



The Supreme Court of the United States (SCOTUS) – Week 4

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Fall 2021, Jefferson County Library*

Mark's Question from Last Week

- ▶ **Question from *Americans for Prosperity v. Bonta*** – If CA could get the info about donors from the IRS, why was this even a case?
 - ▶ IRS requires submission of Form 990 from tax-exempt organizations, giving information about their mission, leadership, and finances to maintain tax-free status. The IRS further requires a Schedule B listing the names, addresses, and donations of any donors above \$5K.
 - ▶ Since 2001, CA also requires tax-exempt organizations who solicit funds in CA to renew their tax-exempt status AND to submit a copy of their IRS Form 990, including Schedule B.
 - ▶ The plaintiffs had annually submitted copies to CA of Schedule Bs that were incomplete or redacted.
 - ▶ In 2010, CA increased its enforcement of disclosure obligations, and AG Bonta threatened the petitioners with suspension of their tax-free status and fines for non-compliance; thus, the suit.



SCOTUS OT 21 Overview

**Annual Conference
by the National Constitution Center
& Anti-Defamation League**

**Speaker: Melissa Murray
Stokes Professor of Law, NY University
July, 2021**

See <https://www.youtube.com/watch?v=Efo2sQYyKMA>, 1:06:30→1:10:00



Constitutional Law

5th Amendment Equal Protection

U. S. v. Vaello-Madero

- ▶ **Question** – Did Congress violate the 5th Amendment by establishing the Supplemental Security Income (SSI) program in the 50 states, the District of Columbia, and the Northern Mariana Islands, but not those living in Puerto Rico and other territories?
- ▶ **Facts of the Case**
 - ▶ Jose Luis Vaello-Madero was born in Puerto Rico in 1954 and moved to New York in 1985. In 2012, he began receiving SSI payment for severe health problems, and in 2013, he moved back to Puerto Rico to help care for his wife.
 - ▶ In 2016, the Social Security Administration (SSA) informed him that, because he was now a resident of Puerto Rico, it was terminating his benefits and seeking to recover \$28K he had received 2013→16.



U. S. v. Vaello-Madero(cont.)

- ▶ **Lower Court Rulings** - Both the District Court in Puerto Rico and the 1st Circuit (which includes Puerto Rico) ruled for Vaello-Madero, and the U.S. Government appealed to SCOTUS.
- ▶ **Solicitor General's Arguments:**
 - ▶ Two previous SCOTUS decisions establish that Puerto Rico's unique tax status provide a rational basis for excluding its residents from federal benefit programs.
 - ▶ Congress could rationally conclude that a jurisdiction that makes a reduced contribution to the federal treasury should receive a reduced share of benefits funded by the treasury, particularly in light of the tremendous cost of including Puerto Rico in the SSI program.
 - ▶ It is rational to distinguish between Puerto Rico and the Northern Mariana Islands because the latter receives benefits through a negotiated covenant (treaty).

U. S. v. Vaello-Madero (cont.)

► 1st Circuit Opinion:

- The exemption of Puerto Rican residents from most federal income taxes does not afford a rational basis for the SSI exclusion, because the populations that receive SSI do not generally pay federal income tax.
- Cost alone can never provide a justification for differential treatment.
- Extending SSI to the Northern Mariana Islands further undercuts the rationality of excluding Puerto Rico, since their residents also generally do not pay federal income taxes.
- **American Bar Association, the ACLU, and governments of the District of Columbia, Guam, and 16 other states & territories** have filed Amicus Briefs in support of Vaello-Madero & Puerto Ricans.
- **Oral arguments are set for Nov. 9, 2021**



Criminal Law – Capital Punishment

U. S. v. Tsarnaev (AKA Boston Bomber)

- ▶ **Question** – Did the 1st Circuit err in vacating the death sentence for the district court's failure:
 - ▶ to ask prospective jurors for a specific accounting of the pretrial media coverage they had reviewed, AND
 - ▶ by excluding evidence at the sentencing phase that Tsarnaev's older brother had been involved in a triple murder two years earlier, evidence deemed "*highly probative of Tamerlan's ability to influence*" his younger brother?

U. S. v. Tsarnaev (cont.)

► Facts of the Case

- In 2013, Dzhokhar Tsarnaev and his older brother Tamerlan detonated two homemade pressure cooker bombs near the finish line of the Boston Marathon, killing three and injuring hundreds.
- Three days later, they shot a police officer and stole an SUV.
- During the subsequent police pursuit, Dzhokhar ran over and killed his older brother.
- Dzhokhar was eventually discovered hiding in a boat nearby and surrendered.

