

Supreme Court Roundup Part 1

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Overview of this Presentation

- Biggest cases of the term for states
- What happened to Justice Roberts?
- President's tax returns cases

Overview of Next Presentation

- Other important cases for the states decided this term
- Preview of the most important cases for states to be decided next term

Overview of the Term for States

- Court was down 10 cases (but you never would have known)
- Lots of big cases
- Most of the big cases involved the states
- Chief Justice Roberts look a sharp turn left in a number of the big cases

June Medical Services v. Russo

- In a 5-4 decision in *June Medical Services v. Russo* the Supreme Court struck down Louisiana's admitting privileges law
- Five Justices agreed that Louisiana's law created an unconstitutional "substantial obstacle" to women obtaining abortions
- Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer's plurality opinion
- Chief Justice Roberts provided the fifth vote
- Sounds simple right?

Facts

- Louisiana law requiring abortion providers to hold admitting privileges at a nearby hospital was nearly identical to a Texas law the Supreme Court struck down 5-4 in *Whole Woman's Health v. Hellerstedt* (2016)
- Admitting privileges allow doctors to admit patients to a hospital and perform surgery
- Controversial because abortion doctors may not be able to get them and don't really need them

Two Legal Tests

- In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, (1992) the Supreme Court stated that “[u]nnecessary health regulations that have the purpose or effect of presenting a **substantial obstacle** to a woman seeking an abortion impose an **undue burden on the right**” and are unconstitutional
- In *Whole Woman’s Health* the Court held that “this standard requires courts independently to review the legislative findings upon which an abortion-related statute rests and to **weigh the law’s ‘asserted benefits against the burdens’ it imposes on abortion access**”
 - Kennedy provided the 5th vote for the balancing test

5 Justices Say this Law Creates a Substantial Obstacle

- Liberals+Roberts

Plurality Substantial Obstacle Analysis

- The plurality opinion, written by Justice Breyer, agreed with the district court in this case that Louisiana's law created "**substantial obstacles**" for women seeking abortions
- Likely only **one** doctor would continue to perform abortions in the state where previously **six** total doctors working in three different locations performed abortions
- One fulltime abortion doctor could meet no more than about 30% of the demand for abortions in Louisiana

The Chief—Applies Substantial Obstacle Test

- Chief Justice Roberts wrote a concurring opinion which provided the fifth vote for the holding that Louisiana’s law is unconstitutional
- The Chief Justice had dissented in *Whole Woman’s Health* but concluded it was good law because of the principle of *stare decisis* (“to stand by things decided”)
- “Because Louisiana’s admitting privileges requirement would restrict women’s access to abortion to the same degree as Texas’s law, it also cannot stand under our precedent”

Plurality Balancing Test

- All burden no benefit
- The Court's plurality again agreed with the district court that Louisiana law does **not protect women's health**
- The district court found that the admitting-privileges requirement serves no "relevant credentialing function" and "does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana"

The Chief—Won't Apply the Balancing Test

- Roberts rejected the balancing test the Court adopted in *Whole Woman's Health* writing “[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts”
- But, regardless of the balancing test, the Chief Justice agreed with the plurality “that the determination in *Whole Woman's Health* that Texas’s law imposed a substantial obstacle requires the same determination about Louisiana’s law”

Roberts Saved Abortion...or Did He?

- 5 votes to get rid of the balancing test
- 5 votes finding a substantial obstacle

Left's Enthusiasm for Roberts' Decision was Muted

- Stuck by precedent but, but, but
 - Only because he had to--to get the 5th Circuit in line
 - Still said *Whole Woman's Health* was wrongly decided
 - Didn't join Breyer opinion at all—could have joined the substantial obstacle portion
 - Effectively killed the balancing test

Very Muted

- Lots of abortion laws may not cause a substantial obstacle to obtaining an abortion but also have no health benefits for women (no telemedicine for chemical abortions, ultrasound laws)
- Roberts hints he might be willing to overturn *Roe v. Wade* but he wasn't asked to-- "neither party has asked us to reassess the constitutional validity" of *Casey*
- He didn't join Thomas's dissent in *Whole Woman's Health* that criticized the new balancing test
- Tom Goldstein: probably the pro-life, pro-abortion restrictions side is happier with the case than liberals

DHS v. Regents of the University of California

- The decision to wind-down the Deferred Action for Childhood Arrivals (DACA) program violated the Administrative Procedures Act (APA)
- 5-4 opinion written by Chief Justice Roberts
- More of an administrative law decision than an immigration ruling
- If it reminds of you the census decision last year...you aren't alone
- If you get lost in the reasoning of this decision...you aren't alone

It's a Long Story

- DACA was established by DHS during the Obama presidency
- The program allows certain undocumented persons who arrived in the United States as children to apply for a two-year **forbearance of removal** and **receive work authorization** and various federal benefits
- During the Trump presidency the Attorney General advised DHS to rescind DACA based on his conclusion it was unlawful
- The Department's Acting Secretary Elaine Duke issued a memorandum ending the program solely on the basis it was illegal

The Story Continues...

