

Impact of Federal Decisions on State and Local Government

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Why Have A Discussion About SCOTUS

- As part of the opening session to your annual convention?

General Reasons SCOTUS is **Always** Important to Cities

- While partisan politics slow down the executive and legislative branches the Supreme Court never stops deciding cases
- SCOTUS decides a significant number of cases affecting each term cities
- Supreme Court is often deciding constitutional cases that affect cities
 - SCOTUS has the final say on constitutional matters unless the constitution is amended (unlikely!)
- SCOTUS takes a lot of Sixth Circuit cases

General Reasons SCOTUS is Important **Right Now**

- Supreme Court has **recently** decided big issues of the day
 - Is the Affordable Care Act unconstitutional?
 - Is banning same-sex marriage unconstitutional?
- **This term** Supreme Court will decide more big issues of the day
 - Can partisan gerrymandering be unconstitutional?
 - Is the travel ban unconstitutional or unlawful?
- **Near future** Supreme Court will likely decide more big issues of the day
 - Will the Court overturn *Quill*?

Supreme Court at a Crossroads

- 5-4 Court with Justice Kennedy in the middle
- New Justice
- Many older Justices (including Justice Kennedy)
- Unpredictable, unconventional president
- Greater ability for partisan confirmations going forward

Our Current Court

Conservative

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

Liberal

- Ginsburg
- Breyer
- Sotomayor
- Kagan

Really Only a 5-4 Court in the Big Cases

- About 45% of decisions are unanimous
- About 20% of decisions are 5-4
- Most “blockbuster” cases are 5-4

Kennedy Court

- Justice Kennedy is almost always in the majority
 - Of the seven 5-4/5-3 cases last term Justice Kennedy was in the majority in 6
- Justice Kennedy is generally considered a **moderate conservative** who is more **liberal** on **social issues** (same sex marriage, death penalty)
- More liberal over time?
 - 2015: voted against a restriction on abortion, in favor of an affirmative action plan
- Complicated, powerful, never-say-never

Justice Gorsuch is a Coup

- President Trump's biggest accomplishment to date: Justice Gorsuch
- Impeccable credentials, young, already proving to be a reliable conservative
- Not a reflection of any of Trump's idiosyncrasies
 - Any Republican president might have picked him

We Should Have Known More about Him Before April

- Authored over 800 hundred opinions; participated in approximately 2,750 decisions
- No rulings on the some of the most prominent issues: gun control and abortion
- Most well known for his ruling regarding the birth control mandate, frozen trucker, and burping student

Amazing what we Learned in Just One Day

- Only participated in 13 cases, only one of which was controversial
- Weighed into guns, same-sex marriage, and the travel ban on the last day of the term June 26

What We Know about Him Now

- Moderate conservatives
 - Roberts, Kennedy
- Conservative conservatives
 - Scalia, Alito, Thomas
- Gorsuch has quickly aligned himself with the most conservative Justices—Thomas and Alito rather than Roberts and Kennedy
- Described as a conservative activist

Travel Ban, Guns, Same-sex Marriage

- Travel ban
 - Would have allowed the travel ban to go into effect completely before the Court could rule on the merits
- Same-sex marriage
 - Nothing in *Obergefell* indicates that a birth registration regime based on biology is unconstitutional
- Guns
 - Court should have reviewed California conceal carry law

Other Things to Think about

- Might be more conservative than Scalia
 - Fourth Amendment, Confrontation Clause
- How much does he value pragmatism?
- How does he feel about precedent?
- Does he want to build consensus with colleagues?
 - Roberts and Kagan have never dissented alone
 - Written more non-mandatory opinions in two months than Kagan did in 2 years
 - Roberts speech on not liking too many opinion
- Views on *Chevron* deference will be very important in the future

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 (83)
 - Justice Breyer (78)
 - Justice Kennedy (80)

