Supreme Court Update

Lisa Soronen
State and Local Legal Center
lsoronen@sso.org
Overview of Presentation

• Overall observations about the term
• Cases important to the states
• Tribute to Justice Kennedy
• Judge Kavanaugh…look into my crystal ball
Supreme Court 2017-18 Term Takeaways

• A significant term
  • Big cases in labor/employment, immigration, law enforcement
  • Some questions left unanswered: gerrymandering, cake case, First Amendment retaliatory arrest

• One Justice’s first term, one Justice’s last
  • Gorsuch impact
  • Kennedy retirement
Supreme Court Stats

• 72 cases decided
• Closer cases than normal:
  • 26% decided 5-4 (compared to an 18% average in the previous 7 terms)
  • 39% decided 9-0 (compared to 50% average)
• Conservative swing in the 5-4 cases
  • Kennedy sided with the right-leaning justices every time
• 37 cases set for oral argument for fall 2018
  • A little higher than average
Superlatives

• Most written opinions: Justice Thomas, 31
• Most questions at oral argument: Justice Sotomayor, 24.3
• Best buddies: Justices Sotomayor and Ginsburg (95.8% agreement)
• Least common ground: Justices Alito and Sotomayor (16.3% agreement in split cases)
• Most popular: Chief Justice Roberts (in the majority 93% of the time)
• Most appearances before the court: Paul Clement, Kirkland and Ellis (6 this term, 92 all time)
Looking to the Future

• Roberts will most likely now be the swing Justice
  • And the Chief Justice
  • How much swinging will be happening?
  • Only voted with the liberals three times in close cases
South Dakota v. Wayfair

• Supreme Court held states and local governments can require vendors with no physical presence in the state to collect sales tax in some instances
• In this case “economic and virtual contacts” between South Dakota and Wayfair were enough to create a “substantial nexus” with South Dakota allowing the state to require collection
• Between $8-$33 billion big deal a year
• 5-4 decision
Precedent

- In 1967 in *National Bellas Hess v. Department of Revenue of Illinois*, the Supreme Court held that per its Commerce Clause jurisprudence, states and local governments cannot require businesses to collect sales tax unless the business has a physical presence in the state.

- Twenty-five years later in *Quill v. North Dakota* (1992), the Supreme Court reaffirmed the physical presence requirement but admitted that “contemporary Commerce Clause jurisprudence might not dictate the same result” as the Court had reached in *Bellas Hess*.
Hope

• In March 2015 Justice Kennedy wrote a concurring opinion stating that the “legal system should find an appropriate case for this Court to reexamine Quill”

• Justice Kennedy criticized Quill in Direct Marketing Association v. Brohl for many of the same reasons the State and Local Legal Center (SLLC) stated in its amicus brief in that case

• Specifically, internet sales have risen astronomically since 1992 and states and local governments are unable to collect most taxes due on sales from out-of-state vendors
States Respond

• Following the 2015 Kennedy opinion a number of state legislatures passed laws requiring remote vendors to collect sales tax in order to challenge *Quill*

• South Dakota’s law was the first ready for Supreme Court review

• It requires out-of-state retailers to collect sales tax if they annually conduct $100,000 worth of business or 200 separate transactions in South Dakota
Oral Argument

• Before oral argument
  • Three likely votes for overturning *Quill*
    • Justice Kennedy
    • Justice Gorsuch
    • Justice Thomas
  
• After oral argument
  • Kennedy, Gorsuch, and *Ginsburg*, (safe to assume Thomas)
  • No clear 5th vote
Why Get Rid of *Quill*?

- The physical presence rule is not a necessary interpretation of the requirement that a state tax must be “applied to an activity with a substantial nexus with the taxing State”
- *Quill* creates rather than resolves market distortions
- *Quill* imposes the “sort of arbitrary, formalistic distinction that the Court’s modern Commerce Clause precedents disavow”
Ignoring *Stare Decisis* is a big Deal

- The economy has moved on; so must we
  - In 1992, less than 2 percent of Americans had Internet access. Today that number is about 89 percent.
  - In 1992, mail-order sales in the United States totaled $180 billion. Last year, e-commerce retail sales alone were estimated at $453.5 billion.
  - In 1992, it was estimated that the States were losing between $694 million and $3 billion per year in sales tax revenues as a result of the physical presence rule. Now estimates range from $8 to $33 billion.
Why Not Wait for Congress?

• “Courts have acted as the front line of review in this limited sphere; and hence it is important that their principles be accurate and logical, whether or not Congress can or will act in response”
Nice Shout Out to the States

- Forty-one States, two Territories, and the District of Columbia now ask this Court to reject the test formulated in *Quill*
Votes

• **Kennedy**, Thomas, Ginsburg, Alito, and Gorsuch
• **Roberts**, Breyer, Sotomayor, and Kagan
• Why might have Justice Alito provided the 5th vote?
• Conservative Justices allow states and local governments to raise taxes!?
What Did the Court Say about South Dakota’s Law?

