘request[] inclusion of a citizenship question.’”
In Re Department of Commerce

- A federal district court allowed the challengers to depose Secretary Ross and Acting Assistant Attorney General John Gore, DOJ’s point person on the citizenship question, and engage in additional discovery based on the “irregularity of the record” and “a strong showing of bad faith or improper behavior.”

- In late October the Supreme Court stayed the deposition of Secretary Ross but allowed the deposition of Gore and the additional discovery to go forward.
The Department of Commerce argues: “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. And the orders defy equally well settled law establishing that plaintiffs challenging agency action may not probe the subjective mental processes of the agency decisionmaker, especially by compelling his testimony. Although this Court has recognized a narrow exception where the plaintiffs make ‘a strong showing of bad faith or improper behavior,’ the district court clearly erred in applying that exception here.”
Challengers respond: the district court “reasonably found that extraordinary circumstances unique to this case provided a sufficiently strong showing of bad faith or improper conduct.” Specifically the Secretary changed his story about why he first started thinking about adding the citizenship question to the census questionnaire. Also, the “Secretary’s belated revelation of a nearly yearlong decision-making process, referred to nowhere in his initial public announcement, triggered significant concerns that [the Secretary] had not provided [in the litigation record] all information that the Secretary ‘directly or indirectly considered.’”
Overturning Precedent

- In three cases the Supreme Court will consider overturning precedent
- All three of these cases are relevant to the states
- It is unusual for the Roberts Court to overturn precedent
Gamble v. United States

• Issue: should the Supreme Court overrule the “separate sovereigns” exception to the Double Jeopardy Clause
• This exception allows states and the federal government to convict and sentence a person for the same conduct
• Local governments (through prosecutors/district attorneys) who prosecute cases on behalf of the states
Backstory

- Justice Thomas joined Justice Ginsburg’s concurring opinion in *Puerto Rico v. Sanchez-Valle* (2016), which suggested the Court do a “fresh examination” of the “separate sovereigns” exception.
- In *Sanchez-Valle* the Court held that the Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a person for the same conduct under equivalent criminal laws.
- Puerto Rico isn’t a sovereign distinct from the United States because it derived its authority from the U.S. Congress.
According to Gamble, the separate-sovereigns exception should be overruled because it “flunks every test of constitutional interpretation”

The United States responds that: “[a]n unbroken line of this Court’s decisions, whose origin reaches back nearly two centuries, has correctly understood the violation of a state law and the violation of a federal law as distinct ‘offence[s]’ under the Double Jeopardy Clause“
Gamble v. United States

• The SLLC *amicus* brief points out that “Tenth Amendment and the federalism principles it enshrines have formed and shaped” the “separate sovereigns” exception

• The brief also argues that a number of practical justifications support retaining the “separate sovereigns” exception

• Specifically, eliminating it would “unfairly impact state and local prosecutors, who would remain politically accountable for law enforcement outcomes, despite being stripped of the ability to address those problems locally”
Franchise Tax Board of California v. Hyatt

- Should the Supreme Court overrule *Nevada v. Hall* (1979), which permits a state to be sued in the courts of another state without its consent.
- In *Hyatt II* (2016), the Supreme Court deadlocked 4-4 on this question shortly after Justice Scalia died.
- 45 states joined a *certiorari* stage *amicus brief* asking the U.S. Supreme Court to overturn *Nevada v. Hall*.
- Since 1979 how many times have state governments been sued in the courts of other states?
Franchise Tax Board of California v. Hyatt

- Gilbert Hyatt was audited by the Franchise Tax Board of California (FTB) in 1993
- He sued FTB in Nevada state court for a number of intentional tort and bad faith conduct claims
- FTB argued that the Nevada courts were required to give FTB the full immunity to which it would be entitled under California law
- In 2003, the U.S. Supreme Court held in *Hyatt I* that Nevada courts did not have to give FTB full immunity
- The Nevada courts eventually awarded Hyatt over $400 million in damages, which lead to a second U.S. Supreme Court case
- In *Hyatt II* the Court limited the amount of damages that Nevada courts could award to the amount that they could award against their own agencies
Franchise Tax Board of California v. Hyatt

- Following *Hyatt II* the Nevada Supreme Court capped damages for FTB at $50,000
- In *Hyatt III*, FTB has again asks the U.S. Supreme Court to overrule *Nevada v. Hall*
- If it does, FTB could not be sued in Nevada state court
Franchise Tax Board of California v. Hyatt

- **FTB** argues that *Hall* was decided incorrectly because “*Hall* stands in sharp conflict with the Founding-era understanding of state sovereign immunity. Before the adoption of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other’s courts.”

