5th Circuit Bar Association Appellate Advocacy Seminar—Supreme Court Panel

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Introduction

October Term 2018

Appointment of Justice Brett Kavanaugh to Replace Justice Anthony Kennedy

- Confirmed by Senate (50 to 48)
- Educational Background—Yale
- Professional Background
  - Judge on D.C. Circuit
  - Several prestigious clerkships, including with Kennedy
  - Law professor teaching separation of powers

Justice Kavanaugh's Judicial Philosophy

- Committed to originalism and textualism
- Came to court with his own distinguishing brand of administrative law jurisprudence
- Expected to make most significant contributions in administrative law.

Department of Commerce v. New York

- Secretary of Commerce sought to add a citizenship question to the 2020 census
- A number of state and local governments and interest groups filed suit seeking to stop the inclusion of that question
- District court held that the Secretary's action was arbitrary and capricious and based on a pretextual rationale
- Proceeded straight to the United States Supreme Court due to the need for a definitive ruling as quickly as possible

Department of Commerce v. New York – Roberts + 4 Conservatives

- Not arbitrary and capricious in violation of the Administrative Procedure Act
- Secretary reasonably weighed the potential for better citizenship data against the risk of depressed response rates
- "The Secretary was required to consider the evidence and give reasons for his chosen course of action. He did so. It is not for us to ask whether his decision was 'the best one possible' or even whether it was 'better than the alternatives.'"

Department of Commerce v. New York – Roberts + 4 Liberals

- Government's stated reason for the citizenship question—to gather date to better enforce the Voting Rights Act—was pretextual
- "[W]e have recognized a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers.' On a 'strong showing of bad faith or improper behavior,' such an inquiry may be warranted . . . ."
- "[U]nlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived."

Department of Commerce v. New York – Thomas + Gorsuch and Kavanaugh

- "For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency's otherwise adequate rationale."

- "The Court's holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. And, if taken seriously as a rule of decision, this holding would transform administrative law."

Department of Commerce v. New York – Postscript

- Speculation that Roberts changed his vote
- Government initially explored options for continuing to fight for the citizenship question
- Eventually decided to use administrative records to collect the data instead

Kisor v. Wilkie

- *Auer* deference: Courts defer to agencies' reasonable readings of their own ambiguous regulations.

- Federal Circuit deferred to VA's interpretation of its own rules to uphold the denial of benefits to a veteran.

Kisor v. Wilkie – Kagan + Roberts and 4 Liberals

- Cabins *Auer*, but declines to overrule it
- Regulation must be ambiguous: "[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous."
- Agency's interpretation must be reasonable: "[T]he agency's reading must still be 'reasonable.' In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools."
- The interpretation "must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views."

Kisor v. Wilkie – Kagan + Roberts and 4 Liberals

- "[T]he agency's interpretation must in some way implicate its substantive expertise."
- Must be a "fair and considered judgment" and not a "convenient litigating position" or a change that "creates 'unfair surprise' to regulated parties."

Kisor v. Wilkie – Kagan + Roberts and 4 Liberals

- *Stare decisis*: "[A]ny departure from [*stare decisis*] demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'"

Kisor v. Wilkie – Gorsuch + 3 Conservatives

- Would overrule *Auer*
- *Auer* deference "creates a 'systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else.'"
- "I would stop this business of making up excuses for judges to abdicate their job of interpreting the law, and simply allow the court of appeals to afford Mr. Kisor its best independent judgment of the law's meaning."
- *Stare decisis* cannot save *Auer*. Even the majority only managed by save it only by rendering "the doctrine . . . maimed and enfeebled—in truth, zombified."

Kisor v. Wilkie – Roberts, Alito, and Kavanaugh

- "[T]he distance between the majority and Justice Gorsuch is not as great as it may initially appear."
- "[T]he cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation."
- "Kagan and Gorsuch's approaches will lead to the same results in vast majority of cases."

