

Supreme Court Update for SLC

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Oh, What A Term!

Overview of Presentation

SCOTUS in the big picture

Big cases for states (and everyone else)

Other cases of interest to states

States and the First Amendment

The Ideological Divide: a Brief History

- 5-4 conservative Court since about 1970
 - Powell
 - O'Connor
 - Kennedy
 - Roberts
- During the Kennedy years almost all “big” cases were decided 5-4 on ideological lines
- This term 6-3 conservative for the **entire time** for the first time
- Abortion and guns cases wouldn't **have even been heard** without a 6-3 conservative Court

New Conservative Court is Only Getting Started

This term

- Abortion
- Guns

Next term

- Affirmative action
- Independent state legislature

6-3 Dominates Big Cases and Beyond

- 29% unanimous; decade average 43%
- 9-0 usually the most common vote alignment
- 6-3 was the most common alignment; 30% of cases being decided along those lines
- Roberts and Kavanaugh voted with the majority 95% of the time—dissented in the same three cases
- **Only one “win” for the liberals in a big(ish) case—Remain in Mexico**
- *Angie Gou, As unanimity declines, conservative majority’s power runs deeper than the blockbuster cases, SCOTUSblog*

Abortion—due
process

Guns—history
and tradition

Administrative
law—major
question

Establishment
Clause—accords
with history

A lot of First
Amendment
cases

Major
Doctrinal
Shifts: Is
there a
Common
Theme?



Replacing Justice Breyer

Known For

Pragmatic moderate—if your lens starts in the 1930s he isn't even considered a liberal

- Skeptical of *Reed v. Town of Gilbert* (2015)
- What happens if we do this? How should I write this opinion?

Writer of abortion decisions

- Joined by the ladies (and Justice Kennedy once)

Skeptical of government and religion

- His views are now more of an outlier

Skeptical of the death penalty

Parents Involved in Community Schools v. Seattle School District



Getting to
Know Justice
Jackson

Basic and Interesting Facts

Came from the DC Circuit

- Ginsburg, Scalia, Roberts, Thomas, and Kavanaugh
- When confirmed on June 14, 2021, three Republicans voted for her

51-year-old former Breyer clerk

Related by marriage to Paul Ryan

- Ryan's wife's sister is married to Jackson's twin brother!

Dad was chief attorney for Miami-Dade County School Board

Attended (public) Miami Palmetto High School (where Jeff Bezos also attended)

Worked as a public defender

Dobbs v. Jackson Women's Health Organization

Overtures *Roe v. Wade* (1973) holding that states must allow abortion until viability (about 22-23 weeks)

6-3

Justice Alito wrote the opinion

Rational-basis applies to state restrictions on abortion

No matter what side you are on can we agree this may be the most significant case since *Brown v. Board of Education* (1954)

Roadmap of the Decision

Right to an abortion isn't in the text of the constitution

Casey Court pointed to a right in the Due Process Clause of the Fourteenth Amendment

Per *Washington v. Glucksberg* (1997) such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty”

No Due Process Right

Not deeply rooted

- “Until the latter part of the 20th century, such a right was entirely unknown in American law”
- “Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy”

Not implicit in liberty

- “*Roe*’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is **fundamentally different**, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called ‘fetal life’ and what the law now before us describes as an ‘unborn human being.’”

Stare Decisis Factors

Planned Parenthood v. Casey (1992) didn't consider them

Public perception not a factor in overturning precedent

If a decision was wrong from the start, it doesn't matter that nothing has changed legally or factually

Thomas: Let's Look at Other Due Process Holding!

- “As I have previously explained, ‘substantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution”
- “[N]o party has asked us to decide ‘whether our entire Fourteenth Amendment jurisprudence must be preserved or revised””
- But in future cases, **we should reconsider all of this Court’s substantive due process precedents**, including *Griswold* [contraception], *Lawrence* [private, consensual sex acts], and *Obergefell* [same-sex marriage]
- What’s missing from the list?

Kavanaugh: Oh No Let's Not!

- But the parties' arguments have raised other related questions, and I address some of them here.
- First is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut*, 381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438 (1972) [contraception for unmarried]; *Loving v. Virginia*, 388 U. S. 1 (1967); and *Obergefell v. Hodges*, 576 U. S. 644 (2015). **I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.**

Roberts: What Happened to Incrementalism?

- “Our abortion precedents describe the right at issue as a woman’s right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further--certainly not all the way to viability. Mississippi’s law allows a woman three months to obtain an abortion, well beyond the point at which it is considered “late” to discover a pregnancy.”
- “I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.”

