

Supreme Court Update

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Overview of Presentation

- Impact of Gorsuch and Trump on the Supreme Court
- Current cases of interest
- Cases of interest accepted for next term
- Possible future cases of interest

Impact of Gorsuch & Trump on the Court

Who is Judge Gorsuch?

- Tenth Circuit Court of Appeals judge (10 years on the bench)
- 49 years old
- Harvard Law graduate
- Son of the first female head of the EPA
- Episcopalian/Catholic
- Justice Kennedy clerk
- Any Republican President might have nominated him
- Conservative and an originalist (like Justice Scalia)

What Do His Past Opinions Tell Us?

- Keep it real
 - Authored over eight hundred opinions; and participated in approximately 2,750 decisions
- Most prominent issues
 - Don't concern local governments
 - Affordable Care Act's birth control mandate
 - Don't exist!
 - No abortion rulings or gun rulings

What Do His Past Opinions Tell Us?

- On the issues that matter to cities:
 - Pro-qualified immunity (not knee-jerk)
 - Fourth Amendment (mixed like Justice Scalia)
 - Pro-employer (no claim employment discrimination for transgender teacher)
 - Speech (no current Justice views free speech narrowly)
 - Property rights (not a lot out there...)
 - Closing the courthouse door (not a lot out there...)
 - Pro-religion in public spaces

Court We Had **Before** Justice Scalia died

- 5-4 conservative Court with Justice Kennedy in the middle
- Recently Justice Kennedy has reliably voted with the liberals on social issues
- Justice Scalia was the second most conservative Justice on the Court

Court We Would Have With Justice Gorsuch

- Not much different than before?
 - Replacing one conservative Justice with another
 - *Searching for Scalia* picked him (out of Trump's list of 21 choices) as most like Justice Scalia
 - Agency deference views are probably the most significant difference
 - Keep an eye on his Fourth Amendment decisions
 - Don't think he will be a liberal on social issues (right away or ever)

Future Supreme Court Nominations

- If Trump gets a **second (third or fourth)** nominee through the Court could really change
- Average retirement age for Supreme Court Justices is 79
- Oldest Justices are liberals and Justice Kennedy
 - Justice Ginsburg (84)
 - Justice Breyer (78)
 - Justice Kennedy (80)

Current cases of interest before the Supreme Court

Overall Observations about the Term

- Court was very conscious about having only eight Justices
 - No real high interest cases—transgender bathroom case sent back to 4th Circuit
 - Lots of early, unanimous or 7-1 opinions (Thomas, dissenting) about 10 pages long
 - Court has accepted lots of cases where generally they have significant agreement
 - Qualified immunity/police
 - First Amendment free speech

Los Angeles v. Mendez

- Most important case of the term for cities
- Would have been really bad had the Court gone the other way
- Could have been a broader opinion

Los Angeles v. Mendez

- Court unanimously rejects the “provocation rule,” where police officers using *reasonable* force may be liable for violating the Fourth Amendment because they committed a separate Fourth Amendment violation that contributed to their need to use force
- Invented and only adopted by the Ninth Circuit

Los Angeles v. Mendez

- Facts are terrible
 - Police officer entered the shack Mendez was living in without a warrant and unannounced
 - Mendez thought the officers were the property owner and picked up the BB gun he used to shoot rats so he could stand up
 - When the officers saw the gun, they shot him resulting in his leg being amputated below the knee

Los Angeles v. Mendez

- The Ninth Circuit concluded that the use of force was reasonable
- Found officers liable per the provocation rule--the officers brought about the shooting by entering the shack without a warrant
- Granted the officers qualified immunity for failing to knock-and-announce themselves
- And ruled provocation rule aside, the officers were liable for causing the shooting because it was “reasonably foreseeable” that the officers would encounter an armed homeowner when they “barged into the shack unannounced”

Los Angeles v. Mendez

- SCOTUS rejects provocation rule
 - Its “fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist”
 - More specifically, “[a]n excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used *reasonable* force *after* committing a distinct Fourth Amendment violation such as an unreasonable entry.”

