Supreme Court Update

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Overview of Presentation

- Changes on the Supreme Court
- Overview of the term
- Six most important cases for Western states
- Lightening round of cases of interest from last term
- Preview for Western states
Changes on the Supreme Court
Court through end of July 2018
Court through the end of July 2018

Conservative
• Chief Justice Roberts
• Kennedy*
• Thomas
• Alito
• Gorsuch

Liberal
• Ginsburg
• Breyer
• Sotomayor
• Kagan
Justice Kennedy
Justice Kennedy

- Appointed by Reagan
- Served for 31 years
- Swing Justice for 12 years
Justice Kennedy

• Generally conservative; more liberal on social issues
  • LGBTQI issues
  • Death penalty
  • Race (sometimes)
  • Abortion (sometimes)
Our New Supreme Court
Our New Supreme Court

Conservative
- Chief Justice Roberts*
- Thomas
- Alito
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- Kavanaugh

Liberal
- Ginsburg
- Breyer
- Sotomayor
- Kagan
In Theory we Now Have a Reliable Conservative Supreme Court

• For the last 50 years we have had an unreliable conservative Supreme Court
• Why?
  • Powell (’71-’87)
  • O’Connor (‘81-’06)
  • Kennedy (’87-’18)
• Now Kennedy (unreliable conservative) has been replaced by Kavanaugh (expected-to-be reliable conservative)
Why Conservative Only in Theory?

• Most cases aren’t decided on ideological lines; but most big cases have been in the recent past
• Over the last decade
  • About 50% of cases are unanimous
  • About 20% of cases are 5-4
    • About half of the 5-4 cases have been “big” cases
Gorsuch and Kavanaugh—Not Identical Twins

**Kavanaugh**
- Aligned himself with Roberts (more near the center of the Court)
- Justice most in the majority
- Pragmatic

**Gorsuch**
- Formalism, originalism, textualism
- Less concerned about precedent
- PhD
- Libertarian
Gorsuch and Kavanaugh—Not Identical Twins

- Were together on the two big cases; most Supreme Court cases aren’t big
- Gorsuch and Kavanaugh have disagreed more than any pair of new justices chosen by the same president in decades—only agreed 70% of the time
- Kavanaugh was about as likely to be in sync with his liberal seatmate Elena Kagan as his fellow conservative Gorsuch
- Robert Barnes, *They’re not ‘wonder twins’: Gorsuch, Kavanaugh shift the Supreme Court, but their differences are striking*, Washington Post
Gorsuch and Kavanaugh—Not Identical Twins

- Disagreed on two Indian law cases, death penalty, abortion
- Gorsuch: skeptical of vague criminal laws; will put him with liberals
- Kavanaugh: more conservative moment Louisiana abortion law
- Kavanaugh: “Freshman effect”?
- Both Justices want to show their independence from Trump
In a Nutshell?

• “We hear a lot about what makes sense in this room,” Justice Gorsuch said at an argument last month over whether a criminal statute was unconstitutionally vague. “I’m curious about what the law is.” When he failed to get a satisfactory answer, he dismissed the lawyer. “Off you go,” he said.

• That same day, in a statute of limitations case, Justice Kavanaugh indicated that he was inclined to take account of what makes sense. “If the law is murky and we can choose one path or another reasonably as a matter of law, wouldn’t we choose the more orderly, practical approach?” he asked.

• Adam Liptak, Kavanaugh and Gorsuch, Justices with Much in Common, Take Different Paths, New York Times
Three Faces of Justice Roberts

- *The Chief: The Life and Turbulent Times of Chief Justice John Roberts*, Joan Biskupic
- Spoiler alert: once a conservative, always a conservative
Chief Justice Roberts—
At a Crossroads

- Conservative on social issues
  - Same-sex marriage
  - Race
  - Phyper v. Doe
Chief Justice Roberts—
At a Crossroads

• Institutional guardian of the Court
  • Sees himself as the institutional guardian of the Court
    • Voted to preserve the Affordable Care Act’s individual mandate as a constitutional “tax”
    • Vote in census case
  • All Justices will now vote in controversial cases with the President who nominated him or her unless Roberts strays
  • Irony: Roberts could have been the first Chief Justice in modern history to be in the minority
  • When Roberts votes to not make the Court look political is he acting political?
Chief Justice Roberts—
At a Crossroads

• Mine-run cases
  • Moderate conservative with pragmatic streaks
  • Two votes “against” the First Amendment
    • BONG HiTS 4 JESUS in school gets no First Amendment protection
    • No First Amendment lawsuit possible (generally) if you are arrested for probable cause but also engaged in First Amendment protected speech
Where is he Today

• Hard to say—cautious, careful
• Doesn’t want the Court to move too fast (to the right) on controversial issues
• Has a lot of power (and he must know it)
• Takes 4 votes for the Court to hear a case
  • Can’t stop his conservative colleagues from granting petitions
  • Can decide to not vote with them on the merits
What Has He Done Lately?

- Provided the 5th vote to prevent Louisiana’s admitting privileges law from going into effect
- Spoke out against Trump calling a judge an Obama judge
- 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
What Has He Done Lately?

• Provided the 5\textsuperscript{th} vote to allow Trump’s ban on transgender persons in the military to stand while issue is being appealed to a federal appellate court
• Voted with conservatives and liberals on death penalty cases
• Voted with liberals in the census case
• Border wall funding?
What Has He **Not** Done Lately?

- Acted like a rabid conservative who just won the lottery and can’t stop spending money
Future of the Court

• No changes on the Court until after the 2020 presidential election
  • Justices Ginsburg (86) and Breyer (80) will hold on if they are able
Future of the Court

• And who knows what will happen after 2020?
  • Will the new world order be that **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
Overview of SCOTUS Term

- 72 cases decided
- Unanimous about 40% of the time (little low)
- 20% of opinions were 5-4 (average)
Court’s New Center?