Dissent



Breyer writes officially
but is Kagan a ghost
writer?



History and tradition
should not be only source
of unenumerated rights



What happened to *stare
decisis*?



What is going to happen
to our other privacy
cases?

Will the Court Overturn its Other Privacy Cases?

Yes

- Have to be a state law and a case
- Other rights from the privacy cases aren't "deeply rooted"

No

- Taking Kavanaugh (and Roberts) at their word aren't 5 votes for that now
- No one joined Thomas opinion (we don't know the views of Alito, Gorsuch, or Barrett)

Status of Abortion in the South—Guttmacher

- Most restrictive—Texas, Oklahoma, Arkansas, Missouri, Mississippi, Alabama
- Very restrictive—Tennessee, South Carolina
- Restrictive—Kentucky, Georgia, Florida, Louisiana
- Some restrictions/protectations—Virginia, North Carolina

I'm Not Really a "Take a Moment Person" but Let's "Take a Moment"

Implications of this case can't be fully described,
quantified, or known

No **institutions** bear greater weight following this
decision than **state legislatures** (other than Congress)

New York State Rifle & Pistol Association v. Bruen

- State of conceal carry law pre-*Bruen*
- “May issue”—permit issued on a case-by-case basis; **6 states NONE in the South**—covering 25% of the U.S. population
- “Shall issue”—an applicant is presumptively entitled to receive a conceal carry permit pending things like “fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force”
- About 25 of “shall issue” jurisdictions allow permit less conceal carry

“May Issue” is Out; “Shall Issue” is In

- States and local governments may not require “proper cause” to obtain a license to carry a handgun outside the home
- 6-3 opinion written by Justice Thomas
- In New York to have “proper cause” to receive a conceal-carry handgun permit an applicant must “demonstrate a special need for self-protection distinguishable from that of the general community”

Test Applied

- “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is **consistent with the Nation’s historical tradition of firearm regulation**. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’”
- NOTE: no tiers of scrutiny; just history

Limits on Conceal Carry are Recent and Rare

- “Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. **But apart from a handful of late 19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense.** Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.”

More on Historical Analysis

- Evidence from the **ratification era** will be given the most weight
- Look for historical analogues not “dead ringers” like sensitive places
- Schools and government buildings are a modern analogue to the sensitive places of the “relatively few 18th- and 19th-century ‘sensitive places’ where weapons were altogether prohibited—e.g., legislative assemblies, polling places, and courthouses”
- Expect litigation over sensitive places (and everything else)

Kavanaugh and Roberts Try to Limit Majority Opinion Quoting from *Heller*

- “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms”
- “We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons”
- Do some of these have a weaker historical analogue than NY’s long standing conceal carry law?
- Message to lower courts: uphold these regulations!?

West Virginia v. EPA

Holding: Environmental Protection Agency (EPA) lacked the statutory authority to issue the Clean Power Plan (CPP)

6-3 opinion written by Chief Justice Roberts

Court applies the “major questions doctrine”

States sued but the state angle isn't necessarily obvious; states implement the Clear Air Act

Facts

- Per the Clean Air Act, for new and existing powerplants EPA may come up with air-pollution standards which reflect “the best system of emission reduction” (BSER)
- Before the CPP when EPA regulated under this provision of the Clean Air Act it required existing powerplants to make technological changes—like adding a scrubber—to reduce pollution
- In the 2015 EPA released the Clean Power Plan which determined that the BSER to reduce carbon emissions from existing powerplants was “generation-shifting”
- This entailed shifting electricity production from coal-fired power plants to natural-gas-fired plants and wind and solar energy
- Operators could generation shift by reducing coal-fired production, buying or investing in wind farms or solar installations, or purchasing emission credits as part of a cap-and-trade regime
- The goal of the CPP was to by 2030 have coal provide 27% of national electricity generation, down from 38% in 2014

Holding and Reasoning

Generation shifting exceeds EPA's authority under the Clean Air Act because Congress didn't give EPA "clear congressional authorization" to regulate in this matter

"As a matter of 'definitional possibilities,' generation shifting can be described as a 'system' — 'an aggregation or assemblage of objects united by some form of regular interaction' capable of reducing emissions. But of course almost anything could constitute such a 'system'; **shorn of all context, the word is an empty vessel.** Such a vague statutory grant is not close to the sort of clear authorization required by our precedents."



Why is Clean Congressional Authorization Required?

- This is a major questions case!
- This doctrine applies, according to the Court, in “extraordinary cases”—cases in which the “**history and the breadth of the authority that [the agency] has asserted,**” and the “**economic and political significance**” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer such authority

Why is this a Major Questions Case?