- Litigation in the D. C. District gave DHS an opportunity to “reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority”
- DHS Secretary Kirstjen Nielsen wrote a lengthier memo identifying multiple policy reasons for rescinding DACA

Issue

- Was it “arbitrary” or “capricious” in violation of the APA to wind down DACA because it was “illegal”?

Holding

- Instead it holds Acting Secretary Duke “failed to consider . . . **important aspect[s] of the problem**” before her and failed to address whether there was “**legitimate reliance**” on the DACA program
- Court offers no conclusion over whether DACA is in fact illegal

No Nielsen Memo

- The Court rejected considering the Nielsen memo because it contained **additional reasons** to rescind DACA beyond the only reason contained in the Duke memo, illegality, **without going through APA procedural requirements for new agency actions**
- According to the Court, it is a “foundational principle of administrative law” that judicial review of agency action is limited to “the grounds that the agency invoked when it took the action”

Forgetting Forbearance

- Despite the Attorney General's determination DACA was illegal Duke still had **“forbearance” discretion** to defer removal of DACA recipients, but her memo offered **no reason for terminating forbearance**

Legitimate Reliance

- The APA requires agencies to “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account’”
- Court concluded that Duke also failed to address whether DACA recipients and others **legitimately relied on the program**
- The federal government agreed that Duke didn’t consider the interests of those relying on the DACA program **because it didn’t have to**
- The Court disagreed stating that even if DACA “conferred no substantive rights” and provided benefits only in two-year increments, “neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any”

Dissents

- Thomas, Alito, Gorsuch—DACA is illegal—why do we care how it was rescinded
 - “The majority does not even attempt to explain why a court has the authority to scrutinize an agency’s policy reasons for rescinding an unlawful program under the arbitrary and capricious microscope”
- Kavanaugh—we should be able to consider the Nielsen Memo
 - “Although I disagree with the Court’s decision to remand, the only practical consequence of the Court’s decision to remand appears to be some delay. The Court’s decision seems to allow the Department on remand to relabel and reiterate the substance of the Nielsen Memorandum, perhaps with some elaboration as suggested in the Court’s opinion.”

Roberts Saved DACA...Or Did He?

- On technicalities and probably only for a little while
- Whether DACA is legal and whether getting rid of DACA is legal are two different questions
- Roberts' opinion avoids deciding whether DACA is legal; had 5 Justices said DACA is legal it might be safer for longer
- Federal district court in Texas ruled DACA was illegal before
 - And will probably do so again
- Even if DACA is legal it still can be rescinded; just must be done so properly which President Trump has said he will attempt to do again

Bostock v. Clayton County

- Gay and transgender employees may sue their employers under Title VII for discriminating against them because of their sexual orientation or gender identity
- Title VII of the Civil Rights Act of 1964 outlawed employment discrimination on the basis of race, color, religion, sex, and national origin
- 6-3 opinion written by Justice Gorsuch

Textualism Rules the Day

- What is the definition of “sex”?
- The Court assumed that the term refers only to biological distinctions between male and female
- But, the Court noted, Title VII prohibits taking certain actions “because of” sex, meaning “sex” can be one of multiple factors
- And Title VII prohibits discrimination against individuals, not groups

Majority Reasoning

- “From the ordinary public meaning of the statute’s language at the time of the law’s adoption, a straightforward rule emerges: If the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put differently, **if changing the employee’s sex would have yielded a different choice by the employer**—a statutory violation has occurred”

Sexual Orientation Example

- The Court offered an example involving a gay employee to illustrate its point that sex is a factor in discriminating against gay employees: “Consider for example, an employer with two employees, both whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but for cause of his discharge.”

Transgender Example

- The Court also offered an example involving a transgender employee to illustrate sex is a factor in discriminating against employees based on gender identity: “[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.”

