

Supreme Court Update

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When I am a General Session Speaker

- I always speak to the same theme
- (Though my specific content changes)

The Supreme Court Matters

- Generally
- Local governments specifically
- Seismic changes on the Supreme Court in the last six months

In GEORGIA in 2021

- Do
- You
- Need
- Me
- To
- Tell
- You
- That the Supreme Court is **important**?

Bear with Me...

- Nine **unelected** people
- Relatively homogenous, not “average,” not young
- Toil away in relative obscurity
 - C-SPAN survey, August 28, 2018, 52% couldn't correctly name one SCOTUS Justice
- But decide (often) definitively the most important issues of the day

In the Last 10 Years (or so)

- Kept the *Affordable Care Act* alive (twice)
- Okayed same sex marriage
- Struck down a restriction on abortion
- Kept affirmative action
- Scaled back the death penalty
- Found an individual right to have a gun
- Struck down union “fair share”
- Gutted the Voting Rights Act
- *Citizen’s United*
- Didn’t overturn the 2020 election

Supreme Court's Darlings

- State government
- Criminal defendants
- **Local governments**
- Everyone else

Put it in Perspective

- Decides about 70 cases a term
- In about 10 of these cases a local government or local government official will be a named party
- Cities on the docket this term: Chicago, Philadelphia, San Antonio, Baltimore

I Will Talk Briefly about Three SCOTUS Cases Affecting Cities

All

- Affect Georgia cities
- Are from this term

None

- Will receive significant media coverage
- Are individually earth shattering

But in Total

- They illustrates the regular, ongoing involvement of the Supreme Court in the day to day operations of local governments
- SLLC has filed an *amicus* brief in all three

Why Does the SLLC File *Amicus* Briefs?

- *Amicus curie* or friend of the court briefs explain the impact of a case for a particular constituency
- SLLC *amicus* briefs explain the impact of a case on state and local governments
- *Amicus* briefs help the Court understand the practical implications of their decision

SLLC Members

- National Governors Association
- National Conference of State Legislatures
- Council for State Governments
- **National League of Cities**
- **U.S. Conference of Mayors**
- National Association of Counties
- International City/County Management Association
- International Municipal Lawyers Association
- Government Finance Officers Association

Uzuegbunam v. Preczewski AKA U. v. P.

- Georgia Gwinnett College's materials distribution policy was clearly unconstitutional; it got sued and changed the policy
- Plaintiffs wanted the policy changed and nominal damages (\$1)
- College argues the case should be over because it is moot
- Why should the college have to accept a judgment against it when it gave the plaintiffs everything they wanted (policy changed)?
- What if the case involved a sign code, social media policy, or a stay-at-home order where the law is unclear?
- City might change a policy just to make the litigation go away

Cedar Point Nursery v. Hassid

- Case out of California; to be decided this term
- If the government comes on to a citizen's property **temporarily** or (or allows someone else to) is this a **taking** under the U.S. Constitution's Fifth Amendment?
- If it is a taking the government will have to pay **just compensation**
- Local governments officials go onto private property temporarily all the time: police work, health inspections, code enforcement, etc.

City of Chicago v. Fulton

- How many of your cities impound vehicles for repeated unpaid tickets?
- Supreme Court held local governments do not have to return impounded immediately upon a debtor filing for bankruptcy
- Change in the law in the 11th Circuit
- A 2013 investigation by the Chicago Tribune found that hundreds of owners of impounded vehicles had turned to a single scam artist to file fraudulent bankruptcy petitions in order to receive their vehicles without paying an impoundment fee

In the Last Six Months the Supreme Court Has Experienced a Seismic Shift

- Gone from a 5-4 conservative Court with an increasingly moderate Chief Justice in the middle
- To a 6-3 conservative Court where the Chief Justice's vote will no longer matter
- Note: Many thought this arrangement might last for an entire decade
- Timeline of events

June and July 2020

- All eyes were on



SCOTUS Was to Decide A Bevy of Blockbusters

- Would the Court strike down an **abortion restriction** identical to one in struck down in 2016 when Justice Kennedy was on the Court?
- Could the President get rid of the **DACA program** because it was illegal?
- Would SCOTUS rule that all **gay and transgender employees** were protected by Title VII?
- Would the Supreme Court force the **President** to give his **tax returns** to Congress and an NYC prosecutor?
- Would the Court strike down NYC's **gun ordinance**?