- Kavanaugh had the highest frequency in the majority of the justices, at 91 percent
- Roberts was second highest at 85 percent
- Kavanaugh and Roberts also shared the highest agreement level for any justice pairing this term, at 94 percent
Overview of SCOTUS Term for the States

- Two big cases
  - Partisan gerrymandering
  - Census
- Both were very important to the states
- Term overall was very low profile; probably on purpose
- 14 SLLC amicus briefs (might be a record)
Stare Decisis

- Four cases where the Court agreed to decide whether to overturn precedent
- All have some impact on the states
- Overturned precedent in only two
- Does it really matter or is it just a tool Justices use to keep decisions they like?
- Liberals remain stuck on *stare decisis*
Chief’s View of Stare Decisis

- Proof of my theory: he cares about it in “big” cases; doesn’t care about it as much in smaller cases
- *Auer* deference requires courts to defer to agencies’ reasonable interpretations of their ambiguous regulations
- Chief Justice voted to keep *Auer* deference alive on *stare decisis* grounds only
- Dissenting Justices note he won’t say it is lawful or wise
- To a legal nerd like the Chief Justice this is a big case!
Six Cases for States
Partisan Gerrymandering

- *Rucho v. Common Cause* the Supreme Court held 5-4 that partisan gerrymandering claims are non-justiciable—meaning that a federal court cannot decide them
- Justice Roberts wrote the opinion and the 4 other conservative Justices joined
Partisan Gerrymandering

- In *Davis v. Bandemer* (1986) a majority of the Supreme Court held that partisan gerrymandering cases are justiciable.
- In that case and since then the Court failed to lay out a standard for when partisan dominance “is too much.”
- In *Rucho v. Common Cause* the Supreme Court announced it will stop trying.
- 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.
Victory for State Legislature

• “The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress”
We Can’t Do it Right

• “Plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.”
Court Offers Solutions

- Majority acknowledges: “[e]xcessive partisanship in districting leads to results that reasonably seem unjust”
- State courts may strike down districting plans under their constitutions
- State statutes and constitutions may address partisan gerrymandering and districting criteria
- States may redistrict using an independent commission or a state demographer
Dissent

• “For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities. And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives.”

• “Of all times to abandon the Court’s duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.”
Roberts in All of This

- “Conservative” vote in the sense of judicial modesty rather than political ideology
- Courts should stay out of the “political thicket”
- This is the state legislatures lane and not the federal courts lane
- Democrats and Republicans both engage in partisan gerrymandering
Neutral Commentary

• Most important case of this century so far…and most Americans know little to nothing about it…
Practical implications—Okay with Decision

- Status quo
- Mathematical limits as to how much you can partisan gerrymander
- In all the past cases challengers said this district will never elect someone from the other party and the district always did
- Democrats live together—unsolvable problem
- More interest in judicial selection
- Bipartisan deals are possible
- Daniel Tokaji, Ohio State University Moritz College of Law, American Constitution Society

SCOTUS Review
Practical implications—Really upset

- Currently and since the early 1990s partisan gerrymandering has mostly benefited Republicans
- Math modelling just gets better and better
- You haven’t seen anything yet!
- Democracy can’t fix the problem: Court to foxes — Benjamin Battles, Please guard henhouse, SCOTUSblog
- Primaries will pick candidates; more extreme candidates will win primaries
- 90% of state judges are elected; ballot measures are rare
• Chief Justice Roberts joined his more liberal colleagues holding the reasons Commerce Secretary Wilbur Ross gave for adding the citizenship question to the 2020 census were pretextual in violation of the Administrative Procedures Act (APA)

• Secretary Ross *could have offered different non-pretextual reasons* for why he wanted to add the citizenship question but he did not
The Facts

• In a March 2018 memo Secretary Ross announced he would reinstate the question at the request of the Department of Justice (DOJ), “which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (VRA)”

• According to the Chief Justice additional discovery revealed the following: “that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process”
The Holding

• The Court agreed “to a point” with the federal government that there was “nothing objectionable or even surprising in this”

• But, the APA requires that federal agencies don’t act arbitrarily and capriciously

• Here, “viewing the evidence as a whole,” Ross’s decision to include the citizenship question “cannot be adequately explained in terms of DOJ’s request for improved citizenship data to better enforce the VRA”
Wow

• “We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.”
Lost in the Shuffle

- Court basically holds any other administration in the future can add the citizenship question—they just must offer their real reason for doing so
Boring Administrative Law Case

• Challengers also argued adding the question violated the APA because the decision wasn’t supported by the evidence; SCOTUS disagreed:
  • “Without a citizenship question, the Bureau would need to estimate the citizenship of about 35 million people; with a citizenship question, it would need to estimate the citizenship of only 13.8 million. Under either approach, there would be some errors in both the administrative records and the Bureau’s estimates. With a citizenship question, there would also be some erroneous self-responses (about 500,000) and some conflicts between responses and administrative record data (about 9.5 million).”
No Constitutional Violation Here!

- The Constitution requires an “Enumeration” of the population every 10 years, to be made “in such Manner” as Congress “shall by Law direct”

- According to Court the Enumeration Clause does not provide a basis to set aside the Secretary’s decision because it “vests Congress with virtually unlimited discretion in conducting the decennial ‘actual Enumeration,’” and Congress “has delegated its broad authority over the census to the Secretary”
Roberts in All of This

• Protect-the-integrity-of-the-Court ruling
• Big practical loss for the Trump administration
• Loss on a very small issue no one ever has to lose on again where the loss probably could have been eliminated with more time
• Total surprise based on oral argument
• Did later revealed facts make a difference?
How Angry Are Conservatives at Roberts?

• Just ask Justice Thomas
  • “The District Court’s lengthy opinion pointed to other facts that, in its view, supported a finding of pretext. I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and—with a jar of pins and a spool of string—create an eye-catching conspiracy web. But the Court does not rely on this evidence, and rightly so: It casts no doubt on whether the Secretary’s stated rationale factored into his decision. The evidence suggests, at most, that the Secretary had multiple reasons for wanting to include the citizenship question on the census.”
From the President’s Twitter Account…

• Recent “strained” decisions by the United States Supreme Court, some so simple as allowing the question, “Are you a citizen of the United States” on our very expensive Census Report, or the even more strained decisions (2) allowing the world’s most expensive & pathetic......