- **Hyatt** claims that *Hall* wasn’t wrongly decided because it is based on a “key distinction that has been drawn from the earliest days of American history”: “the difference between a state’s sovereignty in its own courts and its sovereignty in the courts of another sovereign.”
Franchise Tax Board of California v. Hyatt

State argue: “States all too frequently find themselves the targets of private-plaintiff lawsuits filed in the courts of other States. Such cases not only insult the sovereign dignity of defendant States, but also pose the real risk of exposing States to judgments unrestrained by any concern for local fiscal impact. And where, as here, the State is haled into another State’s courts based on how it has exercised its authority to conduct tax audits, the interest in preserving immunity as an attribute of State sovereignty is particularly acute.”
Will Come Down To

• Justices Kavanaugh and Gorsuch
• Pretty predictable?
Enormous Cross Case

- **Maryland-National Capital Park and Planning Commission v. American Humanist Association**

- Has a local government have 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.”
Are any such Memorials Located on State Land?

- According to an *amicus brief* joined by nearly 30 state attorneys general: “There are at least 242 national and state cemeteries honoring U.S. veterans, and countless more memorials on public lands nationwide—from Arlington National Cemetery and Civil War battlefields, to state capitols and town squares.”
Kennedy and Kavanaugh

- Might have similar views on this
- Kennedy probably would have been okay with this cross
- If the Maryland county loses very likely the Court will focus on size and hopefully distinguish this case from other smaller veterans memorials located on government property
- Oddity of the county thinking it had to buy the land because the cross was at a busy intersection
Tennessee Wine & Spirits v. Byrd

- The Twenty-First Amendment to the U.S. Constitution is famous because it repealed prohibition.
- The second section, which prohibits the transportation or importation of alcohol into a state in violation of state law, is less well-known.
- Despite this section’s broad language and the Supreme Court’s repeated affirmation that the states’ three-tier system of regulating alcohol (manufacturers sell to wholesalers; wholesalers sell to retailers; retailers to consumers) is constitutional, the Supreme Court has limited states’ ability to regulate the distribution of alcohol.
Tennessee Wine & Spirits v. Byrd

- Issue: whether Tennessee’s law requiring alcohol retailers to live in the state for two years to receive a license violates the Constitution’s dormant Commerce Clause
- Dormant Commerce Clause prohibits discrimination against interstate commerce
- Twenty-one States impose some form of durational-residency requirement for liquor retailers or wholesalers
- Many states impose other residency-based requirements on those entities
Tennessee Wine & Spirits v. Byrd

- Tennessee Wine & Spirits argues that the dormant Commerce Clause doesn’t apply to durational-residency requirements because they “treat liquor produced out of state the same as its domestic equivalent”
- *Granholm v. Heald* (2005): Supreme Court struck down a state law that permitted in-state wineries, but not out-of-state ones, to ship directly to in-state consumers
- The Court reasoned that the Twenty-First Amendment did not “save” this law from violating the dormant Commerce Clause
- According to Tennessee Wine & Spirits per *Granholm* the dormant Commerce Clause only applies to regulation of alcohol producers and products
- In short, Tennessee’s durational-residency law doesn’t treat alcohol produced in-state or out-of-state differently
Tennessee Wine & Spirits v. Byrd

- The Sixth Circuit disagreed with Tennessee Wine & Spirits and concluded the dormant Commerce Clause applies to this statute and was violated.
- The statute’s legitimate purposes of protecting the health, safety, and welfare of Tennessee residents and having a higher level of oversight over liquor retailers could be accomplished through non-discriminatory alternatives, according to the court.
- Possibilities included requiring a retailer’s general manager to be a resident of the state and implementing technological improvements, such as creating an electronic database to monitor liquor retailers.
Circuit Split

- Fifth and Sixth Circuits: durational-residency requirements violate the dormant Commerce Clause
- Eighth Circuit: durational-residency requirements are a valid exercise of states’ Twenty-first Amendment authority
- Second and Fourth Circuits: have upheld other kinds of residency-related restrictions on retailers and wholesalers post *Granholm*
Unicorn not Horse

• Bread and butter case is this state statute unconstitutional, unlawful, preempted, etc.
• Very few of these cases this term
Don’t Forget About Last Term

- What to do about
  - Internet sales tax
  - Sport gambling
Questions?

Thanks for attending