Los Angeles v. Mendez

- SCOTUS rejected the Ninth Circuit's causation analysis because it focused on what might foreseeably happen as a result of the officers' failure to knock-and-announce instead of their failure to have a warrant
- The officers' failure to knock-and-announce wasn't relevant as they received qualified immunity for it

Los Angeles v. Mendez

- What's disappointing about the opinion
 - SCOTUS sends the case back to then Ninth Circuit to redo the causation analysis
 - How exactly did the absence of the warrant in this case “cause” Mendez’s injuries?
 - In an asterisk the Court leaves open the argument that the force used in this case was unreasonable given the “totality of the circumstances”

White v. Pauly

- Per curiam decision without oral argument
- Does not move the law one way or the other
- If you are writing a brief on qualified immunity it has some good language
- Interestingly it involves provocation

White v. Pauly

- Facts could be better
 - Police officers went to Daniel Pauly's house to get his side of the story that he was drunk driving
 - Daniel and his brother Samuel claim the officers stated they were coming in the house but failed to identify themselves as police officers.
 - Officer Ray White arrived after the officers (inadequately) announced themselves
 - He hide behind a stone wall after hearing one of the brothers say "we have guns"
 - Daniel fired shots and Samuel pointed a gun at another officer
 - Officer White shot and killed Samuel

White v. Pauly

- Decided on very familiar grounds—don't look at facts at a high level of generality
 - In general an officer should announce him or herself before shooting
 - But an officer who arrives late on the scene can assume his or her colleagues have already announced themselves
 - “Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.”

Outstanding Qualified Immunity Cases

- *Mesa v. Hernandez*
 - Based on oral argument SCOTUS is unlikely to decide whether qualified can be granted or denied based on information learned after the fact
- *Ziglar v. Turkmen, Ashcroft v. Turkmen, and Hasty v. Turkmen*
 - Lots of issue in these case but only 6 Justices
 - Might be a ruling on qualified immunity
 - At oral argument Justices discussed whether a reasonable jailer could have ignored FBI instructions about how detainees were to be housed

Manuel v. City of Joliet

- This case requires a timeline:
 - March 18, 2011: Manuel is arrested and brought before a county court judge, who makes the required probable-cause finding because Manuel was arrested without a warrant
 - May 5, 2011: Manuel is released from jail
 - April 22, 2013: Manuel files his complaint
- Manuel brings a **malicious prosecution** claim because the 2 year statute of limitations on that claim would have ended May 5, 2013

Manuel v. City of Joliet

- Question SCOTUS agrees to hear is whether **malicious prosecutions** can be brought under the Fourth Amendment
- Lots of good reasons for why the Fourth Amendment isn't a good fit
 - Fourth Amendment forbids unreasonable searches and seizures, not unwarranted or malicious prosecutions
 - Stale claims: an argument could be made that people who were maliciously prosecuted and served time didn't "prevail" until they got out of jail or prison, in some instances years after they were arrested

Manuel v. City of Joliet

- Supreme Court hold 6-2 that even after “legal process” (appearing before a judge) has occurred a person may bring a Fourth Amendment claim challenging pretrial detention
- Justice Kagan explains why:
 - The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge’s probable-cause determination is predicated solely on a police officer’s false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment’s probable-cause requirement. And for that reason, it cannot extinguish the detainee’s Fourth Amendment claim— or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause.