• ....healthcare (Obamacare) to stay in place, when it would have been replaced by something far better, shows how incredibly important our upcoming 2020 Election is. I have long heard that the appointment of Supreme Court Justices is a President’s most important decision. SO TRUE!
Census Timeline

• June 27: SCOTUS decision comes out
• June 30: Deadline to print census
• July 2: Wilbur Ross and DOJ say census won’t contain citizenship question
• July 3: President Trump tweets to the effect the census will contain the question

• Hugh Hewitt: “If the case is truly over, it would be one of the biggest legal defeats of the Trump presidency.” Very surprised that @realDonaldTrump surrendered without a battle on this issue.
Census Timeline

- July 5:
  - DOJ announced the census is being printed without the question but Trump administration will continue to try to find a path forward to include the question
  - Litigation in Maryland over whether census was racially biased to continue
  - Litigation in NY over whether the government lied about the deadline for a litigation advantage continues
  - President Trump says he is thinking about an executive order
Census Timeline

• July 8: DOJ legal team has been replaced; William Barr says he has a solution but he doesn’t say what it is
• July 9: NY judge disallows withdrawal of lawyers without explanation
• July 11: Executive order: President orders federal agencies to turn over administrative records indicating who is and who isn’t a citizen (which is what the Census Bureau always requested be done)
While we were Waiting…Conservative Reaction

• There are a **TON** of reasons the citizenship question should be on the census

• Here is one from Justice Alito’s opinion: “As a 2016 Census Bureau guidance document explained, obtaining citizenship statistics is ‘essential for agencies and policy makers setting and evaluating immigration policies and laws, understanding how different immigrant groups are assimilated, and monitoring against discrimination.’”
While we were Waiting…Liberal Reaction

- This is a constitutional crisis; the President is defying the Supreme Court!
Why Does this Play Out as it does?

- Federal government was out of time
- Two lower court judges were going to rule against President Trump if he continued to pursue the citizenship question
- Why push Roberts when you are going to need him (again and again) later?
SCOTUS, Government, and Truth

- Travel ban
- Census citizenship question
- DACA
- …and don’t forget Bridgegate
Bladensburg Peace Cross Case

• Bladensburg Peace Cross may stay the Supreme Court ruled 7-2
• According to Justice Alito: “It has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of ‘a hostility toward religion that has no place in our Establishment Clause traditions.’”
Here it is!
The Facts

- In late 1918, residents of Prince George’s County, Maryland, decided to erect a memorial to honor soldiers from the county who died in World War I.
- The monument, completed in 1925, is a 32-foot tall Latin cross that sits on a large pedestal.
- Among other things, it contains a plaque listing the names of 49 local men who died in the war.
- Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area.
- In 1961, the Maryland-National Capital Park and Planning Commission acquired the Cross and the land it is on in order to preserve it and address traffic-safety concerns.
The Problem

• The American Humanist Association sued the Commission claiming the Cross’s presence on public land and the Commission’s maintenance of it violates the Establishment Clause
Bottom Line

“Retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.”
Reasoning

• Bladensburg Cross “carries special significance in commemorating World War I”
• “With the passage of time” the cross “has acquired historical importance”
• The monument didn’t “deliberately disrespect[] area soldiers who perished in World War I” as no evidence indicates Jewish soldiers were excluded
• “It is surely relevant that the monument commemorates the death of particular individuals”
But it’s a cross!!

Justices Ginsburg, joined by Justice Sotomayor, dissented arguing: “The Latin cross is the foremost symbol of the Christian faith, embodying the ‘central theological claim of Christianity: that the son of God died on the cross, that he rose from the dead, and that his death and resurrection offer the possibility of eternal life’”

While the Court acknowledged that the cross “is undoubtedly a Christian symbol,” the majority opined “that fact should not blind us to everything else that the Bladensburg Cross has come to represent”
For the Lawyers…

• For the last 50 years the Supreme Court has applied the so-called *Lemon* test (at least sporadically) to evaluate Establishment Clause cases
• Were 6 votes to get rid of *Lemon*…why couldn’t the conservative Justices get together and dump it?
• Don’t have anything to replace it with?
Don’t Go Out and Get Your Self a New…
Narrow Ruling

• Presumption of constitutionality applicable to retaining “religiously expressive monuments, symbols, and practices”
• So narrow if it includes “symbols and practices”?  
• How old does the monument, symbol, or practice have to be?  
• Problem with a historical test: Christian bias
Roberts Court and Religion

• Old Roberts Court didn’t take many church and state cases
  • Tended to decide those it took narrowly
• New Roberts Court may be more interested in them
• Why?
  • Provide clarity—might be more consensus on the Court on these issue now
  • Allow more religion in public space
• *Espinoza v. Montana Department of Revenue*
Rules Dual-Sovereignty Stays

- *Gamble v. United States*
- 7-2
- Overturning precedent was on the table but it didn’t happen
The Law

- Double Jeopardy Clause provides that no person may be “twice put in jeopardy” “for the same offence”
- Per the “dual-sovereignty” doctrine the Supreme Court has long held that a “crime under one sovereign’s laws is not ‘the same offence’ as a crime under the laws of another sovereign”
What Happened in the Old Days

• Defendant argued common law forbid successive prosecutions by different sovereigns

• Court says maybe/maybe not:
  • The English cases are a muddle. Treatises offer spotty support. And early state and federal cases are by turns equivocal and downright harmful to Gamble’s position. All told, this evidence does not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns’ laws—much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years.