U. S. v. Tsarnaev (cont.)

► Politics of the Case

- In October, 2020, **Trump's Justice Department** sought a SCOTUS review of the 1st Circuit ruling.
- During his presidential campaign, **President Biden** promised to pass legislation to end the federal death penalty
- Thus, on July 1, 2021, **AG Merrick Garland** placed a moratorium on federal executions to allow the Department of Justice to review the policies and procedures surrounding such executions.
- However, the **Biden Administration through the Solicitor General**, continue to argue for the death penalty in this case, as “*one of the most important terrorism prosecutions in our nation's history.*”
- **Oral Arguments occurred Oct 13, 2021** – SCOTUSBlog observers noted that the Justices paid most attention to the second issue (penalty phase) and predicted a majority to reinstate the death penalty.



Federal Practice – State Secrets *U. S. v. Zubaydah*

Question – Did the 9st Circuit err in rejecting the federal government's assertion of the state-secrets privilege based on its own assessment of the potential harms to national security that would result from disclosure of information pertaining to clandestine CIA activities?

U. S. v. Zubaydah (cont.)

Facts of the Case

- ▶ Zubaydah, a Palestinian, was captured by U.S. forces in Pakistan in 2002 and thought to be a top leader in al-Qaeda.
- ▶ He was subsequently transferred to a CIA “dark site” in Poland, where he was repeatedly waterboarded and subjected to other abusive interrogation tactics for several months.
- ▶ In 2006, the CIA formally concluded it was all a mistake; Zubaydah “*was not a member of al-Qaeda,*” yet he remains imprisoned at Guantanamo.
- ▶ In 2014, the Senate Intelligence Committee released a lengthy classified report detailing the CIA’s use of torture, the unclassified executive summary of which mentions Zubaydah’s name 1,343 times.

U. S. v. Zubaydah (cont.)

International Politics of the Case

- ▶ In 2015, the European Court of Human Rights determined that Zubaydah was held at such a site in Poland.
- ▶ Zubaydah's lawyers and several human rights groups joined forces and ultimately persuaded the Polish government to investigate whether any Polish officials contributed to this abuse.
- ▶ Zubaydah's lawyers asked a U.S. court to compel the testimony of two psychologists who helped develop and oversee the torture techniques and were paid \$81 million by the CIA.
- ▶ The U.S. government argued against such testimony in the interest of national security, but the 9th Circuit found that, *"in order to be a 'state secret,' a fact must first be a 'secret.'"*
- ▶ Thus, the U.S. government appealed for relief from SCOTUS.

U. S. v. Zubaydah (cont.)

Oral Arguments occurred Oct 6, 2021

- ▶ The government argued:
 - ▶ *that “covert intelligence partnerships depend on our partners’ trust that we will keep these relationships confidential,” and*
 - ▶ *that the information sought here “would compel a breach of that trust by confirming or denying the existence of an alleged CIA facility in Poland” in aid of a foreign investigation “whose very purpose is to reveal and prosecute the alleged involvement of Polish officials in covert CIA activities.”*
- ▶ SCOTUSBlog observers thought the government’s arguments seemed to be convincing the Justices until Gorsuch asked why the government couldn’t simply allow Zubaydah to testify “as to his treatment during those dates.”

U. S. v. Zubaydah (cont.)

Oral Arguments (cont.)

- ▶ Acting SG Brian Fletcher responded that Zubaydah's lawyers hadn't made that request, so the government hadn't considered it
- ▶ With apparent frustration, Gorsuch sharply replied, *"This case has been litigated for years and all the way up to the U.S. Supreme Court, and you haven't considered whether that's an off-ramp that the government could provide that would obviate the need for any of this?"*
- ▶ Sotomayor joined the fray, asking Fletcher, *"Are you going to permit him to testify as to what happened to him those dates without invoking a state secret or other privilege? Yes or no? That's all we're looking for."*
- ▶ Eleven days later, Fletcher submitted a 3-page letter to the court that, despite its previous denial, the government would now allow Zubaydah to submit a declaration of his treatment while in CIA custody, though it will be subject to a security review to redact any *"information that could prejudice the security interests of the U.S."*

Abortion

Roe v. Wade: a 7-2 decision in 1973 written by J. Harry Blackmun

- ▶ The Due Process Clause of the Fourteenth Amendment protects, against state action, the right to privacy, and a woman's right to choose to have an abortion falls within that right to privacy. **A state law that broadly prohibits abortion without respect to the stage of pregnancy or other interests violates that right.** Although the state has legitimate interests in protecting the health of pregnant women and the "potentiality of human life," the relative weight of each of these interests varies over the course of pregnancy, and the law must account for this variability.
- ▶ In the first trimester of pregnancy, the state may not regulate the abortion decision; only the pregnant woman and her attending physician can make that decision. In the second trimester, the state may impose regulations on abortion that are reasonably related to maternal health. In the third trimester, once the fetus reaches the point of "viability," a state may regulate abortions or prohibit them entirely, so long as the laws contain exceptions for cases when abortion is **necessary to save the life or health of the mother.**
- ▶ The Court classified the right to choose to have an abortion as "fundamental", which required courts to evaluate challenged abortion laws under the "strict scrutiny" standard, the highest level of judicial review in the United States.