- “In arguing that [the relevant provision of the Clean Air Act] **empowers it to substantially restructure the American energy market**, EPA ‘claim[ed] to discover in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority.’ It located that newfound power in the vague language of an ‘ancillary provision[]’ of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”



Dissent—Justice Kagan Calm

“Best system” — “full stop—no ifs, ands, or buts of any kind relevant here” is a broad Congressional authorization

“The parties do not dispute that generation shifting is indeed the ‘best system’ —the most effective and efficient way to reduce power plants’ carbon dioxide emissions”

“A key reason Congress makes broad delegations like Section 111 [of the Clean Air Act] is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn’t and can’t know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise.”

Dissent— Justice Kagan on FIRE

- “Some years ago, I remarked that ‘[w]e’re all textualists now.’ Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the ‘major questions doctrine’ magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed.”
- **“The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening.”**

Why Did the Court Decide this Case?

- CPP never went into effect; its goals were met by market forces; Biden says he will do something different
- Roberts: Here the Government “nowhere suggests that if this litigation is resolved in its favor it will not” reimpose emissions limits predicated on generation shifting; indeed, it “vigorously defends” the legality of such an approach.
- Kagan: The Court may be right that doing so does not violate Article III mootness rules (which are notoriously strict). **But the Court’s docket is discretionary, and because no one is now subject to the Clean Power Plan’s terms, there was no reason to reach out to decide this case.** The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering. That new rule will be subject anyway to immediate, pre-enforcement judicial review. **But this Court could not wait—even to see what the new rule says—to constrain EPA’s efforts to address climate change.**

Impact on EPA Regulating Powerplants

- “Original design is off the table” —EPA can still regulate greenhouse gases emissions from powerplants (scrubbers) but can’t move electricity production from one source to the next at a different location
- Ruling doesn’t affect EPA ability to regulate greenhouse gas emissions from other sources; but powerplants are the big dog (32% carbon emissions)
- Achieving emissions reductions at powerplants will be more costly and less effective; directly impacted communities can’t wait
- EPA has lots of other options: co-firing, carbon capture, **tightening other powerplant regulations**—[Niina H. Farah](#), [Carlos Anchondo](#), [David laconangelo](#), *What’s On and Off the Table for Climate Action after the Supreme Court Ruling*, [E&E News](#)

What about State Action?

- “States can cut emissions from power plants in a handful of direct and indirect ways. Chief among them are carbon markets that aim to lower emissions from large, polluting facilities over time and rules that require utilities to buy certain amounts of energy from renewable or non-carbon sources.”
 - Kathleen Ronayne, *In light of EPA court ruling, new focus on states’ power*, AP
- “Some clean energy groups have theorized that if the biggest U.S. states were to pull off a swift energy transition, they could effectively drag along the rest of the country by bringing down the costs of low-carbon technologies, allowing them to undercut dirtier, more expensive energy sources”
 - [Niina H. Farah](#), [Carlos Anchondo](#), [David Iaconangelo](#), *What’s On and Off the Table for Climate Action after the Supreme Court Ruling*, [E&E News](#)

What's Next For Major Questions: Anything Big and New?

Past

- FDA banning tobacco as a “device”
- CDC eviction moratorium not necessary to prevent the spread of disease
- EPA construing “air pollutant” to cover greenhouse gases
- OSHA large-employer vaccine mandate
- AG wanted to revoke medical license when used inconsistent with public interest

Future

- SEC corporate disclosure of greenhouse gas emissions
- EPA tailpipe emissions
- FDA ban methanal cigarettes
- FERC greenhouse gas policy
- FTC rules for new mergers
- DACA

Beyond Major Questions: Future of Administrative Law

- All you need to read is the headline: Chad Squitieri, *Can Major-Questions Doctrine Actually Get Congress to Legislate Again?*, National Review
- Breyer was the leading Justice defending the administrative state
- Is *Chevron* going the way of *Lemon*? See *American Hospital Association v. Becerra* (Court agrees with HHS's interpretation of Medicare but doesn't cite to *Chevron*)
- Non-delegation doctrine—Congress can't delegate its legislative powers to administrative agencies

Berger v. NC NAACP

Holding: two North Carolina's state legislative leaders may participate as intervenors in a challenge to North Carolina's voter identification (voter-ID) law

8-1

Written by Justice Gorsuch; ode to states and federalism

Facts

In November 2018, North Carolinians amended their State Constitution to require voter-ID