• To require a vendor to collect sales tax the vendor must still have a “substantial nexus” with the state

• The Court found a “substantial nexus” in this case based on the “economic and virtual contacts” Wayfair has with the state
  • “A business could not do $100,000 worth of business or 200 separate transactions in South Dakota “unless the seller availed itself of the substantial privilege of carrying on business in South Dakota”
  • “And respondents are large, national companies that undoubtedly maintain an extensive virtual presence”
What Did the Court Say about South Dakota’s Law?

- Three features of South Dakota’s tax system that “appear designed to prevent discrimination against or undue burdens upon interstate commerce”
  - Provide a safe harbor to those who transact only limited business in South Dakota
  - Don’t collect retroactively
  - Join the Streamlined Sales and Use Tax Agreement
Dissent

- Short, predictable
  - “I agree that Bellas Hess was wrongly decided, for many of the reasons given by the Court. The Court argues in favor of overturning that decision because the ‘Internet’s prevalence and power have changed the dynamics of the national economy.’ But that is the very reason I oppose discarding the physical-presence rule. Ecommerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress.”
  - Is this really a crisis where we need to change the rules--Amazon is collecting
  - Congress has more “flexibility” to deal with this problem
Annoyed About “Breezy” Majority Opinion

• What about the burden on small businesses of collecting sale tax nationwide?
  • Someone will come up with software
  • South Dakota is protecting small businesses
  • Concerns of a complex state tax system are not before us
State Sales Tax Collection After *Wayfair*

**Key Components:**
- Streamlined Sales and Use Tax Agreement (SST)
- Economic Nexus Laws
- Notice and Reporting Laws
- Implementation Dates
Streamlined Sales and Use Tax Agreement (SST)

• Agreement between states to simplify sales tax collection and minimize costs and administrative burdens on retailers operating in multiple states

• 24 SST States

• Tennessee is an “associate” state (some provisions adopted)

• 20 Non-Streamlined Sales Tax States

• 5 States with No Sales Tax
Streamlined Sales Tax (SST) States

Source: National Conference of State Legislatures
Economic Nexus/Notice and Reporting

• Economic Nexus:
  • Require businesses that have a certain amount of economic activity (sales volume, etc) to collect and remit applicable sales taxes
  • 23 States

• Notice and Reporting Requirements:
  • Impose notification and reporting requirements on out-of-state retailers that do not collect sales tax in a state
  • 13 States

• 10 states with both
Economic Nexus/Notice and Reporting

*Economic Nexus and Notice/Reporting laws vary by state. Please check specific state for more information.*

Economic Nexus laws generally require businesses that have a certain amount of economic activity, such as sales volume, to collect and remit applicable sales taxes.

Notice and Reporting Laws generally impose notification and reporting requirements on out-of-state retailers that do not collect sales tax in the state.

Source: National Conference of State Legislatures
State Marketplace Laws

• Marketplace collection:
  • Provisions that aim to require online and other marketplaces to collect and remit sales and use tax if a retailer sells products on the marketplace
  • 6 states with marketplace collection provisions

• Standard/Traditional Marketplaces:
  • Multiple sellers sell products on a single platform

• “Referral” marketplaces:
  • Customers may search for products and then are referred to purchase those products
State Marketplace Laws

Marketplace collection provisions aim to require online and other marketplaces to collect and remit sales and use tax if a retailer sells products on the marketplace.

Types of Marketplaces
Standard or "traditional" marketplaces where multiple sellers sell products, sometimes the same products, on a single platform.

"Referral" marketplaces are where customers may search for products and are then referred to a place to purchase those products.

Legend
- Enacted Marketplace Law
- No Enacted Marketplace Law
- Non-Sales Tax States

Source: National Conference of State Legislatures
Remote Sales Tax Enforcement Dates

On June 21, 2018, the U.S. Supreme Court, in South Dakota v. Wayfair, ruled that states can require remote sellers to collect and remit applicable sales tax. This map provides an overview of when each state will begin enforcing their sales tax laws on remote sellers. Please check with individual states for specifics.

Source: National Conference of State Legislatures
Remote Sales Tax Enforcement Dates

No State Action:
- 23 States

June 21, 2018:
- 3 States

July 1, 2018
- 4 States

Oct 1, 2018
- 3 States

Dec 1, 2018

- 1 State
  Jan 1, 2019
- 3 States

State Commented/TBD:
- 7 States

*AL has different requirements rolling out at different times
Other Information

Sales Thresholds:
• $100,000 or 200 transactions (*Wayfair* standard)
  • Majority of States
  • Some have $250,000 as a threshold
  • MA has $500,000 as a threshold
• Only one state (Hawaii) has made its tax retroactive
Janus v. AFSCME

- Huge deal; overshadowed by travel ban and Justice Kennedy’s retirement
- State statutes allowing public sector employers and unions to agree that employees who don’t join the union must still pay their “fair share” of collective bargaining costs violate the First Amendment
- Employees must “affirmatively consent” to join the union
- Twenty-two state authorized “fair share” for public sector employees
- 5-4 decision
- Justice Alito was the leader on this issue
Source: National Right to Work Legal Defense Foundation
Janus v. AFSCME

• In *Abood v. Detroit Board of Education* (1977) the Supreme Court held that the First Amendment does not prevent “agency shop” arrangements where public employees who do not join the union are still required to pay their “fair share” of union dues for collective-bargaining, contract administration, and grievance-adjustment.

