2018-2019 Supreme Court Preview: Contents

Institute of Bill of Rights Law at The College of William & Mary School of Law

Repository Citation
https://scholarship.law.wm.edu/preview/285

Copyright c 2018 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
https://scholarship.law.wm.edu/preview
2018-2019 Supreme Court Preview

The Institute of Bill of Rights Law

THE INSTITUTE OF BILL OF RIGHTS LAW was established at William & Mary in 1982 to support research and education on the Constitution and the Bill of Rights. One of the principal missions of the Institute is to facilitate interaction between the professions of law and journalism. Through a discussion of key cases on the Supreme Court’s docket at the start of each term, the annual SUPREME COURT PREVIEW provides in-depth education for journalists on the underlying issues to enhance press coverage of the decisions.

NEAL DEVINS
Sandra Day O’Connor Professor of Law
Director of the Institute of Bill of Rights Law

REBECCA GREEN
Professor of Practice

Student Editors
VICTORIA VACCARO, Chief Student Editor
SHAWN SYED, Assistant Student Editor

Additional Edits
ASHLEA EDWARDS
Conference & Event Coordinator

THE COLLEGE OF WILLIAM & MARY
LAW SCHOOL
WILLIAMSBURG, VIRGINIA 23187-8795
(757) 221-3810 • FAX (757) 221-3775
IBRL@wm.edu • http://www.IBRL.org
Introduction

In This Section:

Schedule of Events ........................................ xi
Panel Members .............................................. xv

I. Moot Court: Nieves

Nieves v. Bartlett .................................................. 20

“SUPREME COURT TRYING AGAIN ON THE FIRST AMENDMENT RETALIATORY ARREST QUESTION: THE QUESTION THAT THE COURT DIDN’T RESOLVE IN LOZMAN V. RIVIERA-BEACH IS BACK, IN ANOTHER CASE ON WHICH THE SUPREME COURT JUST GRANTED”
Eugene Volokh ........................................................................................................ 23

“SUPREME COURT ALLOWS RETALIATORY ARREST LAWSUIT TO MOVE FORWARD”
Robert Barnes ........................................................................................................ 25

“SOUTH FLORIDA ACTIVIST IS 2-0 AT THE SUPREME COURT AFTER FIRST AMENDMENT VICTORY”
Alex Daugherty ........................................................................................................ 27

“LOZMAN V. CITY OF RIVIERA BEACH AND FIRST AMENDMENT RETALIATORY ARREST DAMAGES CLAIMS: THE COURT AGAIN SIDESTEPS THE PROBABLE CAUSE ISSUE”
Sheldon Nahmod ...................................................................................................... 30

“FAKE LOZMAN GOES TO THE SUPREME COURT, AGAIN”
Jeffrey Toobin ......................................................................................................... 34

“ARGUMENT PREVIEW: JUSTICES TO CONSIDER WHETHER PROBABLE CAUSE DEFEATS CLAIMS OF RETALIATORY ARREST FOR FIRST-AMENDMENT-PROTECTED EXPRESSION”
Heidi Kitrosser ......................................................................................................... 36
II. Trump and the Court

IN THIS SECTION:

“BRETT KAVANAUGH, A WASHINGTON VETERAN, IS TRUMP’S SECOND PICK FOR THE SUPREME COURT”
David Savage ........................................................................................................................................ 45

“TRUMP PICKS BRET KAVANAUGH FOR SUPREME COURT”
Eric Bradner, Joan Biskupic, and Jeremy Diamond ........................................................................ 50

“WHITE HOUSE COUNTS ON KAVANAUGH IN BATTLE AGAINST ‘ADMINISTRATIVE STATE’”
Robert Barnes and Steven Mufson .................................................................................................. 54

SEEKING A SUCCESSOR TO JUSTICE KENNEDY’S COMPLEX LEGACY”
Douglas W. Kmiec .......................................................................................................................... 59