The governor vetoed legislation implementing the amendment, and the attorney general voted against an earlier voter-ID law when he was a state legislator

The NAACP sued the governor and the state board of elections

The attorney general is defending the elections board

The speaker of the State House of Representatives and president pro tempore of the State Senate moved to intervene in the case

Law of Intervention

Federal Rules of Civil Procedure Rule 24(a)(2) states a “court must permit anyone to intervene” who,

On timely motion

Claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest

Unless existing parties **adequately represent** that interest



Interest of Legislative Leaders— See State Law

- “North Carolina has expressly authorized the legislative leaders to defend the State’s practical interests in litigation of this sort. State law provides that ‘[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice,’ ‘shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.’”

Adequately Represented by the AG

SCOTUS rejects a presumption of adequate representation by the AG

“Any presumption against intervention is *especially* inappropriate when wielded to displace a State’s prerogative to select which agents may defend its laws and protect its interests. Normally, **a State’s chosen representatives should be greeted in federal court with respect, not** adverse presumptions.”

This Case=Poster Child for Multiple Representatives in State Court

- “When confronted with a motion for a preliminary injunction, the Board **declined to offer expert-witness affidavits in support of [the voter-ID law]**, even though its opponent offered many and the legislative leaders sought to supplement the record with their own. After the District Court issued its (ultimately overturned) injunction, the **Board declined to seek a stay**. That tactical choice, motivated by the Board’s overriding concern for stability and certainty, meant that the State **could not enforce its new law during a statewide election**. Throughout, Board members have been appointed and potentially removable by a **Governor** who vetoed [the voter-ID law], and who filed his own briefs in this litigation **calling the law ‘unconstitutional’ and arguing that it ‘should never go into effect.’** And at all times, the Board has been represented by an attorney general who, though no doubt a vigorous advocate for his clients’ interests, is also an **elected official who may feel allegiance to the voting public or share the Board’s administrative concerns.**”

Million Dollar Questions

Who is the lone dissenter?

Would this case have turned out differently if there was no state law?

Only Oklahoma and North Carolina?

- Oklahoma law provides that where the constitutionality of any statute affecting the public interest is drawn into question, the Speaker of the House of Representatives and President Pro Tempore of the Senate “may intervene on behalf of their respective house of the Legislature and ... shall be entitled to be heard.” Okla. Stat. Ann. tit. 12, § 2024(D)(2) (West).

Gallardo v. Marstiller

Medicaid statute allows states to collect from third party tortfeasors settlements allocated for the cost of **future** (not only past) medical care

7-2 decision written by Justice Thomas

SLLC filed an *amicus* brief arguing for this result

All states can now pass laws to do this!

Sad, Sad (and Expensive) Case

- Gianinna Gallardo has been in a persistent vegetative state since she was hit by a pickup truck getting off the school bus
- Florida's Medicaid agency has paid over \$800,000 for her initial medical expenses
- Gallardo's parents settled a case against multiple parties for \$800,000
- A little over \$35,000 of the settlement was designated as compensation for past medical expenses
- The parties agreed an unspecified amount may represent compensation for future medical expenses

Medicaid Law

States participating in Medicaid must require Medicaid beneficiaries to assign the state “any rights . . . to payment for medical care from any third party”

Medicaid’s “anti-lien provision” prohibits states from recovering medical payments from a beneficiary’s “property”

Florida Law

Florida law allows the state to recover half of a Medicaid beneficiary's total settlement, after deducting 25% for attorney's fee and costs

It presumes, though the presumption may be rebutted, that this amount represents the portion of the recovery for "past and *future* medical expenses"

Argument

- Gallardo argued that Florida may only collect \$35,000 from the settlement because Medicaid's anti-lien provision preempts Florida's law to the extent it allows Florida to recover **future** medical expenses

Holding and Reasoning

- “Plain text” of the Medicaid Act indicates Florida may seek reimbursement from settlement amounts representing past or **future** medical care payments
- Per the Medicaid Act, states must acquire from each Medicaid beneficiary an assignment of “any rights . . . of the individual . . . to support . . . for the purpose of medical care . . . and to payment for medical care from any third party”
- **“Nothing in this provision purports to limit a beneficiary’s assignment to ‘payment for’ *past* ‘medical care’ already paid for by Medicaid.** To the contrary, the grant of ‘*any rights . . . to payment for medical care*’ most naturally covers not only rights to payment for past medical expenses, but also rights to payment for future medical expenses. The relevant distinction is thus ‘between medical and nonmedical expenses,’ not between past expenses Medicaid has paid and future expenses it has not.”