Weyerhaeuser v. United States

- Agency may designate "critical habitat" for special protections
- Fifth Circuit opinions below
- Supreme Court (9-0): Court, not agency, must address meaning of "habitat," before deciding whether land is critical habitat
- Court may review agency's discretionary designation decisions (continuing theme that Court has rejected administration's argument that certain decisions are unreviewable)

Gundy v. United States

- SORNA (2006): The Attorney General "shall have the authority" to "specify the applicability" of SORNA's registration requirements to pre-Act offenders, and "to prescribe rules for [their] registration"
- Under this delegated authority, the AG issued a rule specifying that SORNA's registration requirements applied in full to pre-Act offenders
- Gundy, a pre-Act offender, was convicted of failure to register

Gundy v. United States

QP: Did SORNA's delegation to the AG of the authority to apply SORNA to pre-Act offenders like Gundy constitute an impermissible delegation of legislative authority to the Executive Branch?

- NONDELEGATION DOCTRINE: Congress may not delegate its Article I legislative authority to other branches of government,

- BUT it may do so, provided that it gives the delegee an INTELLIGIBLE PRINCIPLE to guide the delegee's exercise of authority

Gundy v. United States

HELD 5-3: Gundy's impermissible delegation challenge REJECTED

- PLURALITY OPINION: Congress clearly intended that pre-Act offenders would have to register, and left only the logistics up to the AG; this is easily a permissible delegation
- JUSTICE ALITO: This delegation passes muster under current law, but we should revisit that law at another opportunity
- DISSENT: We should revisit that law now, and under a proper conception of the law, this is an improper delegation

Ongoing Debate About the Bind of *Stare Decisis* On Constitutional Precedent

The *Stare Decisis* Debate

- Conservative members of Court overruling constitutional precedent
- Liberal members dissenting, arguing that *stare decisis* should be respected
- Liberals maintain just b/c a case was wrongfully decided does not mean it should be disturbed just b/c the makeup of the court has changed and they would have decided it differently
- Two Cases illustrate this point—*Franchise Tax Board v. Hyatt & Knick v. Township of Scott*

Franchise Tax Board v. Hyatt (Thomas)

- California resident purchased an apartment in Nevada and claimed Nevada as his primary state of residence for tax purposes
- California Tax Board ("CTB") suspected move was a sham and conducted an audit
- Plaintiff sued CTB in a Nevada court for alleged torts committed during audit and CTB wanted Nevada to dismiss suit. Nevada Supreme Court refused
- **QP:** Whether the Constitution permits a private party to sue a State in a different State without the consent of the State being sued?

Hyatt (cont'd)

- Held historical understanding of the States' sovereignty and the Constitution's structure itself prevent a State from being haled involuntarily into a different state's court
- Overruled 40-year-old precedent, *Nevada v. Hall*, 440 U.S. 410 (1979) (holding that it was up to each State to decide whether to grant its sister States sovereign immunity in private citizen cases)
- Concluded *stare decisis* did not compel adherence to what it deemed was erroneously decided precedent

Hyatt (cont'd)

- *Stare decisis* is not "an inexorable command"
- Four factors supported its decision to overrule *Hall*: (1) the quality of the *Hall* court's reasoning, which failed to account for historical understanding of state sovereign immunity from private suits in its courts and others; (2) the inconsistency of *Hall* with its recent decisions (calling it an outlier); and (3) *Hall* was inconsistent with our constitutional structure, opining that "interstate sovereign immunity is integral to the structure of the Constitution," as it is an implied essential component of federalism

Hyatt Dissent (Breyer, Ginsburg, Sotomayor & Kagan)

- *Stare decisis* required them to follow *Nevada v. Hall* b/c overruling a case requires a "special justification," and the majority had none
- Opined the law had not significantly changed since *Hall* and believing something was wrongfully decided cannot alone justify "scraping settled precedent."
- Pondered what decisions the Court would overrule next

Knick v. Township of Scott (Roberts)

- Plaintiff, who owned 90 acres in Penn., part of which contained a cemetery, claimed Penn. town took part of her land without just compensation by enforcing an ordinance requiring all cemeteries to be open and accessible to the general public during daylight hours.
- **QP:** Whether the court should overrule *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (holding that a property owner cannot bring a 5th Amend takings claim in federal court until a state court had denied claim for just compensation under state law)?
- Majority voted 5-4 to overrule decision

Knick (cont'd)

- Takings clause claim arises at the moment of taking without compensation; thus, property owner may bring a Fifth Amendment claim at the time and does not have to bring a state lawsuit first
- Although it noted *stare decisis* reflects a judgment that "in most matters it is more important that the applicable rule of law be settled than it be settled right," court emphasized this doctrine is at its weakest when interpreting the constitution because only it or a constitutional amendment can alter constitutional holdings.
- Concluded several factors weighed in favor of overruling *Williams County* decision, including: (1) the quality of its reasoning; (2) the workability of the rule it established; (3) its consistency with other related decisions, and reliance on the decision.