• Regardless, *stare decisis* (let the decision stand) “is another obstacle”
State and local governments traditionally prosecute crimes

Feds have a lot of resources could effectively push states and local governments out of cases or entire areas of the law

States and local government officials held politically accountable for how crime is dealt with

- Ferguson voters vote out their DA who sought but didn’t receive a grand jury indictment of Officer Wilson; feds didn’t even bring charges

SLLC *Amicus* Brief
Why Did the Court Take this Case?

- Justices Ginsburg and Gorsuch dissented separately
- Court watchers expected Justice Thomas to join them as he had joined Justice Ginsburg’s concurring opinion in *Puerto Rico v. Sanchez-Valle* (2016), which suggested the Court do a “fresh examination” of the “dual-sovereignty” doctrine
- Instead, Thomas wrote a concurring opinion noting that the “historical record does not bear out my initial skepticism of the dual-sovereignty doctrine”
- Who else voted to hear this case?
Warrantless Blood Draws for Drunk Drivers
Okay

• *Mitchell v. Wisconsin*
• 5-4 decision
• Generally when police officers have probable cause to believe an unconscious person has committed a drunk driving offense, warrantless blood draws are permissible
• Wisconsin and twenty-eight other states allow warrantless blood draws of unconscious persons where police officers have probable cause to suspect drunk driving
Facts

• By the time the police officer got Gerald Mitchell from his car to the hospital to take a blood test he was unconscious. Mitchell’s blood alcohol content (BAC) about 90 minutes after his arrest was 0.222%
Where’s the Warrant?

• Per Supreme Court precedent, the Fourth Amendment’s ban on unreasonable searches generally requires police officers to obtain a warrant
• Lots of exceptions to the warrant requirement
• Mitchell argued the police officer should have obtained a warrant before having his blood drawn
In *Birchfield v. North Dakota* (2016) the Supreme Court held that generally police must obtain a warrant to require a blood test (versus a breath test) where officers have probable cause.
Exigency Exception

• In *Missouri v. McNeely* (2013) the Court held that the fact that blood-alcohol evidence is always dissipating due to “natural metabolic processes” does not generally mean the exigent circumstances exception applies and warrantless BAC tests are allowed.

• But in *Schmerber v. California* (1966) the Court allowed a warrantless blood test of a drunk driver who had gotten into a car accident that “gave police other pressing duties,” because “further delay’ caused by a warrant application really ‘would have threatened the destruction of evidence’”
Holding

- Reading these cases together Justice Alito concluded an “exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application”
- According to the Court, unconsciousness does not just create pressing needs; it is itself a medical emergency"
- “It means that the suspect will have to be rushed to the hospital or similar facility not just for the blood test itself but for urgent medical care. Police can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital; that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival; and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value.”
SLLC *Amicus* Brief

- The reasoning of the plurality opinion mirrors the legal and policy arguments the SLLC made in its *amicus* brief.
- Wisconsin argued that the *implied consent* exception to the warrant requirement made the statutes constitutional.
Only a Rebuttable Presumption

- But instead of adopting a per se rule that no warrant is required when officers have probable cause an unconscious driver has driven drunk, the Court created a rebuttable presumption
  - “We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties”
Why Plurality?

• Justice Thomas concurred writing separately that *McNeely* was wrongly decided

• His position is that the exigent circumstances exception to the warrant requirement should apply in all drunk-driving cases because of the “imminent destruction of evidence”
Why Did Wisconsin Win?

- Statistically speaking it should not have because it won before the Wisconsin Supreme Court
- Why should drivers so drunk they have passed out avoid a blood draw?
  - Drivers who are drunk enough to pass out at the wheel or soon afterward pose a much greater risk. It would be perverse if the more wanton behavior were rewarded—if the more harrowing threat were harder to punish.
- Joining plurality opinion: Roberts, Breyer, and Kavanaugh
Western States Allowing Unconscious Blood Draws

- Alaska
- Arizona
- California
- Colorado
- Montana
- New Mexico
- Nevada
- Oregon
- Utah
- Wyoming
Durational-Residency Requirement for Alcohol Sellers

- *Tennessee Wine and Spirits Retailers Association v. Thomas*
- Tennessee’s law requiring alcohol retailers to live in the state for two years to receive a license is unconstitutional
- 7-2 decision
- Dissents: Gorsuch and Thomas
- At least twenty-one states impose some form of durational-residency requirement for liquor retailers or wholesalers
The Law

• The dormant Commerce Clause prohibits state laws that unduly restrict interstate commerce
  • Both parties agree that if Tennessee’s durational-residency requirement applied to anyone wishing to sell anything other than alcohol it would violate the dormant Commerce Clause
• Section 2 of the Twenty-first Amendment prohibits the transportation or importation of alcohol into a state in violation of state law
  • Read literally this section would “prohibit the transportation or importation of alcoholic beverages in violation of any state law,” even if the state law violated another section of the constitution
  • “Although some Justices have argued that §2 shields all state alcohol regulation—including discriminatory laws—from any application of dormant Commerce Clause doctrine, the Court’s modern §2 precedents have repeatedly rejected that view”
• Tennessee Wine and Spirits Retailers Association argued based on *Granholm v. Heald* (2005), where the Court struck down discriminatory direct-shipment laws that favored in-state wineries over out-of-state competitors, that §2 limits discrimination against out-of-state alcohol *products and producers* not alcohol distributors.

• “On the contrary, the Court stated that the Clause prohibits state discrimination against all ‘out-of-state economic *interests,*’ and noted that the direct-shipment laws in question ‘contradict[ed]’ dormant Commerce Clause principles because they ‘deprive[d] *citizens* of their right to have access to the markets of other States on equal terms’”
Applying Section 2

• Test: whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate non-protectionist ground

• “The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety”
Western States Affected

- California
- Idaho
- Washington
Lightening Round
**Franchise Tax Board of California v. Hyatt**

- 5-4 ruling that states are immune from private lawsuits brought in courts of other states
- Court overruled *Nevada v. Hall* (1979) holding that a state may be sued in the courts of another state without its consent
- Mr. Hyatt may no longer sue a California state agency in Nevada state court
Big Symbolic Victory for States?