• In *Janus*, the Supreme Court overruled *Abood*
Janus v. AFSCME

- The Supreme Court’s decision isn’t surprising
- The five most conservative Justices had criticized Abood in 2014 in Harris v. Quinn
- In 2016, right before Justice Scalia died, the Supreme Court heard oral argument in Friedrichs v. California Teachers Association, which raised the same question as Janus
- The Court ultimately issued a 4-4 decision in that case which, practically speaking, kept Abood on the books
Janus v. AFSCME

• The Court’s main defense of agency fee in *Abood* is that it promotes “labor peace”
  • Court said: labor peace exists in federal employment, where agency fee is disallowed, and states without agency fee

• The second defense for agency fee in *Abood* was to avoid free riders who “enjoy[] the benefits of union representation without shouldering the costs”
  • Court said: “First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay”
Janus v. AFSCME

• Bye, bye *stare decisis*

• Five factors it typically weighs when deciding whether to overturn precedent: the quality of the Court’s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.

• Reliance in favor of keeping *Abood*; but reliance—“does not carry decisive weight”
Janus Fallout

- Public sectors unions can (and do) exist without fair share
- Symbolic and practical importance of fair share
  - *Citizens United* of collective bargaining
  - Cornerstone of public sector collective bargaining
  - Guarantees significant funding
- Loss for state sovereignty
  - State laws allow state and local government employers and unions to agree to fair share
  - Dissent: “And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way.”
Janus Fallout

- Union membership of state and local government employees will likely take a hit
  - If you don’t have to pay agency fee will most people continue to pay?
    - Milwaukee Teachers Education Association membership is down 30 percent
    - Teacher union dues in WI are down 50 percent
  - If most people won’t pay their agency fee will they pay for political costs?
- Public sector unions will be poorer and weaker
Janus Fallout

- Opt-out laws unconstitutional as well
- Lawsuits seeking refund for past union dues
- Riffey v. Rauner
- Does Janus restrict public employees speech more generally (no I think)
- States respond to protect unions
  - Expand class of employees that can unionize
- Next challenge: Constitutionality of union as exclusive bargaining representative—Hill v. SEIU (cert denied)
Trump v. Hawaii

- Travel ban
- Indefinitely prevents immigration from six countries: Chad*, Iran, Libya, North Korea, Syria, and Yemen
- Upheld as lawful and constitutional
- 5-4
Trump v. Hawaii

Two most important facts

- The third travel ban restricted entry of nationals of counties “whose systems for managing and sharing information about their nationals the President deemed inadequate”

- While campaigning for office and during his tenure, including after the third travel ban was adopted, the President and various advisers made anti-Muslim statements and indicated the travel bans were designed to exclude Muslims from the United States
Trump v. Hawaii

- Immigration and Nationality Act (INA) argument
  - The INA allows the President to “suspend the entry of all aliens or any class of aliens” whenever he “finds” that their entry “would be detrimental to the interests of the United States”
  - According to the Court this statute “exudes deference” to the President in every clause,” and the travel ban falls “well within” the statute
Trump v. Hawaii

• What about the language saying “no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence”?

• This language doesn’t apply to the universe of who is admissible to the United States it just applies to the smaller class of who gets a visa

• Reagan and Carter did it too…
Trump v. Hawaii

- Establishment Clause argument
  - The issue before the Court “is not whether to denounce the statements”
  - Proclamation is neutral on its face
  - Because this case involved a “national security directive regulating the entry of aliens abroad” the Court only applied “rational basis review” where it would uphold the travel ban “so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds”
  - According to the Court, “It cannot be said that it is impossible to ‘discern a relationship to legitimate state interests’ or that the policy is ‘inexplicable by anything but animus’”
Dissents

- Justice Breyer (joined by Kagan):
  - Fact-specific approach: is the government applying the system of exemptions and waivers that the travel ban contains?
  - Publicly available statistics about waivers for students, refugees, etc “provides cause for concern”
  - Given the importance of the case, would send back to the court for further proceedings and leave the ban blocked

- Justice Sotomayor (joined by Ginsburg):
  - The travel ban “was motivated by anti-Muslim animus” due to the past statements of the administration describing it as a “Muslim ban”
  - “Given the overwhelming evidence . . . it simply cannot be said that the [ban] has a legitimate basis”
Overall Observations