“INFLUENCE IF NOT IN TITLE, THIS HAS BEEN THE KENNEDY COURT”
Adam Liptak ........................................................................................................................................ 62

“A LIBERAL’S CASE FOR BRET KAVANAUGH”
Akhil Reed Amar ............................................................................................................................... 65

“TRUMP PICKED KAVANAUGH. HOW WILL HE CHANGE THE SUPREME COURT?”
Politico Magazine .............................................................................................................................. 67

“BRETT KAVANAUGH IS DEVOTED TO THE PRESIDENCY”
Garrett Epps ......................................................................................................................................... 77

“CHIEF JUSTICE ROBERTS MOVES TO MAN IN THE MIDDLE ON THE SUPREME COURT”
Brett Kendall ......................................................................................................................................... 80

“CHIEF JUSTICE JOHN ROBERTS IS NOW THE SUPREME COURT’S SWING VOTE”
Christopher Ingraham ........................................................................................................................ 83
“CHIEF JUSTICE ROBERTS WILL BE THE ‘SWING’ VOTE”
Jonathan Nash ................................................................. 85

“WITH KENNEDY GONE, ROBERTS WILL BE THE SUPREME COURT’S SWING VOTE”
Julie Hirschfeld Davis ........................................................... 87

III. Property Rights

IN THIS SECTION:

NEW CASE: Timbs v. Indiana ........................................... 93
“Supreme Court Will Decide If Civil Forfeiture is Unconstitutional, Violates The Eighth Amendment”
Nick Sibilla ......................................................................... 99

“HE SOLD DRUGS FOR $225. INDIANA TOOK HIS $42,000 LAND ROVER”
Adam Liptak ........................................................................ 103

“KEEPING COPS’ HANDS OUT OF YOUR POCKETS”
Brian Saady ......................................................................... 106

“SUPREME COURT AFFIRMS LAND ROVER FORFEITURE IN DRUG CASE”
Olivia Covington ................................................................. 109

NEW CASE: Knick v. Township of Scott, Pennsylvania .................. 111

“U.S. SUPREME COURT TO REVIEW NEW TAKING CASE—WILL IT BECOME EASIER TO FILE TAKINGS CLAIMS IN FEDERAL COURTS?”
Brian J. Connolly ................................................................. 125

“HIGH COURT MAY CLARIFY DECADES-OLD PROCEDURAL TAKINGS ISSUE”
Andrew McIntyre ................................................................. 128

“SUPREME COURT WILL HEAR IMPORTANT PROPERTY RIGHTS CASE: THIS COULD RESULT IN A RULING OVERTURNING A TERRIBLE 1985 DECISION THAT MAKES IT VERY DIFFICULT TO BRING TAKINGS CASES IN FEDERAL COURT”
Ilya Somin ........................................................................ 131
“WOMAN ASKS U.S. SUPREME COURT TO HEAR SCOTT TWP. CEMETERY DISPUTE”
Terrie Morgan-Besecker ............................................................................................................. 134

“WOMAN TOLD HER 90 ACRES NOW PUBLIC AFTER ANONYMOUS CLAIM OF GRAVE”
Bob Unruh .................................................................................................................................... 135

“SUPREME COURT POISED TO OVERRULE REQUIREMENT THAT TAKINGS CLAIMS BE FILED IN STATE COURT”
James B. Slaughter and Gus B. Bauman ....................................................................................... 137

NEW CASE: Weyerhaeuser Company v. United States Fish and Wildlife Service ...................... 140

“U.S. TOP COURT TAKES UP PROPERTY RIGHTS CASE INVOLVING ENDANGERED FROG”
Lawrence Hurley .......................................................................................................................... 171

“EX-DOI OFFICIALS URGE JUSTICES TO KEEP FROG HABITAT RULING”
Danielle Nichole Smith ................................................................................................................... 173

“5TH CIRC. UPHOLDS LA. FROG HABITAT DECISION”
Juan Carlos Rodrigues .................................................................................................................... 176

IV. Criminal Law

IN THIS SECTION:

New Case: Madison v. Alabama ....................................................................................................... 180

“TOO OLD TO BE EXECUTED? SUPREME COURT CONSIDERS AN AGING DEATH ROW”
Adam Liptak .................................................................................................................................... 181

“SUPREME COURT STAYS EXECUTION OF INMATE WHO LAWYERS SAY IS NOT COMPETENT”
Steve Almasy and Mayra Cuevas .................................................................................................. 184

“THE CRUELTY OF EXECUTING THE SICK AND ELDERLY: TWO CONTROVERSIAL CASES IN ALABAMA REVEAL A DISTURBING TREND IN THE DEATH PENALTY IN AMERICA.”
Matt Ford ......................................................................................................................................... 186

“EXECUTION CALLED OFF FOR ALABAMA INMATE VERNON MADISON”
Ivana Hrynkiw ................................................................................................................................. 189
New Case: Bucklew v. Precythe ................................................................. 193

“SUPREME COURT TO HEAR CASES ON DEATH PENALTY AND CLASS ACTIONS”
Adam Liptak ............................................................................................... 210

“DEATH-ROW INMATE WITH RARE DISEASE GETS U.S. SUPREME COURT REVIEW
Greg Stohr ................................................................................................. 211

“MISSOURI APPEAL COULD DELAY MISSISSIPPI DEATH PENALTY CASE”
Jeff Amy ........................................................................................................ 212

New Case: Gamble v. United States ............................................................ 214

“SUPREME COURT AGREES TO TAKE UP DOUBLE JEOPARDY ISSUE”
Pete Williams ............................................................................................. 216

“UPCOMING SCOTUS CASE COULD COMPLICATE NY EFFORT TO CLOSE DOUBLE JEOPARDY
‘LOOPEHOLE’”
Colby Hamilton and Dan M. Clark .............................................................. 218

“DON’T GAMBLE ON DOUBLE JEOPARDY”
Ilya Shapiro .................................................................................................. 222

“SUPREME COURT TO HEAR DOUBLE JEOPARDY CASE WITH IMPLICATIONS FOR MUELLER”
Randall Eliason ............................................................................................ 224

New Case: Garza v. Idaho ............................................................................. 229

“CLIENTS, LAWYERS, AND APPEALS”
Kent Scheidegger .......................................................................................... 237

“JUSTICE TO RESOLVE CIRCUIT SPLIT OVER APPEAL WAIVERS”
Dan McCue .................................................................................................... 238
V. Business Law

IN THIS SECTION:

New Case: Lorenzo v. SEC ................................................................. 244

“ARE FALSE STATEMENTS ENOUGH TO PROVE FRAUD”
  Peter J. Henning .................................................................................. 270

“U.S. SUPREME COURT WILL CONSIDER NARROWING SECURITIES-FRAUD LAWS”
  Greg Stohr .......................................................................................... 273

“LORENZO v. SEC: WILL HIGH COURT FURTHER CURTAIL RULE 10B-5?”
  Roger Cooper, Matthew Solomon and Leslie Silverman...................... 274

“BROKER DIDN’T ‘MAKE’ FALSE STATEMENTS, APPEALS COURT SAYS”
  Phyllis Diamond .................................................................................. 279

NEW CASE: Apple, Inc. v. Pepper .......................................................... 281

“APPLE GETS U.S. SUPREME COURT REVIEW ON IPHONE APP FEE SUIT”
  Greg Stohr .......................................................................................... 293

“TRUMP ADMINISTRATION BACKS APPLE IN SUPREME COURT ANTITRUST SUIT OVER APPS”
  Marcia Coyle ...................................................................................... 295

“The Supreme Court Will Decide If Apple’s App Store Is A Monopoly”
  Louise Matsakis .................................................................................. 298

“What happens if Apple loses its Supreme Court App Store Antitrust Appeal?”
  Adi Robertson ...................................................................................... 301

“9TH CIRCUIT APPLE ANTITRUST RULING SPLITS WITH 8TH, IS BOON TO CONSUMERS”
  Alison Frankel ...................................................................................... 303