• Hyatt claimed that since Hall was decided in very few cases have state governments been sued in the courts of other states.

• But (possibly a record) 44 states joined an amicus brief asking the Court to overturn Nevada v. Hall.

• Remembered for this from Justice Breyer: “In any event, stare decisis requires us to follow Hall, not overrule it. See Planned Parenthood of Southeastern Pa. v. Casey…”
**Timbs v. Indiana**

- Supreme Court holds unanimously that the Excessive Fines Clause is incorporated against (or applies to) state and local government
- Case shouldn’t be a big deal
  - Expected
  - Court didn’t rule on whether the forfeiture in this case was excessive
  - Today “all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality”

Was a big deal because the case involved a *forfeiture*
Timbs v. Indiana

- A lot of state legislative activity over so-called policing-for-profit
  - Court fines and fees, bail, forfeitures, loss of driver’s license
- Doesn’t shed light on the two most important question for state legislatures in this space:
  - What are fines (versus fees or taxes) under the Eighth Amendment?
  - When are they excessive?
Knick v. Township of Scott

• In a 5-4 opinion the Supreme Court held that a property owner may proceed directly to federal court with a takings claim.

• In *Knick* the Court overturned *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985), which held that before a takings claim may be brought in federal court, a property owner must first seek just compensation under state law in state court.
Bigger Impact will be for Local Governments

- They are sued more under the Takings Clause
- Under *Williamson County* claims could only go to state court if the state process was reasonable, certain, and adequate
- States adopted processes to that end which will now be ignored
This Case in Context

- Was very hard for state and local governments to win land use/takings cases BEFORE Justice Kennedy left the Court
- Page one of the conservative/libertarian playbook is “property rights”
- Now we have 5 true conservative Justices
- Conservatives have seen Williamson County as vulnerable precedent for decades
- What is the case really about for the other side?
  - Federal judges more favorable, weak link, lower status for property rights?
Virginia Uranium v. Warren

• Court held 6-3 that Virginia’s statute prohibiting uranium mining isn’t preempted by the federal Atomic Energy Act (AEA)
• Court’s bottom line: AEA授予“联邦层面的独占权限来调节近乎核燃料生命周期的每个方面，除了采矿”
• If your state doesn’t prohibit or want to prohibit uranium mining this case doesn’t have much relevance except…Virginia Uranium argued the Virginia legislature intended to get around the AEA by prohibiting uranium
Virginia Uranium v. Warren

- The SLLC *amicus* brief encouraged the Court to not inquire into the intent of the Virginia legislature in deciding whether the statute was preempted
- Justice Gorsuch agreed
It is one thing to do as Pacific Gas did and inquire exactingly into state legislative purposes when state law prohibits a regulated activity like the construction of a nuclear plant, and thus comes close to trenching on core federal powers reserved to the federal government by the AEA. It is another thing to do as Virginia Uranium wishes and impose the same exacting scrutiny on state laws prohibiting an activity like mining far removed from the NRC’s historic powers. And without some clearer congressional mandate suggesting an inquiry like that would be appropriate, we decline to undertake it on our own authority. The preemption of state laws represents “a serious intrusion into state sovereignty.”
Our field preemption cases proceed as they do, moreover, for good reasons. Consider just some of the costs to cooperative federalism and individual liberty we would invite by inquiring into state legislative purpose too precipitately. The natural tendency of regular federal judicial inquiries into state legislative intentions would be to stifle deliberation in state legislatures and encourage resort to secrecy and subterfuge. That would inhibit the sort of open and vigorous legislative debate that our Constitution recognizes as vital to testing ideas and improving laws. In Virginia Uranium’s vision as well, federal courts would have to allow depositions of state legislators and governors, and perhaps hale them into court for cross examination at trial about their subjective motivations in passing a mining statute. And at the end of it all, federal courts would risk subjecting similarly situated persons to radically different legal rules as judges uphold and strike down materially identical state regulations based only on the happenstance of judicial assessments of the “true” intentions lurking behind them. In light of all this, it can surprise no one that our precedents have long warned against undertaking potential misadventures into hidden state legislative intentions without a clear statutory mandate for the project.
And On…

- Beyond these concerns, as well, lie well-known conceptual and practical ones this Court has also advised against inviting unnecessarily. State legislatures are composed of individuals who often pursue legislation for multiple and unexpressed purposes, so what legal rules should determine when and how to ascribe a particular intention to a particular legislator? What if an impermissible intention existed but wasn’t necessary to her vote? And what percentage of the legislature must harbor the impermissible intention before we can impute it to the collective institution? Putting all that aside, how are courts supposed to conduct a reasonable inquiry into these questions when recorded state legislative history materials are often not as readily available or complete as their federal counterparts? And if trying to peer inside legislators’ skulls is too fraught an enterprise, shouldn’t we limit ourselves to trying to glean legislative purposes from the statutory text where we began? Even Pacific Gas warned future courts against too hastily accepting a litigant’s invitation to “become embroiled in attempting to ascertain” state legislative “motive[s],” acknowledging that such inquiries “often” prove “unsatisfactory venture[s].” What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it.”
That He Alienates Concurring Justices

- Ginsburg, Sotomayor, Kagan: “I reach the same bottom-line judgment as does JUSTICE GORSUCH: The Commonwealth’s mining ban is not preempted. And I agree with much contained in JUSTICE GORSUCH’s opinion. See ante, at 4–10. But his discussion of the perils of inquiring into legislative motive, see ante, at 11–14, sweeps well beyond the confines of this case, and therefore seems to me inappropriate in an opinion speaking for the Court, rather than for individual members of the Court.”
Might this Language be Useful in Another

- Less obscure preemption case?
- Only time will tell…
Preview for States
Preview

• Next term is going to be HUGE!
• Most of these cases could have been decided last term—why held back?
• Now they will be decided 6 months before the Presidential election!
What Could Make it On Next Term