Dissent

Justices Sotomayor and Breyer

Criticized the majority opinion for paying “comparatively little attention” to Medicaid’s anti-lien provision

“The anti-lien and anti-recovery provisions establish that acceptance of Medicaid does not render a beneficiary indebted to the State or give the State any claim to the beneficiary’s **property**. In other words, Medicaid is not a loan.”

Where to Southern States Come Down Now?

Future okay

- Florida
- Oklahoma
- Mississippi

Past only

- West Virginia

Why so Many First Amendment Cases?

Many clauses (can you name all 6?)

Much ambiguity and even more intrigue

Very important—cornerstone of our democracy

Especially when religion isn't an issue (but even when it is) the Justices often agree

On religion the Court has move more incrementally but equally as radically

*City of
Austin v.
Reagan
National
Advertising*

Holding: allowing on-premises but not off-premises signs to be digitized isn't a "content-based" distinction per the First Amendment

6-3 decision written by Justice Sotomayor

Justice Breyer cited to the SLIC's brief TWICE in his concurring opinion

Two Reasons Why this Case Matters to States

State laws: since the Highway Beautification Act of 1965 “approximately two-thirds of States have implemented similar on-/off-premises distinctions”

- In the Act, Congress directed States receiving federal highway funding to regulate outdoor signs in proximity to federal highways, in part by limiting off-premises signs

Symbolic victory: narrowing of *Reed v. Town of Gilbert* (2015) is a fairly narrow context



Southern States that Regulate Billboards

- Alabama
- Arkansas
- Georgia
- Louisiana
- Mississippi
- North Carolina
- Oklahoma
- South Carolina
- Virginia

This is Really a Digitized Billboard Case

- Austin's sign code prohibits any new off-premises signs but has grandfathered such existing signs
- On-premises signs, but not off-premises signs, may be digitized
- "Off-premise sign" to mean "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site"
- Reagan National Advertising argued that this distinction violates the First Amendment's Free Speech Clause

It All Goes Back to *Reed*

Per *Reed v. Town of Gilbert* (2015), a regulation of speech is content based if it “applies to particular speech because of the topic discussed or the idea or message expressed”

Content-based regulations are subject to strict scrutiny meaning they are almost always unconstitutional

According to the Fifth Circuit because the City’s on/off premises distinction required a reader to determine “who is the speaker and what is the speaker saying,” the distinction was content based

Read the Sign Interpretation of *Reed*=Too Extreme

In *Reed*, the Town of Gilbert's sign code "applied distinct size, placement, and time restrictions to 23 different categories of signs"

For example, ideological signs were treated better than political signs and temporary directional signs were most restricted

The Court reasoned these categories were content based because Gilbert "single[d] out specific subject matter for differential treatment, even if it [did] not target viewpoints within that subject matter"



How is this Case Different?

- “Unlike the sign code at issue in *Reed* . . . the City’s provisions at issue here **do not single out** any topic or subject matter for differential treatment. A **sign’s substantive message itself is irrelevant** to the application of the provisions; **there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events**, including those sponsored by religious and non-profit organizations. Rather, the City’s provisions **distinguish based on location**: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. **The message on the sign matters only to the extent that it informs the sign’s relative location.**”

Justice Breyer Cites to the SLLC Brief

- “[T]he public has an interest in ensuring traffic safety and preserving an esthetically pleasing environment . . . and the City here has reasonably explained how its regulation of off-premises signs in general, and digitization in particular, serves those interests. *Amici* tell us that billboards, especially digital ones, can distract drivers and cause accidents. **Brief for National League of Cities** et al. as *Amici Curiae* 22 (‘The Wisconsin Department of Transport found a 35% increase in collisions near a variable message sign’). They add that on-premises signs are less likely to cause accidents. *Id.*, at 23 (‘[A] 2014 study found no evidence that on premises digital signs led to an increase in crashes’).”

Shurtleff v. City of Boston

Holding: Boston's refusal to fly a Christian flag on a flagpole outside city hall violated the First Amendment

(Mercifully) short, unanimous opinion written by Justice Breyer

A win disguise as (unanimous) loss???

Facts

On the plaza, near Boston City Hall entrance, stand three 83-foot flagpoles

Boston flies the American flag on one (along with a banner honoring prisoners of war and soldiers missing in action) and the Commonwealth of Massachusetts flag on the other

On the third it usually flies Boston's flag

Since 2005 Boston has allowed third parties to fly flags during events held in the plaza

Most flags are of other countries, marking the national holidays of Bostonians' many countries of origin

Third-party flags have also been flown for Pride Week, emergency medical service workers, and a community bank

Camp Constitution Wanted to Fly a Christian Flag

- And the city said NO for the first time EVER
citing Establishment Clause concerns



Forum or Government Speech?