Dissents

- Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan joined the majority opinion
- Justice Alito wrote a lengthy dissenting opinion which Justice Thomas joined
 - Overall concerns: Court legislating, “pirate ship” textualism, practical concerns
- Justice Kavanaugh wrote a briefer, solo dissent
 - Overall concerns: Court legislating, literal meaning v. ordinary meaning
 - Tom Goldstein: majority on the “side of the angels” but this isn’t our job—
conservative direction moderate voice

Alito's Practical Implication Concerns

- Over 100 federal statutes prohibit discrimination because of sex!
- Bathrooms—transgender women using the women's bathroom
- Women's sports—transgender woman participating in women's sports
- Housing—transgender woman being assigned to a female dorm
- Religious organizations—religious schools having to hire gay, transgender teachers
- Health care—health plans having to cover sex reassignment surgery
- Free speech—failure to use gender neutral pronouns could lead to discrimination claims
- Constitutional claims—heightened scrutiny will apply to constitutional claims involving sexual orientation and gender identity

Chief Justice Roberts Saves Gay and Transgender Employees

- But he doesn't do it alone!!

Justice Gorsuch in the Spotlight

- Not a total surprise following oral argument
- I was more surprised by Robert's vote
- Dons himself in a conservative's mantle—textualism
- But why?
 - He really thinks his interpretation most closely follows the text
 - Individual liberty/libertarian view
 - Attended a lefty Episcopal church in CO
 - Distance himself from Trump
 - Buying political capital

Espinoza v. Montana Department of Revenue

- U.S. Constitution's Free Exercise Clause allows families to receive tax-credit funded scholarships to attend religious schools regardless of the Montana Constitution's no-aid to sectarian schools provision
- 5-4 decision; Chief Justice Roberts joins the conservatives
- Kagan was the only liberal Justice not to write an individual dissent

Simplest way to Understand this Case

- U.S. Constitution's Free Exercise Clause and the Montana Constitution's No Aid to Sectarian Schools Clause conflict
- U.S. Constitution's Free Exercise Clause trumped a la the Supremacy Clause
- About 30 states have super-Establishment Clauses/Blaine Amendments

Facts—Fascinating Inter-Government Struggle

- The Montana legislature established a program offering tax credits for donations to “student scholarship organization,” which give children scholarships to attend private schools, including religious schools
- The Montana Department of Revenue adopted a rule disallowing the use of scholarships at religious schools based on the Montana Constitution which prohibits disallows state aid to sectarian schools
- The Montana Supreme Court struck down the entire scholarship program holding that it violated the Montana constitution

Battle of the Precedent

- In *Trinity Lutheran Church of Columbia v. Comer* (2017), the Court stated that disqualifying otherwise eligible recipients from a public benefit “solely because of their religious character” imposes “a penalty on the free exercise of religion that triggers the most exacting scrutiny”
- In that case Missouri offered playground resurfacing grants to nonprofits but disallowed religious organizations from applying
- The Supreme Court concluded Missouri’s policy failed strict scrutiny because it discriminated against the church “simply because of what it is—a church”

Applying *Trinity Lutheran*

- Applying the reasoning of *Trinity Lutheran* to this case, the Court opined: “Here too Montana’s no-aid provision bars religious schools from public **benefits solely because of the religious character of the schools.** The provision also bars parents who wish to send their children to a religious school from those same benefits, again **solely because of the religious character of the school.**”

Battle of the Precedent

- The Court distinguished this case from *Locke v. Davey* (2004), where the Supreme Court upheld a Washington State scholarship program that wouldn't fund the study of devotional theology
- The student in *Locke* “was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry”
- States have historically not funded training of the clergy, while they have funded religious schools

How Can there be a Free Exercise Violation when there is No Longer a Program?

- Eliminating the entire program was an error that “flowed directly from the Montana Supreme Court’s failure to follow the dictates of federal law”

Will this Case Clear the Way for More Tax Credit/Voucher/School Choice Programs?