Last Term was Supposed to be the First Full Term with Five *Real* Conservative Justices

Conservative

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

Liberal

- Ginsburg
- Breyer
- Sotomayor
- Kagan

Gone were the Unreliable** Conservatives

- Powell ('71-'87)
- O'Connor ('81-'06)
- Kennedy ('87-'18)
- Now Kennedy (unreliable conservative) has been replaced by Kavanaugh (expected-to-be reliable conservative)
- ** Many wondered how reliable Chief Justice Roberts would be

Conservative/Liberal More Important in the Big Case

- Many cases aren't decided on ideological lines; but most big cases have been in the recent past
 - While I am sure there are more...I can only think of two big cases decided in the last 10 years that weren't 5-4
- Over the last decade
 - About 50% of cases are unanimous
 - About 20% of cases are 5-4
 - About half of the 5-4 cases have been "big" cases

So What Did He Do?

- Chief Justice Roberts joined the liberals Justice in numerous rulings
 - Abortion
 - DACA
 - Title VII sexual orientation/gender identity

Has His Going Left Last Term Been Overstated?

- Yes probably (and I am part of the problem)
- He did it on his own terms in a (sometimes) sneaky way which he has done before
- 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**”

Most Prevalent Theory on this Term: Going Left for the Institution

- 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 not causing Democrats to become enraged over SCOTUS)?

It Paid Off!!

- Gallup poll August 2020
 - 58% of people approve of the job SCOTUS is doing
 - Highest since 2009
 - 60% Republicans approve
 - 56% Democrats approve
 - 57% Independents approve

September 2020: Death of Justice Ginsburg

- What does it mean for:
 - Our country
 - Local governments
 - Supreme Court
 - Chief Justice Roberts

Our Country

- Who has seen the documentary and/or the Hollywood movie of her life?
- Second female Justice
- True feminist hero
 - Endured overt sexism women of my generation couldn't dream of
 - Argued six gender discrimination cases before SCOTUS
 - Most famous SCOTUS majority opinion lead to VMI accepting women
- Famous for her dissents
- Cultural icon when most people can't name one Supreme Court Justice

Local Governments

- All Justices are a mixed bag
- She was a pragmatist who wanted fairness and common sense to prevail
- Three cases I will remember her by:
 - *South Dakota v. Wayfair*
 - *Barr v. American Association of Political Consultants*
 - *Gobeille v. Liberty Mutual Insurance Company*

The Court's Shift Right—Overall

- Adam Liptak of the NYT: adding Justice Barrett will move the Court “slightly but firmly to the right, making compromise less likely”
- Why only slightly?
- Chief Justice Roberts is pretty conservative, and he is at the center of the Court
- Most SCOTUS cases aren't decided 5-4 on ideological lines

This Time the Shift Right Will be Real—Big, Controversial Cases

- Now we will have a 6-3 Court in the big controversial cases
- Justice Kavanaugh will be at the center of the Court
- Neither he nor Justice Gorsuch will do much swinging
- So far Justice Kavanaugh has been a reliable conservative vote in big controversial case but watch the ACA ruling this term...
- In the big controversial cases only **Gorsuch** has strayed **once** (Title VII sexual orientation/transgender)

Liberals Only Hope

- Roberts, Gorsuch, Kavanaugh and Barrett will **never** be liberal Justices
- But what if the Chief can peel just one of them off occasionally in big, controversial cases?
 - Gorsuch—sexual orientation/transgender employment cas
 - Kavanaugh—ACA
 - Barrett--??

What it Means for Chief Justice Roberts?

- He can no longer “save” the institution if he wants in the big, controversial cases
- He can “signal” to his conservative colleagues not to take a case because he might not vote with them—guns—but his views won’t matter
- **He can’t control the pace at which his conservative colleagues move the Court to the right**

November 2020: Justice Barrett Joined the Bench

- Hallmarks of a conservative:
 - Textualist
 - Originalist
 - Judicial restraint
 - Clerked for Justice Scalia
- Doesn't have a really long appellate court record
- Not an Ivy league East Coaster who worked for the federal government

How is Justice Barrett Likely to Make a Difference?