Forum=no viewpoint discrimination

Government speech=First Amendment doesn't apply; ban any flag!!

“The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program”

Government Speech “Holistic Inquiry”

History of the expression at issue

The public’s likely perception as to who (the government or a private person) is speaking

Extent to which the government has actively shaped or controlled the expression

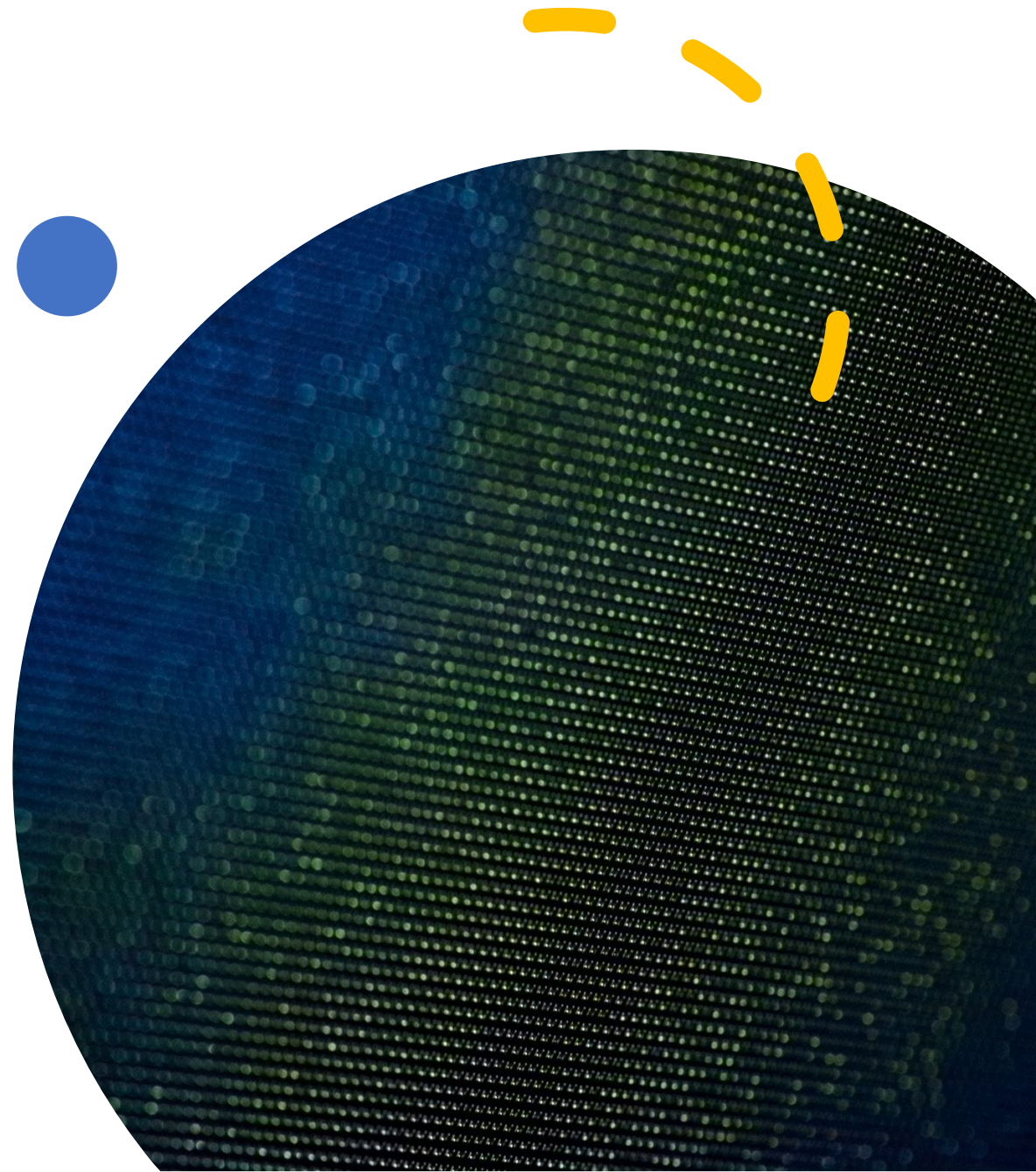
No Government Speech Here

The “general history” of flying flags “particularly at the seat of government” favors Boston

But “even if the public would ordinarily associate a flag’s message with Boston, that is not necessarily true for the flags at issue here” where “Boston allowed its flag to be lowered and other flags to be raised with some regularity”

While neither of these two factors resolved the case, Boston’s record of not “actively control[ing] these flag raisings and shap[ing] the messages the flags sent” was “the most salient feature of this case

Boston had “no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate”



Why Win Disguised a as Loss?