Manuel v. City of Joliet

- The Court left it to the lower court to decide when the cause of action accrued in this case: when Manuel was arrested or when charges against him were dismissed
 - If it is when Manuel was arrested, his unlawful detention claim is time barred
- Justice Alito in his dissenting opinion chastised the majority for not deciding the question presented and concluded that malicious prosecution claims cannot be brought under the Fourth Amendment

Manuel v. City of Joliet

- Is this case a win or a loss for local governments?
- Seems like a loss, right?
- In the win category...
 - Court did not hold that malicious prosecutions can be brought under the Fourth Amendment
 - The lower court might ultimately hold the claim in this case is time barred

First Amendment Free Speech

- Court has accepted three First Amendment free speech cases
- All of the cases give the Court a chance at affirming, narrowing, broadening (nooooo!) its definition of content-based recently adopted in *Reed v. Town of Gilbert, Arizona*
- *Expressions Hair Design v. Schneiderman* has been decided; it did not discuss *Reed* at all

Reed v. Town of Gilbert, Arizona (2015)

- Content-based distinctions in sign codes (and generally) are subject to strict (fatal) scrutiny
- Content-based is defined very broadly
- “Government regulation of speech is content based if a law applies to particular speech because of the **topic discussed** or the **idea or message expressed**”

Packingham v. North Carolina

- Issue: whether a North Carolina statute prohibiting registered sex offenders from accessing commercial social networking websites where they know minors can create or maintain a profile violates the First Amendment
- Was a debate in the briefs about content-based/content-neutral
- Court will not decide this case on this basis; no discussion of content based/neutral speech at oral argument

Packingham v. North Carolina

- Dissenting judge below says:
 - “I think there is a strong argument in light of *Reed* that the statute is content-based because it prohibits registered sex offenders from accessing some websites, but not others, based on the content that appears on the sites...”
- SLLC argues:
 - A conviction under the statute does not turn on the content of the speech; it turns on whether sex offenders have accessed websites where minors can maintain profiles
 - If a minor can maintain a profile in a cooking, religious, or general interest (like Facebook) social networking site sex offenders can’t participate
- North Carolina is almost certain to lose this case; Court will likely say the law is too broad

Lee v. Tam

- Local governments have had a lot of luck with the government speech doctrine as of late
 - *Summum v. Pleasant Grove City* (2009)
 - *Walker v. Texas* (2014)
- *Lee v. Tam* will represent the end of the line for that winning spree
- Issue: whether Section 2(a) of the Lanham Act, which bars the Patent and Trademark Office (PTO) from registering scandalous, immoral, or disparaging marks, violates the First Amendment?

Lee v. Tam

- This case wasn't directly argued as government speech (too much of a stretch?)
- Government's arguments:
 - Trademark program is a government program; government doesn't have to fund speech it doesn't like
 - No restriction on speech here—Tam can speak all he wants—he just can't get a trademark
- Tam's arguments:
 - This is viewpoint discrimination plain and simple
- Section 2 is excepted to go down in flames

Murr v. Wisconsin

- Whether merger provisions in state law and local ordinances may result in unconstitutional taking of property
- What are merger provisions?
 - Nonconforming, adjacent lots under common ownership are combined for zoning purposes

Murr v. Wisconsin

- The Murrs owned two small lots next to each other
- Per an ordinance/state law lots were viewed as one for purpose of sale and development
- The Murrs sought and were denied a variance to separately use or sell the lots

Murr v. Wisconsin

- The Wisconsin Court of Appeals found no taking
 - Murrs' property retained significant value despite being merged; a year-round residence could be located on lot either lot or could straddle both lots
- SLLC filed an *amicus* brief arguing (among other things) that merger provisions are common
- Not sure this is common in Arkansas

Murr v. Wisconsin

- Court agreed to hear this case before Justice Scalia died
- Oral argument took place in March 2017
- Could be a 4-4 decision reheard in the fall?
- Local governments rarely win SCOTUS property rights cases

Bank of America v. City of Miami

- Local governments have “standing” to bring Fair Housing Act (FHA) lawsuits against banks alleging discriminatory lending practices
- But to win these claims local governments must show that their injuries were more than merely foreseeable
- Similar lawsuits have been brought by large cities and counties across the country—most recently Philadelphia
- Larger trend of affirmative litigation—cities suing the Trump administration over the sanctuary cities EO, counties suing drug manufacturers over the opioid epidemic