- Louisiana abortion law
- Obamacare unconstitutional (no longer a tax)
- Sanctuary cities
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”
Plot Thickens

• Everyone thinks NY will lose this case
• Gun law is idiosyncratic, proscriptive, and probably unique
• New York is trying to “moot” the case by repealing restrictions on taking guns out of the city
• Repeal should be completed in the few weeks or so
Waiting in the Wings

• Rogers v. Grewal

• New Jersey’s handgun law requires an “urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant’s life that cannot be avoided by means other than by issuance of a permit to carry a handgun” to carry a gun outside the home
Hawaii Wildlife Fund v. County of Maui

- Oversimplification
  - Is groundwater covered by the Clean Water Act?
  - If it is and it contains pollutants it must be covered by a federal permit
- More technically
  - If you add “any pollutant to navigable waters from any point source” you must receive an NPDES (federal) permit
  - A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged”
Hawaii Wildlife Fund v. County of Maui

- Treated wastewater went from a well (point source) to underground (not a point source) to the ocean (a navigable water)
- Is a permit required because groundwater isn’t a point source?
- Holding: *indirect* discharges from a point source to navigable waters require a federal permit under the Clean Water Act
The Facts

• Maui operated 4 wells which received treated wastewater
• Wells injected wastewater into the groundwater
• Tracer dye studies determined the wastewater from the wells made it into the ocean
Ninth Circuit Holding

• The wells are point sources; the groundwater is not BUT the pollutants that made it into navigable waters were fairly traceable to point source wells “such that the discharge is the functional equivalent of a discharge into the navigable water”

• Is the water held in a point source?
Impact of Ninth Circuit Decision

- This case matters because water leaks
- Discharges from water supply, sanitation, and flood control services will require NPDES permits under the Ninth Circuit’s theory
- Obtaining such permits will be costly and unnecessary
- NPDES permitting process is a poor match for regulating groundwater because it is designed to regulate surface water only.
- SLLC amicus brief
Plot Thickens

• Maui is thinking of settling
• But all signs point towards it winning
  • EPA has taken the position groundwater isn’t covered under the Clean Water Act
  • Five conservative Justices
  • This case is the best vehicle
  • They can save the planet after the win before SCOTUS
Where Ninth Circuit Opinion Applies
DACA

• Is Department of Homeland Security’s (DHS) decision to end the Deferred Action for Childhood Arrivals (DACA) program is judicially reviewable and lawful?
• DACA was established through a DHS Memorandum during the Obama presidency
• The program allowed undocumented persons who arrived in the United States before age 16 and have lived here since June 15, 2007, to stay, work, and go to school in the United States without facing the risk of deportation for two years with renewals available
DACA

• DHS rescinded DACA in September 2017 after receiving a letter from the Attorney General stating the program was unconstitutional and created “without proper statutory authority”
Everyone Agrees DHS Could Rescind DACA

- Simply because DHS no longer wants/likes/agrees with the program
- In the same way the Obama administration began to program because the President wanted/liked/agreed with it
- President Trump doesn’t want to take the heat on rescinding DACA for policy reasons—but if it is illegal it has to go!
So What’s the Argument?

- The Administrative Procedures Act prevents federal agencies from taking actions which are not “otherwise in accordance with law”
- DHS’s “primary bases for concluding that DACA was illegal were that the program was ‘effectuated . . . without proper statutory authority’ and that it amounted to ‘an unconstitutional exercise of authority’”
- DHS has dropped its argument DACA is unconstitutional
- Defenders of DACA argue the program isn’t illegal
Why DACA Illegal?

- Unites States argues: legislative rule which should have been promulgated through notice-and-comment rulemaking
- Lower courts have disagreed: notice-and-comment procedures are not required where an agency pronouncement is a “general statement[] of policy”
- Unites States argues: “substantively inconsistent” with the Immigration and Nationality Act (INA)
- Lower courts have disagreed: the INA doesn’t define “how immigration status may be derived by undocumented persons who arrived in the United States as children”
Remember DAPA?

- Like DACA but for undocumented parents of children who are citizens
- Fifth Circuit concluded DAPA is likely arbitrary and capricious because it is “foreclosed by Congress’s careful plan” in the Immigration Naturalization Act for “how parents may derive an immigration classification on the basis of their child’s status and which classes of aliens can achieve deferred action and eligibility for work authorization”
- SCOTUS affirmed 4-4
Smart Money

• DACA and DAPA aren’t the same
• But smart money is on SCOTUS concluding DACA (like DAPA) violates the INA and can be rescinded because it is “illegal”
• Oral argument will be telling
Sexual Orientation/Transgender Cases

• Title VII prohibits discrimination because of sex

• Is discrimination against a person because of sexual orientation or gender identity covered by Title VII

• Until 2017 all federal courts of appeals to consider the question had held Title VII does not protect employees on the basis of sexual orientation

• This changed when the Seventh Circuit reversed itself in Hively v. Ivey Tech Community College concluding “discrimination of the basis of sexual orientation is a form of sex discrimination”
Sexual Orientation/Transgender Cases

• Zarda v. Altitude Express (en banc 2d Circuit) (employees may bring sexual orientation discrimination claims under Title VII)

• Bostock v. Clayton County Board of Commissioners (11th Cir.) (discrimination on the basis of sexual orientation not actionable 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.)
Sexual Orientation Case

• Question in this case is whether sexual orientation is “properly understood” as a “subset of actions taken on the basis of sex”
• The lower court concluded it was by looking at the statute’s text
Sexual Orientation Case

• According to the lower court: “the most natural reading of the statute's prohibition on discrimination ‘because of . . . sex’ is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions.”
Gender Identity Case

- Lower court held that discriminating against transgender persons violates Title VII because it amounts to discrimination on the basis of sex stereotyping and that transgender status is protected under Title VII
Gender Identity Case