Only 13 pages

Written by Justice Breyer

Opinion was very narrow and focused heavily on the facts

Compare what the Court **held**

- Boston's flag-raising program does not express government speech

With what it **could have held**

- Third-party flag-raising program are public forums
- Any time government intends to speak but allows third-parties to participate there can be no government speech

Why Does this Case Matter to States?

Not that many government speech cases

Breyer is right cases will always be tricky when the government invites the public to speak in a program it wants to be government speech; Texas license plate case

Court gives some good guidance

- “Boston could easily have done more to make clear it wished to speak for itself by raising flags. Other cities’ flag-flying policies support our conclusion. The City of San Jose, California, for example, **provides in writing that its ‘flag-poles are not intended to serve as a forum for free expression by the public,’ and lists approved flags that may be flown ‘as an expression of the City’s official sentiments.’**”

Justice Gorsuch on Why Boston Followed *Lemon*

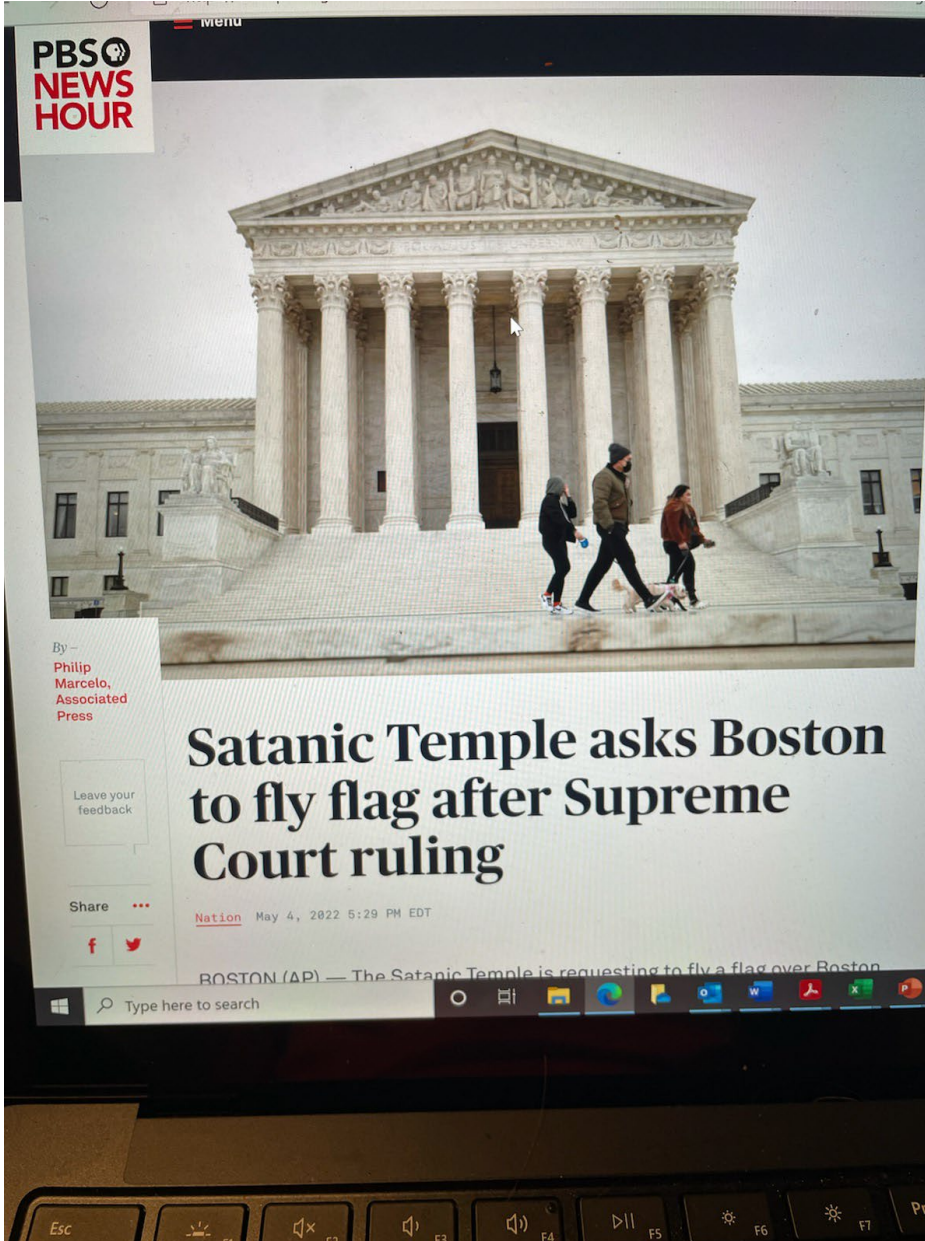
Local government officials are biased or lazy