NEW CASE: Mount Lemmon Fire District v. Guido ........................................ 305

“US SUPREME COURT TO KICK OFF NEXT SESSION WITH AZ AGE-DISCRIMINATION CASE”
  Howard Fischer .................................................................................... 312
“Age Law Shield for State Workers Doesn’t Turn on Unit Size”
Kevin McGowan ........................................................................................................ 314

“ADEA Applies To Small State Offices, Feds Tell High Court”
Branden Campbell .................................................................................................. 316

NEW CASE: Frank v. Gaos ...................................................................................... 318

“Google Privacy Deal Is ‘Clear Abuse,’ High Court Told”
Shayna Possess ........................................................................................................ 331

“Frank v. Gaos: Cy Pres Gets Its Day At the Supreme Court”
Jonah M. Knobler and Sam A. Yospe .................................................................. 334

“Ninth Circuit Confirms That A Cy Pres Only Settlement Can Work In Privacy Class Action”
Jay Ramsey .............................................................................................................. 340

NEW CASE: Jam v. International Finance Corp. ..................................................... 342

“Justices To Review Scope of Immunity For Int’s Orgs”
Jimmy Hoover .......................................................................................................... 353

“Supreme Court Grants Cert In Jam v. International Finance Corporation”
Elliot Kim .................................................................................................................. 355

“Indian Fisherman Hail U.S Supreme Court Decision To Hear World Bank Suit”
Rina Chandran .......................................................................................................... 361

“Can You Sue International Organizations? The Supreme Court Decides To Weigh In”
Kristina Daugirdas .................................................................................................. 363
VI. Separation of Powers

In This Section:

**NEW CASE: Gundy v. United States** ................................................................. 373

“SEX OFFENDER CASE MAY DEAL BLOW TO 'ADMINISTRATIVE STATE’”

Jimmy Hoover ........................................................................................................ 376

“THE SUPREME COURT MAY REVIVE A LEGAL THEORY LAST USED TO STRIKE DOWN NEW DEAL LAWS”

Mark Joseph Stern ................................................................................................. 379

“WILL SUPREME COURT PUSH CONGRESS TO GET BACK TO ITS JOB OF MAKING LAW?”

Mark Miller ............................................................................................................. 381

“UNITED STATES v. GUNDY”

Justia Inc. ................................................................................................................ 383

**NEW CASE: Nielsen v. Preap** ............................................................................. 385

“SUPREME COURT TO DECIDE WHETHER IMMIGRANTS JAILED FOR PAST CRIMES CAN BE DETAINED PENDING DEPORTATION”

David G. Savage ..................................................................................................... 399

“SUPREME COURT TO CONSIDER HOW FAST GOVERNMENT MUST ACT IN DETAINING IMMIGRANTS FOR DEPORTATION”

Robert Barnes ......................................................................................................... 401

“MORE DETAINED IMMIGRANTS ARE OWED BOND HEARINGS: 9TH CIRC.”

Alissa Wickham ...................................................................................................... 403

**Topic: Chevron Deference**

“A POWER GRAB OF SORTS, BURIED IN A SUPREME COURT DECISION”

Noah Feldman .......................................................................................................... 406

“The Federalist Society’s CHEVRON DEFERENCE DILEMMA”

Christopher J. Walker ............................................................................................. 409
“UNDE FEERENCE”
Jonathan Wood................................................................. 413

**Topic: Deferred Action for Childhood Arrivals (DACA)**

“THE END OF DACA IS THE NEXT BIG IMMIGRATION FIGHT”
Noah Feldman ........................................................................... 416

“JUDGE UPHOLDS ORDER FOR TRUMP ADMINISTRATION TO RESTORE DACA”
Miriam Jordan ........................................................................... 419

“KAVANAUGH COULD STYMIE TRUMP’S IMMIGRATION POLICIES”
Laura D. Francis ........................................................................... 421