- Sixth Circuit had long held discrimination against persons based on transgender status violated Title VII because of sex stereotyping.
- In *Price Waterhouse v. Hopkins* (1989) the Supreme Court held that employees may bring sex discrimination claims based on sex stereotyping under Title VII. In 2004 the Sixth Circuit extended *Price Waterhouse’s* reasoning to transgender persons as they are also engaging in “non sex-stereotypical behavior.” So that previous case controlled the outcome of *Harris Funeral Homes.*
Gender Identity Case

- The Sixth Circuit also held that transgender status is a protected class under Title VII. Harris Funeral Homes argued that transgender status refers to “a person's self-assigned ‘gender identity’” rather than a person's sex, and therefore such a status is not protected under Title VII. The Sixth Circuit disagreed noting “it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex.”
SLLC Didn’t File in these Cases

- If we filed in favor of the employees we would be filing against a county and against our interests as employers generally
- Filing in favor of the employer would puts us on the wrong side of history
Conventional Wisdom

- Easy text of the statute case
- Gay and transgender employees will lose
- Blame Congress
Superfund Case

• *Atlantic Richfield Co. v. Christian*

• Owners of a Superfund site object to having to take remedial action not required by the Environment Protection Agency (EPA) to benefit landowners located within the bounds of the site

• From Montana
The Facts

• The Anaconda Smelter, now owned by ARCO, processed copper ore from Butte for nearly one hundred years before shutting down in 1980
• That same year Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund law
• The purpose of this law is to “foster the cleanup of sites contaminated by hazardous waste, and to protect human health and the environment”
The Facts

• EPA required ARCO to pursue particular remedies
• Landowners located within the bounds of the site sought two additional remedies beyond what EPA required: removing the top two feet of soil from affected properties and installing permeable walls to remove arsenic from the groundwater
Argument

• ARCO argues that two provisions of CERCLA prevent the landowners from obtaining additional remedies in this case
• ARCO also argues that CERCLA preempts state common-law claims for restoration beyond EPA-ordered remedies
• The Supreme Court of Montana rejected all of ARCO’s arguments
Complicated for States

• States are generally against federal preemption of state law claims
• To the extent state own Superfund sites they may prefer that remedies be limited to what the EPA mandates
• But to the extent others own Superfund sites states may prefer they be remedied to a greater extent than what EPA requires
• More complicated for local governments; most states don’t own Superfund sites
Georgia v. Public.Resource.org

• May states copyright statutory annotations
The Facts

• Georgia, through a Code Revision Commission, made up of the Lieutenant Governor, the Speaker of the House, members of the Senate and House, and others, contracts with Lexis to draft the statutory annotations published in the Official Code of Georgia Annotated (OCGA)

• Annotations include “history lines, repeal lines, cross references, commentaries, case notations, editor’s notes, excerpts from law review articles, summaries of opinions of the Attorney General of Georgia, summaries of advisory opinions of the State Bar, and other research references”
Everyone Agrees?

- Copyright interests vest in the author of a work
- State statutes may not be copyrighted because the author is “the People”
- Annotations created by a private party may be copyrighted because they are an original work created by a private publisher
- Annotations in the OCGA fall somewhere between
Lower Court Holding

• While the Eleventh Circuit noted annotations don’t carry the force of law it nevertheless held Georgia may hold no copyright to them
Lower Court Reasoning

• While a private party, Lexis, is responsible for drafting the annotations it does so under the “highly detailed instruction” of the Code Revision Commission.

• While the annotations don’t carry the force of law they are “law-like”.

• The annotations are created using a process “very closely related” “to the process by which the statutory provisions were made into binding law”.
  • The Georgia General Assembly votes to adopt annotations like it would any other law.
What is At Stake in this Case?

• Georgia and Lexis make money selling the annotated statutes
• Lexis says if materials can’t be copyrighted it won’t have any incentive to continue to put compile the annotations
• Georgia and Lexis put a lot of effort into creating these annotations
• Open government
• States may waive copyright
• Does your state have a similar arrangement with a legal publisher?
Fun Fact

- The last time the Supreme Court reviewed the rule that government edicts can’t be copyrighted was 1888.
- A lot has changed since then including the volume, cost, and sophistication of materials governments create…and of course the means of disseminating information has changed vastly as well.
Espinoza v. Montana Department of Revenue

- If a state-aid program violates a state constitutional prohibition against mixing church and state because religious institutions may participate, does discontinuing that program violate the federal constitution’s Free Exercise or Equal Protection Clauses?
- Another Montana case!
Which Has More Muscle?

- State Establishment Clause provisions
- Federal Free Exercise Clause
- Federal Equal Protection Clause
Or Are the Provisions

- Two ships passing in the night?
- In general state legislatures don’t want the federal constitution to trump state constitutional provisions
- Tricky with Free Exercise or Equal Protection Clauses where some state legislators don’t like their state Establishment Clauses
Facts are WOW!

- Montana statutes allow taxpayers to receive tax credits for contribution to Student Scholarship Organizations (SSO) that give students scholarships to attend private schools, including religious schools.
- The Montana Department of Revenue adopted Rule 1 disallowing religious schools to participate in the program because it concluded their participation would violate Montana’s constitution.
- Parents of students attending religiously-affiliated private schools challenged Rule 1.
Lower Court Holding

- Montana Supreme Court held that the Tax Credit Program violates the Montana Constitution
Strong Blaine Amendment

• The provision of the Montana Constitution entitled “Aid prohibited to sectarian schools,” is a “broader and stronger” prohibition against aid to sectarian schools than other states.

• The Tax Credit Program allows the legislature to “indirectly pay tuition at [qualifying schools including religious schools] by reimbursing parents for donating to SSOs, donations funded with money the parents would have otherwise used to pay their child’s tuition.”