McLane v. EEOC

- A federal court of appeals should review a federal district court's decision to enforce or quash an Equal Employment Opportunity Commission subpoena for abuse of discretion not *de novo*
- Only the Ninth Circuit used abuse of discretion review

State Farm v. Rigsby

- The False Claims Act (FCA) allows third parties to sue on behalf of the United States for fraud committed against the United States
- Per the Act a FCA complaint is kept secret “under seal” until the United States can review it and decide whether it wants to participate in the case
- SCOTUS held unanimously that if the seal requirement is violated the complaint doesn’t have to be dismissed
- Dismissal remains a possible remedy for seal violations but the Court didn’t articulate a test for when it is the appropriate remedy

Cases the Court Has Accepted for Next Term

District of Columbia v. Wesby

- Really important sleeper case
- Easy to get lost in the funny facts of this case and that at a glance the legal issue seems narrow
- Issue: can officers have probable cause to make an arrest if they don't believe the suspect's version of the story based on circumstantial evidence
- Police officers are almost always making credibility determinations when they are deciding whether to arrest someone

District of Columbia v. Wesby

- Police officers arrested a group of late-night partygoers for trespass
- The party-goers gave police conflicting reasons for why they were at the house (birthday party v. bachelor party)
- Some said “Peaches” invited them to the house; others said they were invited by another guest
- Police officers called Peaches who told them she gave the partygoers permission to use the house
- But she admitted that she had no permission to use the house herself; she was in the process of renting it
- The landlord confirmed by phone that Peaches hadn’t signed a lease
- The partygoers were never charged with trespass

District of Columbia v. Wesby

- The partygoers sued the police officers for false arrest
- To be guilty of trespass the partygoers had to have entered the house knowing they were doing so “against the will of the lawful occupant or of the person lawfully in charge”
- They partygoers claimed they did not know they lacked permission to be in the house

District of Columbia v. Wesby

- D.C. Circuit granted the partygoers summary judgment reasoning the police officers lacked probable cause to make the arrest for trespass because: “All of the information that the police had gathered by the time of the arrest made clear that Plaintiffs had every reason to think that they had entered the house with the express consent of someone they believed to be the lawful occupant.”
- And denied the officers qualified immunity!

United States v. Carpenter

- Court's latest attempt to grapple with technology and the 4th Amendment
- Everyone knew the Court would resolve this issue sooner rather than later
- Lot of attention will be paid to how Justice Gorsuch votes

United States v. Carpenter

- Issue: must police must obtain warrants per the Fourth Amendment to require wireless carriers to provide cell-site data
- Cellphones work by establishing a radio connection with the nearest cell tower
- Towers project signals in different directions or “sectors”
- In urban areas, cell sites typically cover from between a half-mile to two miles. Wireless companies maintain cell-site information for phone calls

United States v. Carpenter

- Stored Communications Act requires governments to obtain a court order based on “reasonable grounds” for believing that the records were “relevant and material to an ongoing criminal investigation”
- Sixth Circuit held that obtaining the cell-site data does not constitute a search under the Fourth Amendment because while “content” is protected by the Fourth Amendment “routing information” is not
- See *Smith v. Maryland* (1979) where the Supreme Court held that police installation of a pen register—a device that tracked the phone numbers a person dialed from his or her home phone—was not a search

Waters of the United States

- If water is defined as “waters of the United States,” per the Clean Water Act the federal government has jurisdiction over the water
- Local governments would generally prefer that the federal government not have jurisdiction over water
- Federal water=permits
- Permits=time+hassle+money
- In spring 2015 EPA issued final rules defining WOTUS

Main Objections to the Regulations

- Definition of ditches
- Definition of tributaries
- Not being adequately involved in the regulatory process

Sixth Circuit Issues Nationwide Stay

- Regulations are not currently in effect
- Court issues a preliminary injunction generally agreeing that the regulations
 - Go to far
 - Weren't issued with proper process