“JUDGE’S RULING ISN’T GOING TO SAVE THE DREAMERS”
Noah Feldman ........................................................................... 424

“A JUDGE SUPPORTS DREAMERS AND THE RULE OF LAW”
Cass R. Sunstein ........................................................................... 427

**Topic: Sanctuary Cities**

“FULL APPEALS COURT TO HEAR CASE ON INJUNCTION AGAINST TRUMP SANCTUARY POLICIES”
Josh Gerstein ........................................................................... 431

“SANCTUARY CITIES AS THE NEXT NATIONWIDE INJUNCTION TEST CASE”
Steve Vladeck ........................................................................... 433

“JUDGE: TRUMP OVERSTEPPED IN SANCTUARY CITY ORDER”
Kimberly Atkins ........................................................................... 435

**Topic: Affordable Care Act**

“TRUMP ADMINISTRATION WON’T DEFEND ACA IN CASE BROUGHT BY GOP STATES”
Amy Goldstein ........................................................................... 438

“TRUMP’S SABOTAGE OF OBAMACARE IS ILLEGAL”
Nicholas Bagley and Abbe R. Gluck ........................................... 441
VII. Civil Rights

IN THIS SECTION:

Topic: Sexual Orientation and Title VII

“COURT: LAW doesn’t bar sex-orientation discrimination on job”
Kate Brumback ........................................................................................................................................ 448

“7TH CIRC. UPHOLD GROCERY STORE WORKER’S TITLE VII WIN”
Danielle Nichole Smith ................................................................................................................................ 450

“AGS TELL 8TH CIRC. TITLE VII DOESN’T COVER SEX ORIENTATION”
Danielle Nichole Smith ................................................................................................................................ 452

“APPEALS COURT RULES ANTI-GAY EMPLOYMENT DISCRIMINATION IS ALREADY ILLEGAL UNDER FEDERAL LAW”
Mark Joseph Stern .......................................................................................................................................... 455

“SCOTUS ASKED TO IGNORE CIRCUIT SPLIT ON SEXUAL ORIENTATION DISCRIMINATION”
R. Robin McDonald ....................................................................................................................................... 458

“EEOC BACKS GAY EMPLOYEE IN LATEST APPELLATE BATTLE OVER WORKPLACE RIGHTS”
Alison Frankel ............................................................................................................................................... 460

“EEOC ARGUES THAT SEXUAL ORIENTATION DISCRIMINATION BY A HETEROSEXUAL PERSON CAN CONSTITUTE A PROTECTED ACTIVITY”
Seyfarth Shaw LLP .................................................................................................................................... 462

“ENDING SEXUAL ORIENTATION DISCRIMINATION IN EMPLOYMENT”
Gay Crosthwait Grunfeld and Marc J. Shinn-Krantz .................................................................................... 464

“JUSTICE DEPARTMENT SAYS RIGHTS LAW DOESN’T PROTECT GAYS”
Alan Feuer .................................................................................................................................................... 468

“POST-KENNEDY COURT LIKELY TO TAKE NARROW VIEW OF TITLE VII”
Braden Campbell .......................................................................................................................................... 471
“JUSTICE KENNEDY’S MASTERPIECE RULING”
Garrett Epps ........................................................................................................... 474

“BAKER CLAIMS RELIGIOUS PERSECUTION AGAIN—THIS TIME AFTER DENYING CAKE FOR TRANSGENDER WOMAN”
Amy B. Wang ............................................................................................................ 478

Topic: Transgender Rights

“FEDERAL LAW ON TRANSGENDER, SEXUAL ORIENTATION BIAS A MIXED BAG”
Jon Steingart ............................................................................................................... 481

“TRANSGENDER WORKERS GAIN NEW PROTECTION UNDER COURT RULING”
Robert Pear ................................................................................................................ 484

“U.S. ANTI-BIAS LAW DOES NOT PROTECT TRANSGENDER WORKERS: JUSTICE DEPT”
Daniel Wiessner and Sarah N. Lynch ............................................................... 487