- Yes, if state's with super-Establishment Clauses want to adopt them (some already have them)
- The Court didn't distinguish this case from *Trinity Lutheran* **regardless of funds in this case being used for religious education**
- According to the Court, “[t]his case also **turns expressly on religious status and not religious use**. The Montana Supreme Court applied the no-aid provision solely by reference to religious status.”
- The Chief Justice noted that some Justices have questioned “whether there is a meaningful distinction between discrimination based on use or conduct and that based on status,” but this case didn't require resolving that question

Roberts Saves a Tax Credit Program that Helps Low Income Families

- This is one way of looking at this case
 - For the school year beginning in fall 2017, Big Sky received 59 applications and ultimately awarded 44 scholarships of \$500 each. The next year, Big Sky received 90 applications and awarded 54 scholarships of \$500 each. **Several families, most with incomes of \$30,000 or less, used the scholarships to send their children to Stillwater Christian.**
- Other way to look at this case
 - **If government offers a benefit it must be available to religious organizations**
 - Tom Goldstein: Religion in the space the conservative Justices are moving the law the most

Gun Case

- 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

Gun Case

- In a two-page *per curiam* opinion SCOTUS held that a challenge to New York City's rule disallowing residents to transport firearms to a second home or shooting range outside of the city is **moot**
- After the Court agreed to hear it “the State of New York amended its firearm licensing statute, and the City amended the rule so that [residents] may now transport firearms to a second home or shooting range outside of the city, which is the precise relief . . . requested”
- Lower court could resolve issues related to whether the “new rule may still infringe their rights” by preventing stops for coffee, gas, food, etc. on the way to second homes or shooting ranges outside of the city
 - Dissent: case “becomes moot only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party”

SCOTUS Shocker: SCOTUS Denies Petitions in 10 Gun Cases

- Lots of issues to chose from
 - New Jersey—justifiable need to carry a handgun outside the home
 - California—ban on semi-automatic handguns
 - Massachusetts—ban on “assault weapons” and “high-capacity magazines”
- Is a circuit split on whether the Second Amendment grants individuals a right to carry a gun outside the home
- Four Justices on the record they want to hear a gun case—Thomas, Alito, Kavanaugh, Gorsuch
- Only takes 4 votes to grant a petition

Roberts Doesn't Save Guns...for Now...

- Doesn't want to tackle this issue *now*
- Doesn't want to commit his view to paper
- Why take the Court take the NY case?
 - Very narrow case; only challenge was to not being able to take a gun to a second home or an out of the city shooting range

What Happened to Chief Justice Roberts?



Our Supreme Court



First Full Term with Five *Real* Conservative Justices

Conservative

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

Liberal

- Ginsburg
- Breyer
- Sotomayor
- Kagan

Kavanaugh Kennedy Switch

- In the middle of last term Justice Kavanaugh (expected and proving to be) a reliable conservative replaced swing Justice Kennedy (who occupied that role for over a decade)
- Even before the switch Justice Roberts had shown a moderate streak most famously voting the ACA's shared responsibility payment was a constitutional tax

What We Know for Sure

- I don't know why, no one knows why, no one may ever know why
- Took some sharp turns left in big cases
- He did it on his own terms in a (sometimes) sneaky way which he has done before
 - ACA
 - Census
- In 60 out of the 62 cases he was in the majority!!
- Lyle Denniston: He wants to be in the majority in the big cases

Has His Going Left Been Overstated?

- Yes probably (and I am part of the problem)
- Adam Liptak, New York Times writes Roberts “**steered the Supreme Court toward the middle, doling out victories to both left and right in the most consequential term in recent memory**”
- Tom Goldstein: not an “aggressive” conservative (but never forget *Citizens United*)
- Staying conservative
 - Voting—Roberts has not allowed lower courts to make accommodations to voting rules dues to COVID-19
 - Business cases

Biggest Surprise for me—Gay/Transgender Case

- My theories
 - Pragmatism
 - Textualism
 - Not a constitutional ruling
 - Getting older; having teenagers
 - Buying capital/joining the liberals on the cheap
 - Under the radar--Gorsuch drew all the attention
 - Tom Goldstein: didn't want to change directions radically on this issue

Most Prevalent Theory: Going Left for the Institution

- 5 Justices on the Court were appointed by Republican Presidents; 4 Justices were appointed by Democratic Justices
- If all the Justices vote in the big cases with the views of the President who nominated them the Court looks **political**
- Conservatives push back: doesn't trying to not look political make the Court look political?
- Might Roberts have gone left this term to help the right in the next election (by making SCOTUS less of an issue)?