• The court concluded: “Although the Tax Credit Program provides a mechanism of attenuating the tax credit from the SSO’s tuition payment to a religiously-affiliated [schools], it does not comport with the constitutional prohibition on indirectly aiding sectarian schools.”
SCOTUS Question

- In one sentence the Montana Supreme Court stated that prohibiting state aid to religious schools in this case doesn’t violate the federal constitution.
SCOTUS Has Long Wrestled with this Issue

• In *Locke v. Davey* (2004) the Supreme Court held that a State of Washington scholarship program that excluded students pursuing degrees in devotional theology didn’t violate the Free Exercise Clause

• Washington’s constitution prohibits providing state funds to students pursuing degrees that are “devotional in nature or designed to induce religious faith”

• Petitioner-parents note in the *certiorari* petition that “while some courts have read *Locke* to prohibit the *wholesale* exclusion of religious options from student-aid programs, other courts have read the decision for the exact opposite conclusion”
Not Very Helpful

• In *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) the Supreme Court held that Missouri violated a church’s federal free exercise rights when it refused, on the basis of religion, to award the church a grant to resurface its playground with recycled tires.

• Missouri’s constitution prohibits public funds from being used “directly or indirectly, in aid of any church, sect, or denomination of religion”.

• Petitioner-parents note *Trinity Lutheran* was decided on “narrow grounds and did not address the student-aid question.”
“Bridgegate”

• Basic question: whether the masterminds of “Bridgegate” have committed fraud in violation of federal law

• More technical question: whether a public official “defrauds” the government of its property by advancing a “public policy reason” for an official decision that is not the subjective “real reason” for making the decision
The Facts

• Former New Jersey Governor Chris Christie’s Deputy Executive Director of the Port Authority of New York and New Jersey, the Port Authority’s Director of Interstate Capital Projects, and Christie’s Deputy Chief of Staff for Intergovernmental Affairs orchestrated “Bridgegate”

• Under the guise of conducting a traffic study, they conspired to reduce traffic lanes from the George Washington Bridge (the busiest bridge in the world) to Fort Lee the first week of Fort Lee’s school year, because the mayor of Fort Lee refused to endorse Governor Christie for governor
Lower Court Holding

• Two of the former employees were convicted of violating a number of federal fraud statutes; one was a cooperating witness

• The Third Circuit accepted the United States’ argument that these convictions should stand because the former employees deprived the Port Authority of tangible property

• The time and wages of the former employees and the 14 Port Authority employees they “conscripted” in the scheme was sufficient to deprive the Port Authority of money or property
Too Broad?

• In their *certiorari* petition the former employees argue that the Third Circuit read the fraud statutes too broadly

• They claim it can’t be that “any official (federal, state, or local) who conceals or misrepresents her subjective motive for making an *otherwise-lawful decision*—including by purporting to act for public-policy reasons without admitting to her ulterior political goals, *commonly known as political ‘spin’*—has thereby defrauded the government of property (her own labor if nothing else)”

• If using government resources while misrepresenting a subjective motive is fraud they continue, “nearly limitless array of routine conduct” will be criminal
Was Bridgegate Really Just Spin?

• The Third Circuit disputes the former employees’ characterization of their conduct as “official action” “merely influenced by political considerations.” “Trial testimony established that everything about the way this ‘study’ was executed contravened established Port Authority protocol and procedures. Indeed, witnesses testified that traffic studies are usually conducted by computer modeling, without the need to realign traffic patterns or disrupt actual traffic. When traffic disruptions are anticipated, the Port Authority gives advance public notice.”
Big Difference

• It seems possible the Supreme Court will separate the facts of this case from an example contained in the former employees’ *certiorari* petition: a municipal official who orders speedy pothole repair for neighborhoods that support the incumbent but doesn’t admit this motivated his or her decision
Official v. Institutional Interests

- Government official/employee interests: narrow federal fraud statutes
- Institutional interests: broad federal fraud statutes to discourage corruption and make sure it is punished
Federal Fraud Convictions Happen

- *United States v. James* (3d Cir. 2018) (former Virgin Islands senator charged with wire fraud and Section 666(a)(1)(A) violations for obtaining legislature funds under false pretenses)
- *United States v. Fumo* (3d Cir. 2011) (Pennsylvania state senator convicted of mail and wire fraud for using state-paid employees for personal and political tasks in violation of state ethics laws)
- United States v. Bryant (3d Cir. 2011) (New Jersey state senator charged with mail fraud for fraudulently inflating pension eligibility through no-show jobs)
ACA Risk Corridor Case

- Moda Health Plan v. United States
- May Congress enact appropriations riders restricting the sources of funding available to pay health insurers for losses incurred that were supposed to be paid per federal law
The Facts

• The Affordable Care Act’s (ACA) risk corridor program provided that if a health insurance plan participating in the exchange lost money between 2014-2016 it would receive a payment from the federal government based on a formula defined in the statute
• If it made money the plan had to pay the federal government based on a formula
• The purpose of the program was to induce health insurance companies to offer plans on the exchange despite the fact they didn’t have reliable data to price the plans
The Facts

- The Government Accountability Office (GAO) identified a particular funding source the federal government could use to make payment.
- Congress passed appropriations riders for all three years disallowing that funding source to be used to make risk corridor payments.
- Over the three-year period the risk corridor program was short $12 billion.
- Moda Health Plan claims it is owed $290 million.
Lower Court Ruling

• Federal government is not obligated to pay the statutory formula for what it owes insurers under the risk corridor program because of the appropriations riders
  
  • “Congress clearly indicated its intent here. It asked GAO what funding would be available to make risk corridors payments, and it cut off the sole source of funding identified beyond payments in. It did so in each of the three years of the program’s existence.”
Argument

- Moda Health plan argues that the Congressional intent the Federal Circuit relied on was “divined not from the text of the riders (which simply restricted one source of funds to honor the commitment), but from two snippets of purported legislative history. That holding disregards literally centuries of precedent holding that a later statute cannot be construed to repeal or suspend an earlier one unless that construction is ‘necessary and unavoidable.’”
Impact on States

- Only direct impact on states is in their capacity as regulators of health insurance
- Could appropriations riders like the one in this case be used to renege on promises of funding to states?
Questions?

Thanks for attending