Gamble v. United States

- Gamble was convicted of an Alabama state felon-in-possession charge; then he was indicted for a federal felon-in-possession charge based on the same instance of possession
- The lower courts rejected Gamble's claim that double jeopardy barred the federal charge, citing the DUAL-SOVEREIGNTY DOCTRINE
- SCOTUS granted cert. to determine whether the dual-sovereigns doctrine should be overturned

Gamble v. United States

Held 7-2: The Court DECLINED to overrule the dual-sovereignty doctrine

- The term "offence" in the DJ Clause is sovereign-specific
- In a line of cases going back to before the Civil War, the Court has consistently upheld the dual-sovereignty doctrine
- In light of the text of the DJ Clause and this historical pedigree, *stare decisis* would require a "special justification" before overruling the dual-sovereignty doctrine

Gamble v. United States

- Gamble's historical arguments about DJ do not rise to the level of persuasiveness necessary to overcome *stare decisis* and to repudiate the dual-sovereignty doctrine
- JUSTICE THOMAS: I don't agree that *stare decisis* should prevent us from correcting "demonstrably incorrect precedents"; but, here, despite my initial skepticism, I think the dual-sovereignty doctrine is a correct reading of the DJ Clause
- JUSTICES GINSBURG AND GORSUCH dissented

Timbs v. Indiana

- Timbs was convicted in Indiana state court of drug and theft offenses; the State sought a civil *in rem* forfeiture of his $42,000 Land Rover as an alleged instrumentality of the drug crime
- The trial court declined, finding this was unconstitutional under the Excessive Fines Clause of the 8th Amendment, and the intermediate appellate court affirmed, BUT
- The Indiana Supreme Court reversed, holding that the 8th Amendment's Excessive Fines Clause is not incorporated against the states via the 14th Amendment's Due Process Clause

Timbs v. Indiana

The Supreme Court reversed, 9-0:

- The 8th Amendment's Excessive Fines Clause is incorporated against the states pursuant to the 14th Amendment's Due Process Clause
- Under *Austin v. United States* (1994), the Excessive Fines Clause applies to civil *in rem* forfeitures where they are at least partially punitive
- Indiana's argument for only partial incorporation is rejected; once a right is found to be incorporated, it applies in full against the states, in all its applications

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Timbs v. Indiana

- JUSTICE GORSUCH: Joined the majority opinion, but believes that if he could write on a clean slate, it might be better to incorporate rights under the 14th Amendment's Privileges and Immunities Clause rather than under the 14th Amendment's Due Process Clause
- JUSTICE THOMAS: Concurred only in the judgment; he believes that incorporation should be via the Privileges and Immunities Clause, not the Due Process Clause; but, he agrees that the Excessive Fine Clause is applicable to the states under that rubric

United States v. Davis

- *Davis* requires us to look back at *Sessions v. Dimaya* (2018), where the Supreme Court held that the residual clause of 18 U.S.C. § 16(b)'s "crime of violence" definition was unconstitutionally vague:

The term "crime of violence" means —

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

United States v. Davis

- At issue in *Davis* was the "crime of violence" definition in 18 U.S.C. § 924(c) (punishing possession/use/carry of a firearm during a "crime of violence"), which contains a very similar residual clause:

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and —

(A) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

United States v. Davis

- (The constitutionality of § 924(c)(3)(B)'s residual clause was at issue in *Davis* because one of Davis's § 924(c) convictions had as a predicate a robbery conspiracy conviction, which could only count as a "crime of violence" under the residual clause)
- The Fifth Circuit held that the residual clause of § 924(c)(3)(B) was unconstitutional under the reasoning of *Dimaya*
- The government petitioned for cert., arguing that § 924(c)(3)(B) was different, because (1) § 924(c) dealt with current offenses, not historical ones, and (2) the predicates should therefore not be subject to the categorical approach