• Mainstream press has overstated the Court’s view of the irrelevance of the President’s statements
  • National security directive regulating the entry of aliens abroad
  • Little comfort to those challenges the President’s other immigration-related activities
• Win for Jeff Sessions
• Kennedy and the pulse of our country—was this a hit or a miss?
Overlooked Issue of Lasting Impact

- Travel ban will go away…lower courts issuing nationwide injunctions will not (unless the Supreme Court curtails the practice)
- Ninth Circuit issued a “nationwide”/”global”/”cosmic”/beyond the parties injunction against the Trump
- Supreme Court didn’t have to address this issue because it ruled in favor of Trump (so no injunction)
  - I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality.
- Looming in sanctuary cities dispute (and many, many others)
Partisan Gerrymandering—A Brief History

• Partisan gerrymandering claims are justiciable—*Davis v. Bandemer* (1986)
  • Supreme Court may rule some amount of partisan gerrymandering is too much and violates the Equal Protection Clause
  • Six votes for this position
  • Weren’t five votes to lay out a standard for when partisan gerrymandering is unconstitutional
  • Justice Kennedy: “The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering”
Partisan Gerrymandering Cases Overview

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

• Lower courts in both cases laid out (different) standards for when partisan gerrymandering is unconstitutional

• *Gill v. Whitford* involves a *statewide* Equal Protection vote dilution and First Amendment association challenge to state legislative redistricting (Wisconsin)

• *Benisek v. Lamone* involves a *single-district* challenge to a congressional district based solely on First Amendment retaliation (Maryland)
Gill v. Whitford

- “Cracking” divides up supporters of one party among different districts so that they do not form a majority in any of them
- “Packing” puts large numbers of a party’s supporters in relatively few districts, where they win by large margins

Allegations
- Wisconsin legislature “packed” and “cracked” Wisconsin Democrats into legislative districts to give Republicans a statewide advantage
- In 2012, Republicans won 60 out of 99 Assembly seats with 48.6% of the statewide vote; in 2014, Republicans won 63 Assembly seats with 52% of the vote
**Gill v. Whitford**

- **Argument**
  - The “efficiency gap” compares each party’s respective “wasted” votes across all legislative districts
  - “Wasted” votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win
  - “Large and unnecessary efficiency gap” in favor of Republicans violated the First Amendment right of association of Wisconsin Democratic voters and their Fourteenth Amendment right to equal protection
• Holding
  • To have standing (in general) a challenger must show individual harm
  • To have standing in a vote dilution case a challenger must “prove” her or she lived in a “packed” or “cracked” district
  • None of the challengers tried to prove this (though 4 alleged they did)
  • The efficiency gap may prove statewide harm to a party but not harm to an individual
  • Four challengers living in allegedly “packed” or “cracked” districts get another shot at proving standing
Gill v. Whitford

• Justices Kagan, Ginsburg, Breyer, and Sotomayor “imagine”
  • Not so hard to prove a person lives in a packed or cracked district
    • Statewide remedy might be appropriate if enough districts are packed or cracked
  • What if challengers tried harder to argue this case as a First Amendment association case?
    • Proving standing shouldn’t be too hard—”when the harm alleged is not district specific, the proof needed for standing should not be district specific either”

• Justices Gorsuch and Thomas would have given the challengers another shot at proving standing
Overall Observations

• Kennedy could have joined the Kagan opinion but didn’t; why?
  • Lays out a roadmap for successfully bringing partisan gerrymandering claims which would have been “the law” had it had five votes
  • Very speculative and hypothetical
• Future of partisan gerrymandering leaders will be Roberts and Kagan
  • Both consensus builders with moderate leanings
• Before Justice Kennedy announced his retirement there was a lot of discussion over whether post-
  Gill it is harder or easier to bring partisan gerrymandering case
  • Easier because of clarity; harder because of rigor
Is Partisan Gerrymandering Dead?

• If and as long as the Court has five solid conservatives—probably
• But…
  • Lower courts want a standard and will continue to push the Court to give them one
  • Cases exist which have much worse efficiency gaps than Wisconsin’s
    • NC: The 2016 efficiency gap, was 19.4% favoring Republican candidates; the thirteenth highest in all of the United States from 1972 to 2016
    • State constitutions offer a possible remedy (Pennsylvania)
Murphy v. NCAA

- Supreme Court rules Federal Professional and Amateur Sports Protection Act (PASPA) unconstitutional
- PASPA prohibited states from authorizing sports gambling
- Violates Constitution’s Tenth Amendment anticommandeering doctrine
- 6-3 decision
- Formerly “Christie” case
History of the case is complicated
  - Atlantic city was struggling
  - New Jersey wanted to allow sports gambling
  - PASPA prevented it from doing so
  - If PASPA is unconstitutional…New Jersey could authorize sports gambling
What is anticommandeering?