Sixth Circuit Rules on Jurisdiction

- After the fact, the Sixth Circuit rules that it and not a federal district court has jurisdiction to rule on merits of WOTUS regulations
 - Sixth Circuit reads the Clean Water Act's appellate court jurisdiction statute as broadly as it could possibly be read

SCOTUS to Decide Who Rules on WOTUS

- January 2017 SCOTUS agrees to decide which court has jurisdiction—the federal district court or federal court of appeals
- Does this matter?
 - Practical matter: 6th Circuit may not have jurisdiction to issue the stay
- Supreme Court will resolve this case by June 30, 2018 (more likely March 2018)

WOTUS Executive Order

- Calls for the “rescinding or revising” of WOTUS definitional regulations
- Acknowledges that rewriting the WOTUS definitional regulations will require going through the lengthy and complicated process under the Administrative Procedures Act
- This process involves proposing a new rule, receiving and responding to (likely thousands) of comments, and issuing a final rule

SCOTUS Decides to Keep the Case

- Trump administration asked the Supreme Court to hold “in abeyance” litigation over
- SCOTUS denies motion April 2

Where Regulatory Process is at?

- Two step process
 - Repeal current WOTUS rule and reinstate old WOTUS rule—not in the Federal Register yet
 - Propose and finalize new WOTUS rule—EPA is seeking feedback

New Rule will be Challenged

- EO instructs that Justice Scalia's decision in *Rapanos v. United States* (2006) be “considered” in defining the term “navigable waters”
- *Rapanos* is a 4-1-4 decision
- Justice Scalia wrote the plurality opinion defining this term more narrowly than Justice Kennedy's solo concurring opinion
- Apparently every court to rule in the issue has held Justice Kennedy's opinion controlling
- If the new definition of WOTUS relies on Justice Scalia's opinion—it will almost certainly be challenged on this ground, along with many others

SCOTUS will Review Some Version of WOTUS

- Views of the new Justice will matter
- Justice Gorsuch opposes agency deference to statutes (which will be at the heart of any challenge)
- He may still think the current WOTUS regulations are a reasonable interpretation of the Clean Water Act (regardless of what the EPA thinks)

Possible Future Cases of Interest

Travel Ban

- Big cities argue:
 - Discrimination on the basis of religion and national origin undermines trust with law enforcement
 - Message may give rise to hate crimes
 - Immigration and tourism and good for cities
- Moot as of June 14?

Will *Quill* be Overturned?

- South Dakota (and other states) passed a law defying *Quill* with the hopes the Supreme Court will hold their law constitutional and overturn *Quill*
- A state trial court ruled against South Dakota in March; the South Dakota Supreme Court should do the same—then on to SCOTUS
- In the last year Judge Gorsuch wrote an opinion strongly suggesting SCOTUS should overturn *Quill*
- \$23 billion in lost tax revenue a year

Guns, Guns, and MORE Guns

Quick Overview

- In *District of Columbia v. Heller* (2008), the Court ruled that the Second Amendment provides individuals the right to possess a firearm to use for lawful purposes, including for self-defense in the home
- In *McDonald v. Chicago* (2010), the Court held that the Second Amendment right of individuals to keep and bear arms in self-defense is incorporated through the Fourteenth Amendment to apply against state and local government

Two Big Questions

- Is there an individual right to bear arms outside the home?
- May particular guns be banned?
- Lower courts have been very support of state and local gun regulation

Puerta v. California

- Under California law open carry is prohibited
- Concealed carry is permitted with a license based on good cause—most sheriffs say self defense is good cause
- San Diego County Sheriff says good cause means a *particularized need for self-defense*

Religious Liberty

- Famous cake case
- Colorado courts interpret the Colorado Anti-Discrimination Act as requiring a cake artist to make a wedding cake for a same-sex couple
- Does this law violate the Free Speech or Free Exercise Clauses of the First Amendment?
- Court will eventually decide a religious liberty case (wedding photographer, pharmacy doesn't want to carry Plan B, etc.)