Go Back in Time One Year

- Here were the predictions...
 - Hillary was going to win
 - She would fill Scalia's seat with Judge Garland or someone younger and more liberal
 - She might replace Ginsburg, Kennedy, and Breyer
 - In 8 years we might have a young, liberal 7-2 Court

Lot of Talk of Justice Kennedy Retiring

- If Trump replaces Kennedy, Chief Justice Roberts will be the swing Justice **and** the Chief Justice
- Nina Totenberg reports he hasn't hired clerks for October 2018 and is telling applicants he is considering retirement
- Democrats need Justice Kennedy to hang on until 2020 because Democrats are unlikely to take control of the Senate in 2018

Conservative and Moderate Justices are **Generally Good for Cities**

Good

- Qualified immunity
- Employment
- Closing the courthouse door
- Federalism and preemption*

Bad

- Land use
- Free speech*

Four Cases Illustrate Five Points about SCOTUS

- Power of Justice Kennedy/power of *amicus* briefs
- Philosophy and savvy of Justice Roberts
- Impact of SCOTUS on all cities in a smaller case
- Hopeful impact of SCOTUS on all cities in a big case

What Does the SLLC Do?

- Files *amicus* briefs in the U.S. Supreme Court in cases affecting state and local government
- On behalf of nine organizations representing elected and appointed state and local government officials including the **National League of Cities** and the United States Conference of Mayors
- The **Michigan Municipal League** contributes annually to support the SLLC
- *Amicus* briefs make policy arguments in favor of particular outcomes and explain the practical implications of cases on behalf of filing groups
- SLLC *amicus* brief explain the views and impact of a case on all of state and local government

Murr v. Wisconsin

- Imagine this scenario
 - Someone purchases two very small plots of land right next to each other
 - The city realizes all these small lots will cause congestion, clogged sewer, etc. and adopts a minimize lot size requirement
 - All previously purchased small lots are grandfathered in EXCEPT for land owners who have adjacent lots
 - For zoning purposes these lots are combined
 - The purchaser of two very small plots of land right next to each other wants to sell them separately
 - City says no pointing to its “merger” ordinance

Murr v. Wisconsin

- Has an unconstitutional taking occurred?
- Supreme Court rules generally no
- SLLC filed an *amicus* brief arguing these ordinances are common, a good idea, and don't cause takings

Murr v. Wisconsin

- First takings win for local governments since 2010
- 5-3 decision
- Justice Kennedy writes for the majority
- Justice Kennedy cited the SLLC brief twice in his opinion:
 - “The merger provision here is . . . a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago.”
 - Again citing the SLLC’s brief, the Court further noted that focusing only on lot lines would “frustrate municipalities’ ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today.”

Supreme Court's Dilemma

- Wants to lie low
 - “A switch in time saves nine”
 - Not elected, only 9 people, appointed for life, somewhat homogenous, not “average,” never young
- Has carved out an ambitious role for itself
 - Rules on whether laws are constitutional
 - Decides circuit splits
 - Decides important questions of federal law

Chief Justice Philosophy

- Narrow, incremental rulings
- Just call “balls and strikes”
- Prefers unanimous court with fewer opinions

Chief Justice Philosophy

- How successful is he?
 - Only one Justice
 - Personally tries to make the Court appear more non-partisan
 - Conservative in the big cases; moderate overall
 - Famously voted the ACA individual mandate violates the Commerce Clause but is constitutional as a tax
 - Last term he wrote two majority opinions in two “small” race discrimination cases
 - No one can control Justice Thomas

Travel Ban

- Two lower courts prevented parts of the revised travel ban from going effect
- Supreme Court let some but not all of the travel ban go into effect until it rules on the merits
 - The Supreme Court concluded that until it rules on the merits of this case the executive order cannot be enforced against persons, including refugees (even if they exceed the 50,000 cap), who have a “bona fide relationship with a person or entity in the United States” “close family,” students, and workers offered employment
- Unauthored opinion (Alito, Gorsuch, and Thomas dissented)
- Big cities (lead by Chicago) were very involved as *amici* in the lower court cases

What Does the Travel Ban Decision Say About the Court?