- Justice Alito admits it “sounds arcane”
- “[S]imply the expression of a fundamental structural decision incorporated into the Constitution, i.e., Congress lacks the power to issue orders directly to the States”
Murphy v. NCAA

• Why anti-commandeering here?
  • By telling states they could not authorize sports gambling (either outright or by repealing bans on the books) PASPA violates the anticommandeering rule
  • “[PASPA] unequivocally dictates what a state legislature may and may not do. . . . [S]tate legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”
Why is this case a Big Deal?

• Supreme Court has only twice ruled a law amounted to anti-commandeering
• This case was different than previous case because it didn’t require a state to do anything
  • “The distinction between compelling a State to enact legislation and prohibiting a State from enacting new laws is an empty one. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event”
• Court struck down the entire law
  • PASPA contains provisions prohibiting states from operating a sports betting lottery, private actors from operating sports betting schemes pursuant to state law, and restrictions on both state and private actors regarding advertising sports gambling
Why is this case a Big Deal?

- Court rejects the notion PASPA amounts to valid preemption provision
  - “[I]n order for the PASPA provision to preempt state law, it must satisfy two requirements. First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do. Second, since the Constitution ‘confers upon Congress the power to regulate individuals, not States,’ the PASPA provision at issue must be best read as one that regulates private actors.”
  - “[I]t is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors.”
- Dissents were very short and mostly focused on severability
Murphy v. NCAA

• Impact on sports gambling
  • Congress may still regulate sports gambling but must do so directly
  • States with legislation already passed: Delaware, Rhode Island, Mississippi, New Jersey, New York, Pennsylvania, West Virginia, [Connecticut]
  • At least 19 states with active legislation in 2018
    • At least 62 separate pieces of legislation
    • Expect this to increase in 2019
Not A Get Rich Quick Scheme

• Nevada 2017
  • Total tax collections on all gambling: $875 million
  • Total tax collections on sports gambling: $16.6

• Why?
  • “Handle” (total bets made) aren’t taxed; “hold” (sports book winnings) are taxed
  • Hold percent is 5% of the handle

• In Vegas sports gambling is one of many “amenities”
Beyond sports gambling

Where else has Congress prohibited states from acting?

Potentially problematic federal laws include:

- Federal legislation related to sanctuary cities
- Federal restrictions on state tax laws
- FCC infrastructure mandates
- Federal ban on state benefits for aliens
- Potential future attempts to prohibit state legalization of marijuana use
Murphy v. NCAA

- Sanctuary cities impact
  - 8 U.S.C. 1373 prohibits states and local governments from restricting employees from sharing immigration status information with federal immigration officials
  - DOJ has interpreted this statute very broadly (provide advance notice of release of “criminal aliens” from local government custody; hold “criminal aliens” for pick by ICE without a judicial warrant
  - Federal district court in City of Philadelphia v. Sessions ruled the statute unconstitutional
  - “8 U.S.C. §§ 1373(a) and 1373(b) by their plain terms prevent ‘Federal, State, or local government entity[ies] or official[s] from’ engaging in certain activities. These provisions closely parallel the anti-authorization condition in PASPA which was at issue in Murphy”
Husted v. A. Philip Randolph Institute

- Ohio’s processes of removing people from the voter rolls does not violate federal law
- First Ohio compares the names and addresses contained in Ohio’s Statewide Voter Registration Database to the National Change of Address database
- If a person doesn’t vote for two years Ohio sends them a confirmation notice
- If they don’t respond to the notice and don’t vote in the next four years, Ohio removes them from the voter rolls
- 5-4 vote
Husted v. A. Philip Randolph Institute

- National Voter Registration Act (NVRA) explicitly allows the Ohio process
- So what is the problem?
- The “Failure-to-Vote Clause” in the NVRA says a state program “shall not result in the removal of the name of any person . . . by reason of the person’s failure to vote”
- Challengers’ argument: Ohio’s process violate the NVRA’s Failure-to-Vote Clause because “the failure to vote plays a prominent part in the Ohio removal scheme”
  - Failure to vote is used as a trigger for sending the confirmation notice and as a requirement for removal
Husted v. A. Philip Randolph Institute

• Why does Ohio win?
  • Other language in the NVRA states that registrants may not be removed “solely by reason of a failure to vote”
  • The NVRA simply forbids the use of nonvoting as the sole criterion for removing a registrant, and Ohio does not use it that way
  • Ohio removes registrants only if they have failed to vote and have failed to respond to a notice
**Husted v. A. Philip Randolph Institute**

- Why is this case a big deal?
  - It involves voting
  - It involves voting in Ohio
  - It involves people getting **tossed from the voter rolls**
  - 12 states use the Ohio process; others use a similar process; now all 50 states can use the Ohio process
  - Lots of great language in the opinion about legislative authority
The case is seen as political

- Justice Alito’s opinion sticks to the statute
  - JUSTICE SOTOMAYOR’s dissent says nothing about what is relevant in this case—namely, the language of the NVRA—but instead accuses us of “ignor[ing] the history of voter suppression” in this country and of “uphold[ing] a program that appears to further the . . . disenfranchisement of minority and low-income voters.” Those charges are misconceived.