Abortion (continued)

Planned Parenthood of Southeastern Pennsylvania v. Casey: a 5-4 1992 decision written by J. Sandra Day O'Connor

- Question presented: Can a state require women who want an abortion to obtain informed consent, wait 24 hours, if married, notify their husbands, and, if minors, obtain parental consent, without violating their right to abortion as guaranteed by *Roe v. Wade*?
- In a bitter 5-to-4 decision, the Court reaffirmed *Roe*, but upheld most of the Pennsylvania provisions. For the first time, the justices imposed a new standard to determine the validity of laws restricting abortions. The new standard asks ***whether a state abortion regulation has the purpose or effect of imposing an "undue burden," which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."*** Under this standard, the only provision to fail the undue-burden test was the husband notification requirement. In a rare step, the opinion for the Court was crafted and authored by three justices: O'Connor, Kennedy, and Souter.
- *Casey* ended the trimester regime in favor of a viability standard. There is a patchwork of state regulation.

Abortion: Current State Restrictions

38 states require a licensed physician. 19 require a hospital after a specified point in the pregnancy; 17 states require the involvement of a second physician after a specified point.

43 states prohibit abortions after a specified point in pregnancy, with some exceptions provided. The allowable circumstances are generally when an abortion is necessary to protect the patient's life or health.

21 states prohibit “partial-birth” abortion. 3 of these apply only to post-viability abortions.

16 states use their own funds to pay for all or most medically necessary abortions for Medicaid enrollees in the state. 33 states and the District of Columbia prohibit the use of state funds except in those cases when federal funds are available: where the patient's life is in danger or the pregnancy is the result of rape or incest. In defiance of federal requirements, South Dakota limits funding to cases of life endangerment only.

12 states restrict coverage of abortion in private insurance plans, most often limiting coverage only to when the patient's life would be endangered if the pregnancy were carried to term. Most states allow the purchase of additional abortion coverage at an additional cost.

45 states allow individual health care providers to refuse to participate in an abortion. 42 states allow institutions to refuse to perform abortions, 16 of which limit refusal to private or religious institutions.

18 states mandate that individuals be given counseling before an abortion.

25 states require a waiting period, usually 24 hours, between counseling and the procedure.

37 states require some type of parental involvement in a minor's decision to have an abortion. 27 states require one or both parents to consent to the procedure, while 10 require that one or both parents be notified

Source: <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>



Abortion: Current Challenges to Roe et al.

The Texas Law and the Shadow Docket

- S.B. 8 is the Texas law that bans abortion after about six weeks of pregnancy. The law outsources enforcement to literally any private citizen by authorizing lawsuits against abortion doctors and anyone else who aids or abets the doctors.
- This strategy was designed to frustrate pre-enforcement challenges and put abortion providers out of business. In the past, when Texas required clinics to comply with the rules governing ambulatory surgical centers and mandated that doctors have admitting privileges at a nearby hospital, many closed, never to reopen, even after the Supreme Court ultimately held those laws unconstitutional. Allowing S.B. 8 to go into effect, its supporters hoped, would have the same effect.
- We are all aware by this time of the 5-4 shadow docket decision denying a preliminary injunction to prevent the law from going into effect.

Abortion: Current Challenges to Roe et al.

The Texas Law and the Shadow Docket

- ▶ A couple of weeks ago, the court took up two challenges:
 - ▶ One, brought by abortion providers, asks the justices to weigh in on “whether a state can insulate from federal-court review a law that prohibits the exercise of a constitutional right” by delegating enforcement to private citizens.
 - ▶ The court also granted a separate petition from the US Justice Dept. The United States, which until now had never brought a challenge to a state abortion restriction, argued that S.B. 8 interferes with its sovereign interest in ensuring that states recognize federal constitutional rights. DOJ also argued that the law raises **preemption concerns** by threatening the work of federal agencies, employees, and contractors who might offer abortion services.
 - ▶ It is not clear whether this hearing will take up the underlying issue or only deal with the procedural issues, but **some commentators say it is most likely that the court will resolve only procedural questions about S.B. 8 and will do so quickly** — perhaps before the court even hears oral argument on the constitutionality of **Mississippi’s** 15-week abortion ban in early December.