- Justice Roberts vision
 - Both sides got something (no one asked for the relief sought)
 - Trump got what he called a big victory (in name more than anything else)
 - Court spoke with (mostly) one voice
 - Limited narrow ruling which banks on mootness
 - Decision doesn't look political Roberts and Kennedy (we assume) joined with the liberals

Reed v. Town of Gilbert, Arizona

- Who has heard of this case?
- Whose city had updated its sign code in the last two years?
- Whose city has recently updated its panhandling ordinance?
- Who participated in the SLLC *Reed* webinar on August 31?

Reed v. Town of Gilbert, Arizona

- Adam Liptak of the New York Times: I don't think the Supreme Court really meant what it said in *Reed v. Town of Gilbert, Arizona*
- My words not his

Reed v. Town of Gilbert, Arizona

- Was decided in 2015
- Wasn't a blockbuster case
- Important to cities
 - Changed the law regarding sign codes
 - Most sign codes didn't comply with the First Amendment before *Reed*
 - Left a lot of open questions
- Important generally
 - Changed/clarified First Amendment jurisprudence generally

Reed v. Town of Gilbert, Arizona

- Without getting into all the details:
 - Practically speaking, content-based distinctions in sign codes and generally are unconstitutional
 - “Content-based” (previously defined narrowly) was defined very broadly

Reed v. Town of Gilbert, Arizona

- Biggest impact outside sign context is **panhandling ordinances**
- Historically it has been easier to regulation commercial speech (including bill boards)
- Million dollar questions
 - Will the lower courts and the Supreme Court apply *Reed* to commercial speech making it harder to regulate?
 - Federal court in Michigan in June just said NO!
 - Did the Supreme Court mean what it said in *Reed*?

Quill v. North Dakota

- It is possible the Supreme Court will overturn *Quill* allowing states and local governments to force out of state retailers to collect sales tax by June 2018
- Really?
- How?
- Why?

Quill v. North Dakota

- In 1992 SCOTUS ruled that states can't force out of state retailers to collect sales tax
- Wasn't such a big deal in 1992—is a \$23 billion dollar a year deal today
- Few fun facts:
 - Decision was begrudging—based on a 1967 precedent from *Bellas Hess*
 - Court was quick to remind Congress it can overturn *Quill*
 - Kennedy and Thomas are still the Court

Fast Forward to 2015

- Colorado has passed a law where online retailers have to inform taxpayers and the department of revenue of online purchases—prompting people to pay sales tax on their own
- Question before the Supreme Court was which court should decide whether this scheme violates *Quill*—a state or a federal court
- Who cares right?

SLLC Filed an *Amicus* brief

- One sentence saying the case should be heard in state court
- Rest of the brief talked about how terrible *Quill* is and how it needs to be overturned

Justice Kennedy Says...

- Court rules 8-0 that this case should be heard in federal court
- Justice Kennedy writes a concurring opinion:
 - We were wrong in *Quill*
 - I was wrong in *Quill*
 - Times have changed
 - Legal system bring us a case to overturn *Quill*

Three Problems

- No one joins the Kennedy concurrence
 - Disagree?
 - Case didn't raise the issue of overturning *Quill*?
- Kennedy isn't a young man
- State legislatures must pass a law that violates *Quill*

The Plot Thickens

- Colorado's notice and reporting case goes back to the 10th Circuit which rules the law doesn't violate *Quill*
- Judge Gorsuch writes a concurring opinion strongly suggesting he thinks *Quill* should be overturned

States Respond

- About 10 states have passed laws requiring out-of-state retailers to collect sales tax and/or notice and reporting laws
- South Dakota was first
- South Dakota state trial court declared the law unconstitutional in March 2017
- South Dakota Supreme Court heard oral argument on August 29, 2017
- If the SD Supreme Court rules SOON SCOTUS can review this case by June 2018

The Court Holds All the Cards

- If doesn't so much have to agree to hear the case much less overturn *Quill*