- Look where Chief Justice Roberts held back
 - Guns
 - Abortion
 - ACA
- She already has!
 - Before she joined the Court allowed all stay-at-home orders to stay in place over claims they discriminated against religion; since she has joined all stay at home orders reviewed by the Court have been struck down

SCOTUS Has Avoided Gun Cases

- In the last ten years SCOTUS declined to grant review in over **150 Second Amendment cases**
- 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

SCOTUS Shocker: SCOTUS Denies Petitions in 10 Gun Cases

- June 2020
- Roberts doesn't want to tackle this issue *now*
- Roberts doesn't want to commit his view to paper
- The Court knew Justice Ginsburg is going to die soon and didn't want a case this controversial on the docket?

Justice Barrett and Guns

- *Kanter v. Barr*: owner of an orthopedic footwear company convicted of mail fraud argued federal and state laws that prohibit people convicted of felonies from having guns violate his Second Amendment right to bear arms
- Majority of the 7th Circuit disagreed
- Barrett dissented—At the time of the country’s founding legislatures took away the gun rights of people who were believed to be dangerous
- History and tradition v. intermediate scrutiny
- Case to watch: *Folajtar v. United States* raises the same issue as *Kanter v. Barr*
- Professor Stephen Vladeck of the University of Texas School of Law—gun case like “candy”

American Views and Guns—Pew 2019

- Majority of Americans think gun laws should be tougher (60%)
 - Big differences based on party, gender, education attainment
- Agreement
 - Mental illness=no gun
 - Background checks private gun sales and gun shows
- Court unfortunately isn't likely to decide in the near future a case involving one of the gun issues Americans agree on
- 44 percent of people know someone who has been shot

November and December 2020: SCOTUS Was Involved in the Election

- Was involved by mostly not being involved
- Texas asked the Supreme Court to decide whether Georgia, Michigan, Pennsylvania and Wisconsin took “non-legislative actions to change the election rules that would govern the appointment of presidential electors” that violated the federal constitution
- I got countless texts and emails all hours of the day and night asking me whether the Court would decide the Texas case
- SCOTUS said no standing but the reasons I gave people ahead of time was...

Supreme Court and the Pre-Election

- SCOTUS decided numerous cases on its so-called “shadow docket” involving whether states could count ballots received **after election day**
- Roberts’ line in the sand: if **state** judges said the counting late arriving ballots was okay per the **state constitution** the Supreme Court should stay out
- Cases came out differently; none of them affected the outcome of the election
- Adam Liptak, *In Voting Cases, Chief Justice Roberts Is Alone but in Control*, NY Times

January 2021: President Trump Has Left Office

- After appointing three Justices
- Joan Biscupic, *Trump transformed the Supreme Court that mostly helped advance his agenda*, CNN, Jan. 19, 2021
- Supreme Court mostly gave Trump what he wanted
 - Travel ban, federal executions, union dues, public charge, abortion pill
- Perhaps ironically, the one **individual** who stood most in the way of Trump was Chief Justice Roberts
 - DACA, citizenship census question, tax returns

What Does a More Conservative Supreme Court Mean for **Local Governments**?

- Probably will be a smaller change than you think
- Most local government cases aren't blockbuster cases which in the last 10 years would have been decided 5-4 on ideological lines
- Chicago bankruptcy case was decided 8-0
- Ideal SCOTUS Justices for local governments: pragmatic, moderate, conservative (in that order)

What Does a More Conservative Supreme Court Mean for **Democracy**?

- Such a Court will more often than before be out of lock step with mainstream American views on controversial topics
- The conservative Justices know this, we knew this
- One Justice (whether he will ever admit it or not) has modified his views occasionally, narrowly, creatively in nod to that reality

Million Dollar Question: Will Others?

- We don't know yet
- Only thing we know for sure is **they don't have to**
- Why?
- Because they are unelected and appointed for LIFE

Bottom Line: We Have Given this Institution A Lot of Power

- In theory this is a problem—not elected, life time tenure
- We can all agree we should have a more effective legislative branch, right?
- But during my lifetime SCOTUS has done a pretty good job or not making anyone too happy or getting anyone too angry
- Pragmatism: to avoid uncertainty and confusion, some institution or person has to make the tough final calls on what is unconstitutional

What is SCOTUS's Job?

- Decide what the law is?
- Serve the interests of justice?
- Determine the original meaning of the constitution?
- Call balls and strikes?
- Be a force to improve people's lives?
- Use their outstanding intellect to figure out the best way to make tough calls?
- Achieve desired political ends?

This is What I Think it Is

- Whether we or the Court likes it or not
- Our collective voice and our collective conscience
- What's it gonna be thinking/saying now?

Question????

Thanks for attending