- Justice Sotomayor isn’t having it
  - “Congress enacted the NVRA against the backdrop of substantial efforts by States to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. The Court errs in ignoring this history and distorting the statutory text to arrive at a conclusion that not only is contrary to the plain language of the NVRA but also contradicts the essential purposes of the statute, ultimately sanctioning the very purging that Congress expressly sought to protect against.”
Husted v. A. Philip Randolph Institute

• The decision is seen as political
  • CNN headline: “Democrats fret court's Ohio decision could lead more states to purge voter rolls”
  • President Trump tweet: “Just won big Supreme Court decision on Voting! Great News!”
Husted v. A. Philip Randolph Institute

• What about good governance?
  • Numerous local governments have been sued for having too many ineligible voters on the rolls
  • In settlements local governments have agreed to the Ohio process
  • There must be some process for removing voters who have moved other than relying on the Postal Service Change of Address
Husted v. A Philip Randolph Institute

Ohio process
- Georgia
- Alaska
- Florida
- Illinois
- Iowa
- Missouri
- Montana
- Oklahoma
- Pennsylvania
- Rhode Island
- Tennessee
- West Virginia

Similar process
- Arkansas
- Kentucky
- Louisiana
- Mississippi
- Nevada
- North Carolina
- South Carolina
Masterpiece Cakeshop v. Colorado Civil Rights Commission

- Court reverses a ruling against the owner of a cake shop who refused to create a wedding cake for a same-sex couple because of his religious beliefs
- And decides…nothing?
- Both sides declared victory
- 7-2 (dissenters would have ruled against cake shop owner)
Masterpiece Cakeshop v. Colorado Civil Rights Commission

- Charlie Craig and Dave Mullins filed a complaint against Masterpiece Cakeshop claiming it violated Colorado's public accommodations law, which prohibits discrimination in public accommodations on the basis of sexual orientation, when it refused to create a wedding cake for them.

- The cake shop owner, Jack Phillips, explained: “To create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.”

- Legal basis of lawsuit: First Amendment free speech and free exercise of religion.
Masterpiece Cakeshop v. Colorado Civil Rights Commission

- Colorado Civil Rights Commission acted with hostility toward religion “inconsistent with the First Amendment’s guarantee that our laws be applied … neutral[ly] toward religion”
- “I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”
Masterpiece Cakeshop v. Colorado Civil Rights Commission

• Court wimped out
  • “[A]fter the Commission’s ruling, the Colorado Court of Appeals considered the case de novo. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say.”
  • Supreme Court reviewed this case de novo and could have simply disavowed and then ignored the Commission’s bias
• From Justice Ginsburg/Sotomayor dissent
Masterpiece Cakeshop v. Colorado Civil Rights Commission

- Outcome Justice Kennedy can live with:
  - JUSTICE KENNEDY: Commissioner Hess says freedom of religion used to justify discrimination is a despicable piece of rhetoric. Did the Commission ever disavow or disapprove of that statement?
  - MR. YARGER: There were no further proceedings in which the Commission disavowed or disapproved of that statement.
  - JUSTICE KENNEDY: Do you disavow or disapprove of that statement?
  - MR. Yarger: I would not have counseled my client to make that statement.
  - JUSTICE KENNEDY: Do you now disavow or disapprove of that statement?
  - MR. YARGER: I -- I do, yes, Your Honor. I think -- I need to make clear that what that commissioner was referring to was the previous decision of the Commission, which is that no matter how strongly held a belief, it is not an exception to a generally applicable anti-discrimination law.
Masterpiece Cakeshop v. Colorado Civil Rights Commission

• Court did not:
  • Rule that Phillips had a First Amendment free speech or free exercise of religion right to not make a wedding cake for a same-sex couple
  • Rule that Phillips lacked a First Amendment free speech or free exercise of religion right to not make a wedding cake for a same-sex couple
  • Suggest how this case would have decided this case had the commissioners not demonstrated a bias against religion or how similar, future cases should be decided
Masterpiece Cakeshop v. Colorado Civil Rights Commission

- Will this be the enduring take away?
  - “Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”

- Nine Justices agree with this
  - *Brush & Nib Studio v. City of Phoenix*
  - *Arlene’s Flower’s v. Washington*
States with PA Statutes Protecting Sexual Orientation

- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Hawaii
- Illinois
- Iowa
- Maine
- Massachusetts
- Maryland
- Minnesota
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- Nevada
- Oregon
- Rhode Island
- Vermont
- Washington
- Wisconsin
Minnesota Voter Alliance v. Mansky

- States can’t: ban (all or a confusing body of) political apparel at the polling place
- States can: regulate campaign-related at the polling place
- Where is the line?
  - Who knows
- 7-2 decision
- Very good loss for state and local government
  - This law isn’t okay but similar laws might be okay
Minnesota Voter Alliance v. Mansky