United States v. Davis

The Supreme Court agreed, 5-4, that § 924(c)(3)(B)'s residual clause was indeed unconstitutional:

- Like the residual clause in § 16(b), § 924(c)(3)(B)'s residual clause likewise requires a categorical analysis, not a fact-specific one
- That being the case, the clause is unconstitutionally vague just like, and for the same reasons as, the one considered in *Dimaya*
- The Court rejected the government's constitutional-avoidance argument
- DISSENT: § 924(c)(3)(B) can be saved by refusing to read it with the categorical approach

American Legion v. American Humanist Association

- QP: Does public maintenance of 32-foot cross on a traffic median that was erected after World War I to honor soldiers killed in that war violate the Establishment Clause?
- Background: *Van Orden v. Perry*: In 2005, Court held 5-4 that Texas Ten Commandments monument did not violate the Establishment Clause
  - Rehnquist, Scalia, Kennedy, and Thomas, with Breyer concurring in the judgment

American Legion v. American Humanist Association – Alito + 6

- Announces a "presumption of constitutionality for longstanding monuments, symbols, and practices" and gives four reasons supporting that rule

- "First, these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult."

- "Second, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply."

American Legion v. American Humanist Association - Alito + 6

- "Third, just as the purpose for maintaining a monument, symbol, or practice may evolve, '[t]he "message" conveyed . . . may change over time.'"
- "Fourth, when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral . . . ."

American Legion v. American Humanist Association - ***Lemon*** **Test**

- *Lemon* Test: A court must ask whether a challenged government action
  - (1) has a secular purpose;
  - (2) has a "principal or primary effect" that "neither advances nor inhibits religion"; and
  - (3) does not foster "an excessive government entanglement with religion."

American Legion v. American Humanist Association - ***Lemon*** Test

- Alito + 4 Conservatives: "If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met."

- *Lemon* no longer applies to monuments, symbols, or practices

- Breyer and Kagan didn't embrace the *Lemon* test either

American Legion v. American Humanist Association - Ginsburg + Sotomayor

- Cross is inherently religious: "The Latin cross is the foremost symbol of the Christian faith . . . . Precisely because the cross symbolizes these sectarian beliefs, it is a common marker for the graves of Christian soldiers."
- Cross maintains religious significance in war memorial context: "[U]sing the cross as a war memorial does not transform it into a secular symbol. Just as a Star of David is not suitable to honor Christians who died serving their country, so a cross is not suitable to honor those of other faiths who died defending their nation."
- "By maintaining the Peace Cross on a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion."

Tennessee Wine & Spirits Retailers Assoc. v. Thomas (Alito)

- Considered whether a Tennessee law requiring those applying for a license to open a liquor store to have resided in state for previous two years was unconstitutional
- By a vote of 7-2, the Court struck down Tennessee's law as an unconstitutional restriction on the Commerce Clause b/c it blatantly favored residents and had little relationship to public health and safety. Furthermore, the law could not be saved by the § 2 of the 21st Amendment that gives states broad power to regulate alcohol.

Tennessee Wine & Spirits (cont'd)

- 21st Amendment only sanctions regulations that are connected to public health and safety and cannot be used to shield residents from out-of-state competition
- **Dissent:** Gorsuch and Thomas believed 2-year residency requirement was permissible under the 21st Amendment b/c it could serve a legitimate state purpose to increase the price of alcohol

Partisan Gerrymandering Cases

Rucho v. Common Cause (Roberts)

- N.C. voters claimed their State's congressional districting maps discriminated against Democrats, and Maryland voters claimed their congressional maps discriminated against Republicans, in violation of 1st and 14th Amendments and Articles 1 & 2 (Elections Clauses).
- **QP:** Whether partisan gerrymandering claims are claims of legal right resolvable according to legal principles (justiciable) or political questions that must be resolved elsewhere?
- In a 5-4 decision, court held partisan gerrymandering claims present political questions beyond the Court's reach.