“TITLE VII IN TRANSITION? TEXAS FEDERAL COURT RULES THAT ANTI-DISCRIMINATION STATUTE PROTECTS TRANSGENDER INDIVIDUALS”
Stephen Fox and Jonathan Clark ........................................................................ 489

“TRANSGENDER STUDENT IN BATHROOM DISPUTE WINS COURT RULING”
Matt Stevens ............................................................................................................. 491

“THE TRUMP ADMINISTRATION MAY HAVE DOOMED GAVIN GRIMM’S CASE”
Emma Green ............................................................................................................ 494

“JUDGE SIDES WITH GLOUCESTER TRANSGENDER STUDENT ON BATHROOM ACCESS ISSUE”
Peter Dujardin ......................................................................................................... 496

“6TH CIRC. REVIVES EEOC’S FUNERAL HOME TRANS BIAS SUIT”
Braden Campbell ...................................................................................................... 499

“TRUMP SAYS TRANSGENDER PEOPLE WILL NOT BE ALLOWED IN THE MILITARY”
Julie Hirschfeld Davis and Helene Cooper ............................................................ 502
“TRUMP CUT FROM TRANSGENDER MILITARY SUIT AGAINST GOV’T”
Daniel Wilson .................................................................................................................. 506

**Topic: Abortion**

“LAWSUIT CHALLENGES TEXAS ABORTION CURBS”
Jonathan Stempel ........................................................................................................... 510

“7TH CIRC. BACKS IND. ABORTION LAW STAY DURING LEGAL CHALLENGE”
Bonnie Eslinger ............................................................................................................. 512

“PENCE’S ANTI-ABORTION LAW COULD UPEND ROE V. WADE”
Jennifer Haberkorn ..................................................................................................... 515

“What happens if Roe v. Wade gets overturned?”
Kimberly Leonard ........................................................................................................ 518

“NEW SUPREME COURT JUSTICE COULD WEIGH IN ON ABORTION QUICKLY”
Jennifer Haberkorn ..................................................................................................... 524

“SUPREME COURT WIPES OUT APPEALS COURT RULING IN IMMIGRANT ABORTION CASE”
Josh Gerstein and Renuka Rayasam ............................................................................... 538

“AGS URGE DC CIRC. TO OK BLOCK ON DETAINEE ABORTION RULES”
Tiffany Hu ....................................................................................................................... 540

“GOV. THREATEN LEGAL ACTION IF TITLE X CHANGES BECOME LAW”
Shayna Possess ............................................................................................................. 542

**Topic: Affirmative Action**

“AS AFFIRMATIVE ACTION IS TARGETED, HIGHER ED MUST RESPOND”
Sarah Moore .................................................................................................................. 545
“BRETT KAVANAUGH ONCE PREDICTED ‘ONE RACE’ IN THE EYES OF GOVERNMENT. WOULD HE END AFFIRMATIVE ACTION?”
Ann E. Marimow and Robert Barnes ................................................................. 548

“ASIAN-AMERICANS SUING HARVARD SAY ADMISSIONS FILES SHOW DISCRIMINATION”
Anemona Hartocollis.......................................................................................... 552

“HARVARD RATED ASIAN-AMERICAN APPLICANTS LOWER ON PERSONALITY TRAITS, SUIT SAYS”
Anemona Hartocollis.......................................................................................... 555

“ASIAN-AMERICAN GROUPS TAKE OPPOSING SIDES IN HARVARD AFFIRMATIVE ACTION CASE”
Chris Fuchs........................................................................................................... 558

“U.S. SAYS IT MIGHT ENTER HARVARD AFFIRMATIVE ACTION COURT BATTLE”
Nate Raymond...................................................................................................... 561

“TRUMP OFFICIALS REVERSE OBAMA’S POLICY ON AFFIRMATIVE ACTION IN SCHOOLS”
Erica L. Green, Matt Apuzzo, and Katie Benner .................................................. 563