- Minnesota law which prohibits voters from wearing a political badge, political button, or anything bearing political insignia inside a polling place on Election Day
- Andrew Cilek was temporarily prevented from voting for wearing two items: a T-shirt with the words “Don’t Tread on Me” and the Tea Party Patriots logo and a “Please I. D. Me” button
- He argued Minnesota’s ban on political speech at the polling place violates the First Amendment because it is **overly broad**
- Supreme Court agreed
Minnesota Voter Alliance v. Mansky

- Supreme Court had a long list of problems with this statute
  - Bottom line: law lacked a “sensible basis for distinguishing what may come in from what must stay out”
  - Statute doesn’t define “political”
  - Minnesota stated that apparel on “any subject on which a political candidate or party has taken a stance” is disallowed. To this the Court responded: “A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable.”
  - Minnesota interpreted the statute to ban apparel “promoting a group with recognizable political views.” The Court pointed out this could include associations, educational institutions, businesses, and religious organizations who have stated an opinion on issues confronting voters in a given election
Minnesota Voter Alliance v. Mansky

- Without opining on their constitutionality the Court cited to some more “lucid” examples
  - Cal. Elec. Code Ann. §319.5 (West Cum. Supp. 2018) (prohibiting “the visible display . . . of information that advocates for or against any candidate or measure,” including the “display of a candidate’s name, likeness, or logo,” the “display of a ballot measure’s number, title, subject, or logo,” and “[b]uttons, hats,” or “shirts” containing such information)
  - Tex. Elec. Code Ann. §61.010(a) (West 2010) (prohibiting the wearing of “a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election”)
Dissent

• Court should have afforded the Minnesota state courts “a reasonable opportunity to pass upon” and construe the statute

• Dissenters acknowledge the history of regulating speech at polls based on chaos and violence…from the State and Local Legal Center *amicus* brief
  
  • J. Johnson, Fight Breaks Out at Polling Place (Nov. 8, 2016) (describing a fight in which a voter sprayed pepper spray at a campaign volunteer who allegedly had been handing out campaign materials)

  • R. Reilly, A Guy in a Trump Shirt Carried a Gun Outside of a Virginia Polling Place. Authorities Say That’s Fine (Nov. 4, 2016) (describing a man wearing a shirt bearing the name of a candidate and carrying a weapon outside of a polling place)
States that **Don’t** Prohibit Some Accessories or Apparel in the Polling Place

- Alabama
- Arizona
- Florida
- Iowa
- Kentucky
- Maine
- Maryland
- North Carolina
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- Virginia
- Washington
- West Virginia
- Wyoming
NIFLA v. Becerra

• In a 5-4 decision the Supreme Court ruled that a California law requiring licensed crisis pregnancy clinics to disclose they don’t offer abortions and unlicensed crisis pregnancy clinics to disclose the fact they are unlicensed likely violates the First Amendment.

• I will focused on the licensed requirement.
NIFLA v. Becerra

- Ninth Circuit applied intermediate scrutiny to the licensed clinic notice because it was “professional speech” and held the requirement was constitutional.
- Supreme said it has never recognized a category of “professional speech”.
- Court held the licensed clinic notice was content-based so strict it applied strict scrutiny; notice failed intermediate scrutiny.
- Notice doesn’t apply to numerous other community clinics which serve low-income women, who are the intended target of the licensed notices.
Impact

- Government required notices at pregnancy clinics about abortions aren’t all that common but state and local governments require all kinds of notices
  - Only Hawaii and Illinois have laws similar to California's
- Does strict scrutiny now apply to all of them?
  - Justice Breyer points out “[v]irtually every disclosure law could be considered ‘content based.’” The majority opinion states it does not “question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products. But this generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification.”
Impact

• Professional speech has been used to uphold bans on conversion therapy for minors in the Ninth and Third Circuits

• States regulating conversion therapy for minors: California, Oregon, New Mexico, Illinois, New Jersey, Vermont, and DC

• Professor Erwin Chemerinsky: it may now be easier to challenge laws in states including Texas, Louisiana and South Dakota that require pregnant women to be shown pictures of fetuses (content-based requirement)
NIFLA v. Becerra

• Justice’s Kennedy’s last word on the First Amendment:
  • “The California Legislature included in its official history the congratulatory statement that the Act was part of California’s legacy of ‘forward thinking.’ But it is not forward thinking to force individuals to ‘be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.””
Carpenter v. United States

- The Fourth Amendment requires the government to receive a warrant to obtain cell-site location information (CSLI)
- 5-4 decision
- Roberts+liberals-Kennedy
- Smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone’s features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information
Carpenter v. United States