Another Roberts Truism

- Most enduring truth about Roberts (more than him being a conservative and also not always true): likes to issue **narrow rulings and move slowly**
 - In [a New York Times op-ed](#), Jonathan Adler begins by asking “What is up with Chief Justice John Roberts?” and concludes that, despite a seemingly unpredictable voting pattern, the chief’s hallmark is an “**anti-disruption jurisprudence**” that “has become more pronounced the longer he has been on the court”

He Has so Much Power—Compared to **Anyone** not Just Past Justices or Chief Justices

- Jeffrey Rosen, in the Atlantic argues that Chief Justice John Roberts “decisively and impressively achieved his goal” of preserving the court’s institutional legitimacy, becoming in the process the most powerful chief justice since the New Deal era
- Noah Feldman writing for Bloomberg asserts that Roberts is “now the most influential chief justice since the great John Marshall, who held the job from 1801 to 1835”
- Adam Liptak, New York Times writes about Roberts: “15 years into his tenure, he now wields a level of influence that has caused experts to hunt for historical comparisons”

The Amount of Power he has is **SCARY**

- He conjures more **annoyance** than **fear**
- Former Hawaii legislative staffer Ted Baker: “Too conservative for the liberals, too liberal for the conservatives, yet wielding his authority as chief to protect the Court while incrementally moving his own agenda forward.”

Big Questions Going Forward

- How long will he retain the power he has?
- If he is no longer the Justice in the middle will he still be a centrist Justice?
- If he stays in the middle will he ever go left on race?

President's Tax Returns

- Two cases involving two different parties
- President wins both cases and loses both cases
- Case involving a local prosecutor's subpoena authority is a win for state/local authority
- Both 7-2 (READ: not close cases)
- Majority opinions written by Chief Justice Roberts

Trump v. Vance

- The U.S. Constitution doesn't “categorically preclude, or require a heightened standard for, the issuance of a **state criminal subpoena** to a sitting President”

Facts and Legal Background

- New York County District Attorney's Office, acting on behalf of a grand jury, subpoenaed President Trump's accounting firm for the President's tax returns from 2011 forward related to an investigation into whether the President violated state law
- Since nearly the founding, the Supreme Court has held numerous times that a sitting President may be subpoenaed in *federal* criminal proceedings

President's Arguments

- The President argued “that the Supremacy Clause gives a sitting President absolute immunity from *state* criminal subpoenas because compliance with those subpoenas would categorically impair a President’s performance of his Article II functions”
- The Solicitor General, arguing on behalf of the United States, took the position that a state grand jury subpoena for a sitting President’s personal records must, at the very least, “satisfy a heightened standard of need”

No Absolute Immunity

- Trump pointed to diversion, stigma, and harassment as the reasons he should be immune from state subpoenas
- The majority opinion rejected these arguments as foreclosed by precedent or, in the case of harassment, manageable due to protections already in place to limit grand jury investigations

No Heightened Need

- The Court cited three reasons why it didn't think a state grand jury subpoena seeking a sitting President's private papers must satisfy a heightened need standard
- “First, such a heightened standard would extend protection designed for official documents to the President's **private papers**”
- Second, the Solicitor General was unable to establish that “heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions”
- Finally, “the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence”

Court Hold State Subpoena May Be **Issued**

- But President Trump can still argue that he doesn't have to **comply** with it
- Litigation is continuing in the lower court over whether the President has to *comply* with the subpoena
- Roberts' majority opinion lists numerous grounds on which the President may challenge complying

Trump v. Mazars

- SCOTUS held courts must apply a balancing test when determining when a Congressional Committee may issue subpoena directed at the President's personal information

Facts and Legal Background

- Three House Committees sought a variety of the President's financial documents from banks and his accounting firm
- While the Supreme Court had never before heard a case involving Congress subpoenaing the President's personal information, the Court held in other cases Congress simply needs a **“valid legislative purpose”**

Holding and Reasoning

- **Any type of information** may have “some relation to potential legislation”
- “Congress and the President have an ongoing institutional relationship as the ‘**opposite and rival**’ political branches”
- For these reasons, “in assessing whether a subpoena directed at the President’s personal information is ‘related to, and in furtherance of, a legitimate task of the Congress,’ courts must perform a careful analysis that takes adequate account of **the separation of powers principles at stake**, including both the **significant legislative interests of Congress and the ‘unique position’ of the President.**”

Win/Loss

- Win for the President: President's tax returns are unlikely going to be released to the NYC prosecutor or a Congressional Committee before the election
- Loss for the President: NYC prosecutor case the Court rejected both Trump's arguments and the U.S. government's arguments; Presidents may be issued state subpoenas
- Loss for Congress: essentially an "President exception" to Congress's subpoena authority
- Victoria Nourse: Is it weird that a county prosecutor has more subpoena authority than Congress?

Questions?

Thanks for attending!

See you again on August 4