See <https://www.scotusblog.com/2021/10/supreme-speed-the-court-puts-abortion-on-the-rocket-docket/>

Abortion: Current Challenges to *Roe et al.*

The Mississippi Challenge: *Dobb's v. Jackson Women's Health Org.*

- In March 2018, the state of Mississippi passed the Gestational Age Act, which banned any abortion operation after the first 15 weeks of pregnancy, with exceptions for medical emergencies or severe fetal abnormality, but did not include any exceptions for cases of rape or incest.
- The law was enjoined from being enforced by the Dist. Ct. and the Fifth Circuit as clearly unconstitutional and now comes to the Supreme Court for argument in December.
- The Court granted *certiorari* to the petition on May 17, 2021, limiting the case to the single question -- "**Whether all pre-viability prohibitions on elective abortions are unconstitutional.**" The case is expected to be heard on December 1. A direct challenge to *Roe* and *Casey*.

Cameron v. EMW Women's Surgical Center

- A case in which the Court will decide whether a state attorney general, vested with the power to defend state law, should be permitted to intervene after a federal court of appeals invalidates a state statute and when no other state actor will defend the law.

Abortion: Current Challenges to Roe et al.

- ▶ How much does the language of the constitution matter to the justices, and how much simply depends on how they feel about abortion? Language from Roe:

'The Constitution does not explicitly mention any right of privacy ... the Court has recognized that a right of personal privacy ... does exist under the Constitution. ... the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, ...; in the Fourth and Fifth Amendments, ...; in the penumbras of the Bill of Rights, Griswold v. Connecticut ...; in the Ninth Amendment, ...; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, ...

[O]nly personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," ... are included in this guarantee of personal privacy ... [T]he right has some extension to activities relating to marriage, Loving v. Virginia, ...; procreation, Skinner v. Oklahoma, ...; contraception, Eisenstadt v. Baird.' ... This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'

The 'Historical' argument for an incomplete overrule of Roe: 'quickening' and the treatment of abortion when the 14th amendment was adopted.

GUNS: *New York State Rifle & Pistol Assn. v. Bruen*

Case involves the right to carry a firearm in public.

- ▶ New York requires a person to show a special need for self-protection to receive an unrestricted license to carry a **concealed** firearm outside the home. Nash and Koch challenged the law after New York rejected their concealed-carry applications based on failure to show “proper cause.”
- ▶ The question is whether New York's law (in effect since 1911), requiring that applicants for unrestricted concealed-carry licenses demonstrate **a special need for self-defense**, violates the Second Amendment. The state has clarified that this must be **a non-speculative need for self-defense** as to establish a proper cause to grant a permit.
- ▶ This is the first major gun-rights case in more than a decade and the first to be heard by the six-member conservative majority. Thomas, Gorsuch and Kavanaugh have stated the need in prior opinions for the Supreme Court to review the current stance on 2nd Amendment cases. Barrett had also expressed support for a 2nd Amendment review prior to her appointment. Some analysts believe the Court may interpret the 2nd Amendment more liberally in favor of personal rights over states' powers, which could render many existing public-possession regulations unconstitutional. However, the limited question that the Court certified may restrict the issue to concealed-carry licenses and not the matter of any and all public possession.
- ▶ Methodology: Historical approach vs. ‘strict scrutiny’ of restrictions. What ‘rule’ would the court establish?

RELIGION: *Carson v. Makin*

TAXPAYER FUNDING OF RELIGIOUS SCHOOLS: *Carson v. Makin* is the court's latest case over discrimination based on religion. Parents in Maine are suing over the state's exclusion of religious schools from a tuition program for families who live in towns that don't have public schools.

- ▶ The State of Maine relies on local school administrative units (SAUs) to ensure that every school-age child in the state has access to a free education. Not every SAU operates its own public secondary school. An SAU without its own public secondary school may either: (1) contract with a secondary school, or (2) pay the tuition of a secondary school at which a particular student is accepted. In either circumstance, the secondary school must be **either a public school or an "approved" private school.**
- ▶ To be an "approved" school, a private school **must be "nonsectarian in accordance with the First Amendment."**
- ▶ The families live in SAUs that provide tuition assistance to parents who send their children to an "approved" private school. The three families opted to send their children to private schools that are accredited but are religiously affiliated, but because the schools are not "approved," they do not qualify for tuition assistance. The families filed a lawsuit in federal court but lost at the D. Ct. and the 1st Circuit.
- ▶ Prediction: The court will rule that you can't treat religious schools differently than other private schools (opportunity to participate), but the state can set educational standards that must be met by all.

Clash of Sovereigns: *Mississippi v. Tennessee*

A case of original jurisdiction

- ▶ Does Mississippi have sole sovereign authority over and control of groundwater naturally stored within its borders?
- ▶ Is Mississippi entitled to damages, injunctive, and other equitable relief for the groundwater taken by Tennessee?

Oral argument was held October 4.

Interesting because it is an interstate dispute over control over an aquifer that can (and allegedly was) be affected by a neighboring state's actions. It makes me wonder whether the entire southwest will show up one day to fight over the Colorado river.