Rucho (cont'd)

- Partisan gerrymandering cases are distinguishable from other gerrymandering cases where congressional districts were drawn based upon race (inherently suspect) or designed to dilute the vote (one person and one vote) b/c these cases gave rise to a legal right (equal protection)
- Problem with partisan gerrymandering issues—permissible for legislators to take into account their partisan interests when drawing district lines
- Question becomes when does political gerrymandering go too far
- No legal standards discernable from the Constitution for making this judgment

Rucho (cont'd)

- Groups with a certain level of political support should enjoy a commensurate level of political power and influence
- Federal courts not equipped or authorized to apportion political power as a matter of fairness, making issue non-justiciable
- Liberals Dissent—partisan gerrymanders "deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their representatives."
- Majority wrongly refused to remedy these constitutional violations

October Term 2019: Coming Attractions

Ramos v. Louisiana

QP: Does the Due Process Clause of the 14th Amendment fully incorporate the 6th Amendment's guarantee of a unanimous verdict in a criminal case?

- The problem: in 1972, due to an unusual 4-1-4 division of the Justices in *Apodaca v. Oregon* and *Johnson v. Louisiana*, the Court held that unanimous criminal verdicts were required in federal court, but not in state court
- For many years, Louisiana and Oregon were the only states not to require unanimous verdicts in criminal cases; now only Oregon
- *Apodaca* cited in *Timbs* as the sole example of "watered down" incorporation

Kahler v. Kansas

- QP: Do the 8th and 14th Amendments permit a state to abolish the insanity defense?
- Kansas is one of a few jurisdictions that have abolished the traditional insanity defense, and have instead confined mental-state evidence to *mens rea*
- Does the Constitution require states to recognize a moral-culpability defense to criminal liability?

Bostock/Zarda/Harris Funeral Homes

- QP in *Bostock/Zarda*: Does Title VII of the Civil Rights Act of 1964, which prohibits discrimination "because of sex" prohibit firing an employee because of his sexual orientation
- QP in *Harris Funeral Homes*: Same but for transgender status
- EEOC's shifting position
- Scope of *Price Waterhouse v. Hopkins* "sex stereotyping" claim
- We are all textualists now

New York State Rifle & Pistol Ass'n, Inc. v. City of New York

QP: Is the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel?

- POTENTIAL MOOTNESS PROBLEM!

DACA Cases

Trump v. NAACP (oral argument 11-12-2019)

- Appeal from D.C. Circuit challenging DHS's decision to rescind DACA program as unconstitutional and violative of the Administrative Procedure Act ("APA").
- DACA is a program offering renewable two-year grants to defer deportation for undocumented aliens brought to the U.S. as children by 2007.
- Trump administration rescinded DACA as being illegal b/c it imbued a policy to violate immigration laws and encourages smuggling of children across the border.
- **QPs**: Whether (1) the DHS's decision to rescind DACA is judicially reviewable under the APA; and (2) DHS's decision to rescind DACA is unlawful as being arbitrary and capricious and racially motivated?

Trump v. NAACP (cont'd)

- Consolidated with *McAleenan v. Vidal* (DACA appeal from Second Circuit) and *Dep't of Homeland Security v. Regents of the Univ. of Cal*. (DACA appeal from the Ninth Circuit)

Grants from Long Conference

June Medical Services, LLC v. Gee

- **QP:** Whether the U.S. Court of Appeals for the 5th Circuit's decision upholding Louisiana's law requiring physicians performing abortions to have admitting privileges at a local hospital conflicts with the Supreme Court's binding precedent in *Whole Woman's Health v. Hellerstedt*, -- U.S.--, 136 S.Ct. 2202 (2016)?

Gee v. June Medical Services, LLC

- **QPs:** Whether (1) abortion providers can be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients absent a "close" relationship with their patients and a "hinderance" to the patients' ability to sure on their own behalf; and (2) objections to prudential standing are waivable?
- Note there is a Circuit split on second issue: U.S. Court of Appeals for the 4th, 5th, 7th, 9th, 10th and Federal Circuits have opined prudential standing is waivable, whereas the U.S. Courts of Appeals for the D.C., 2nd and 6th Circuits have found it is non-waivable.

Enjoy your lunch in the Fifth Circuit's Great Hall!