- Robbery suspects gave the FBI Timothy Carpenter’s name and cell phone number as an accomplice who participated in a number of robberies with them.
- Prosecutors obtained Carpenter’s CSLI for over 100 days and were able to show that Carpenter was located at four of the robberies at the exact time they occurred.
- Per the Stored Communications Act (SCA), prosecutors applied for a less-stringent court order rather than a warrant to obtain the records.
Carpenter v. United States

- Obtaining CSLI is a “search”
  - The Court rejected the argument that the “third-party” doctrine applies in this case
  - In previous cases the Court has held that persons have no legitimate expectation of privacy in information voluntarily turned over to third parties, meaning such information isn’t protected by the Fourth Amendment
  - The information to which the Court applied the third-party doctrine in previous cases (bank records and dialed phone numbers) isn’t comparable to “the ability to chronicle a person’s past movements through the record of his cell phone signals”
Carpenter v. United States

• CSLI is something we have never seen before
  • “With access to CSLI, the Government can now travel back in time to retrace a person’s whereabouts, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. Police need not even know in advance whether they want to follow a particular individual, or when.”
Carpenter v. United States

- Warrant was needed
  - Warrants are typically required where “a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing”
  - The SCA’s requirement to show “reasonable grounds” for believing that the records were “relevant and material to an ongoing investigation” “falls well short of the probable cause required for a warrant”
Carpenter v. United States

- Carpenter joins a line of cases where the Supreme Court has offered Fourth Amendment protection to other electronic information
  - GPS devise on a car is a Fourth Amendment search—Jones
  - Searching a cell phone requires a warrant--Riley
- Professor Alexandra Natapoff: Warren Court created criminal procedure that protect sevveryone but protections were designed with the poor and minorities in mind; Carpenter is designed for *everyone* who isn’t accustomed to interacting (negatively) with the police; “trickle down” criminal procedure
Kennedy Focused Observations

• Justice Kennedy ruled the world
  • In the majority in all the big cases
  • *South Dakota v. Wayfair*—his idea, his opinion
  • Cake case—he writes the opinion, his theory of the case triumphs
  • Partisan gerrymandering—Roberts and Kagan were fighting for his heart and mind
Kennedy Focused Observations

• Why was he so indecisive/narrow this term?
  • Cake case—really torn?
  • Partisan gerrymandering—waiting for something worse?
• Because he knew he was leaving?
• Why was has so conservative this term?
  • He is a conservative
Kennedy Focused Observations

• He was angry about something you all should care about—misbehavior by the government
  • Cake case—discriminatory statements by Colorado Civils Rights Commission members
  • NIFLA—state legislatures congratulating themselves for forcing people to say things they don’t want to say
  • Retaliatory arrest case—look up Fane Lozman getting arrested at a City of Riviera Beach board meeting
  • Travel ban—government officials speaking and acting with discriminatory animus
His Parting Words are to Elected Officials

There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.
His Parting Words are to Elected Officials

• The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.
What Does This Term Say

• About the Court?
• About our democracy?
• Role of Justice Kennedy?
Supreme Court is Incredibly Powerful

- They decide
- Pick and choose what they decide, when they decide, how they decide
- Never stop, rarely slow down
- Decide many of the most important issues of the day
- Final say on constitutional matters
Should it Be?

- Only 9 people
- Not elected
- Appointed for life
- Relatively homogenous, not “average,” never young
For Better or Worse

• These qualities make the Court
  • Nimble
  • Decisive
  • Skewed
If It is This Way...

• We were lucky to have Justice Kennedy right where he was
  • Everyone in this room agrees with many of his votes
  • In *South Dakota v. Wayfair* we see his humility and curiosity
  • Whether we like it or not the Supreme Court has been our collective voice and conscience; Justice Kennedy made it a moderate, thoughtful, cautious, and open-minded one

• And now he is leaving
Where did He Provide the Critical 5th Vote?

- Anything, everything
  - Gun rights
  - Death penalty
  - Affirmative action
  - Abortion
  - Same sex marriage
  - Land use
  - *Citizens United*
Where Was Justice Kennedy “Liberal”?  

- GLBTQI issues  
- Death penalty  
- Race (sometimes)  
- Abortion (sometimes)
Who is Judge Kavanagh?

- We know three things about him for sure
  - Very conservative (could be an even more reliable conservative)
    - In between Thomas and Gorsuch/Alito
  - Over 1/3 of his opinions involve administrative law
  - D.C. Circuit doesn’t decided many cases involving bread and butter issues for states and local governments
What We Have Seen So Far

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

• Pro-property rights
• Pro-religion in public spaces
• Pro-closing the courthouse door
• Anti-race-based decision making
Will He Get Through?

- Conventional wisdom says he gets YES but there is no issue like abortion
- Only needs 51 votes
- Has that in Republicans exactly (-McCain +Pence)
- Possible Republicans to vote AGAINST him: Collins, Murkowski, Paul
- Possible Democrats to vote IN FAVOR of him: Manchin, Donnelly, Heitkamp, McCaskill, Jones