Transgender Student Rights

- At least two cases raise the issue of whether transgender students have the right under Title IX to use the bathroom consistent with their gender identity
- SCOTUS sent a 4th Circuit case sent back after the Department of Education pulled a letter saying transgender students have such a right under Title IX
- 7th Circuit case recently decided

Overturing *Auer* Deference

- Per *Auer* deference courts must defer to agency interpretations of their own regulations
- Justice Scalia was the modern author of *Auer* deference (1997)
- In 2015 he said he was willing to overrule it
- SLLC file an *amicus* brief in a cert petition asking the Court to overturn *Auer* deference days before Justice Scalia died
- Cert denied was no surprise in *Bible v. United Student Aid Funds*
- Justice Gorsuch has criticized *Chevron* deference on the 10th Circuit

Overturing *Auer* Deference

- Issue came up in the transgender student case
- Court didn't accept the question of whether to overturn *Auer* deference
- Did accept the question of how to interpret Title IX ignoring the Department of Education's letter

Sexual Orientation Discrimination

- Seventh Circuit has become the first federal circuit court of appeals to rule that employees may bring sexual orientation discrimination claims under Title VII
- 90 days to file cert petition hasn't yet passed
- *Hively v. Ivy Tech Community College*

Debtor's Prison Litigation

- Ferguson report: primary goal of Ferguson's municipal court system was not "administering justice or protecting the rights of the accused, but of maximizing revenue"
- Supreme Court has repeatedly stated that before courts convert unpaid criminal fines into jail time they must make a reasonable inquiry into the defendant's ability to pay
- Defendants must make "all reasonable efforts to pay"—including seeking work and borrowing money
- If they still can't pay, they may not be automatically imprisoned without considering alternative means of punishing them

Debtor's Prison Litigation

- Claims in at least 12 states
- Including: municipal courts failed to determine indigency, failed to tell defendants they could request an indigency determination, and failed to consider alternative punishments
- Local governments may not be liable--municipal judge acting in a judicial capacity may cause the constitutional violation
- Pressure to settle may be high

Walker v. City of Calhoun, Georgia

- Maurice Walker was arrested for being a pedestrian under the influence, could not afford the \$160 cash bond, and was jailed for 11 days before he could see a judge
- Issue: whether an arrestee can be jailed temporarily because he or she cannot afford bail
- SCOTUS has never decided an indigency-based claim in the bail context
- City just won in the 11th Circuit on a technicality because the lower court failed to explain how the City of Calhoun should fix its bail system

DOL Final Overtime Rules

- Obama rule raised the minimum salary for exempt employees from \$455/week (\$23,660/year) to \$913/week (\$47,476/year)
- Practical effect: if your city pays anyone less than \$47,476/year, this employee will now have to be paid overtime if he or she works over 40 hours a week
- Salary levels for exempt employees will be updated every three years (beginning on January 1, 2020)

Texas District Court Temporarily Blocked Rules

- FLSA doesn't have a salary test
 - “If Congress intended the salary requirement to supplant the duties test, then Congress, not the Department, should make that change.”
- DOL lacked the authority to automatically update salary level
- Should *Garcia v. San Antonio Metropolitan Transit Authority* (1985), where the Court held that the FLSA applies to the states be overturned?

What Will President Trump Do?

- Said a few things on the campaign trail indicating he will direct DOL to withdraw these regulations
- These rules might help a significant group of his supporters?
- DOJ has an extension until June 30 to file a brief defending the rule
- Acosta testified in his confirmation hearings that \$33,000 should be the new salary level
- Texas AFL-CIO has filed a motion to intervene if the government refused to defend the rule

What Else is on Justice Kennedy's Agenda?

- How far does he want to go on sexual orientation/gender identity issues?
- What about race?
- Partisan gerrymandering—Wisconsin case
- Death penalty
- Long solitary confinement

SLLC Supreme Court Review Webinar

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