- “First, it’s hard not to wonder whether some simply prefer the policy outcomes *Lemon* can be manipulated to produce”
- “*Lemon*’s abstract three-part test may seem a simpler and tempting alternative to busy local officials and lower courts”

My response

- Court has never overruled *Lemon*
- Establishment Clause has to mean something?
- So if not *Lemon* that what?


Never Fear
the Satanists
Are Here!



The image shows a laptop screen displaying a news article from PBSO News Hour. The article features a photograph of the Supreme Court building with three people walking on the steps. The headline reads "Satanic Temple asks Boston to fly flag after Supreme Court ruling". The byline is "By Philip Marcelo, Associated Press". The article is dated "May 4, 2022 5:29 PM EDT". The Windows taskbar is visible at the bottom of the screen.

PBSO NEWS HOUR

menu



By –
Philip
Marcelo,
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**Satanic Temple asks Boston
to fly flag after Supreme
Court ruling**

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BOSTON (AP) — The Satanic Temple is requesting to fly a flag over Boston

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*Carson v.
Makin*

- In a normal Supreme Court term this could be the most important case
- Holding: If a state has a school voucher program religious schools must be eligible to receive vouchers
- 6-3 holding on predictable lines

Facts

Maine's constitution and statutes require that students receive a free public education

Fewer than half of Maine's school administrative units (SAUs) operate their own public secondary schools

If those SAUs don't contract with a particular public or private school, they must "pay the tuition . . . at the public school or the approved private school of the parent's choice"

To be approved a private school must be "nonsectarian"

Holding and Reasoning

Chief Justice Roberts write the opinion which contained NO concurrences

“We have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits”

“Unremarkable” principles applied in two recent U.S. Supreme Court cases “suffice to resolve this case”

Precedent

In *Trinity Lutheran Church of Columbia v. Comer* (2017) the lower court held Trinity Lutheran Church's preschool wasn't allowed to receive a state playground resurfacing grant because it was operated by a church. The Supreme Court reversed holding the Free Exercise Clause did not permit Missouri to "expressly discriminate[] against otherwise eligible recipients by **disqualifying them from a public benefit solely because of their religious character.**"

In *Espinoza v. Montana Department of Revenue* (2020) the Montana Supreme Court held that to the extent a Montana program providing tax credits to donors who sponsored private school tuition scholarships included religious schools, it violated a provision of the Montana Constitution which barred government aid to religious schools. The U.S. Supreme Court reversed stating: "A State need not subsidize private education. But once a State decides to do so, it **cannot disqualify some private schools solely because they are religious.**"

Maine's Program is Totally the Same

- The U.S. Supreme Court opined that the facts of this case are very similar to those in *Trinity Lutheran* and *Espinoza*: “Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in *Trinity Lutheran*, [the religious schools at issue in this case] **are disqualified from this generally available benefit “solely because of their religious character.”**
- The U.S. Supreme Court concluded Maine’s exclusion of religious schools doesn’t comply with strict scrutiny because “a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.”

Dissent— What about the Establishment Clause?

- “The First Amendment begins by forbidding the government from ‘mak[ing] [any] law respecting an establishment of religion.’ It next forbids them to make any law ‘prohibiting the free exercise thereof.’ The Court today pays almost no attention to the words in the first Clause while giving almost exclusive attention to the words in the second.”

Dissent...this Happened Kind of Fast

Justice Breyer noted that in *Zelman v. Simmons-Harris* (2002) the U.S. Supreme Court held “a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.” But, “[w]e have never previously held what the Court holds today, namely, that a State must (not may) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education.”

Justice Sotomayor: **What a difference five years makes.** In 2017, I feared that the Court was “lead[ing] us . . . to a place where separation of church and state is a **constitutional slogan, not a constitutional commitment.**” *Trinity Lutheran*, 582 U. S., at ____ (dissenting opinion) Today, the Court leads us to a place where separation of church and state becomes a constitutional violation. If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens. **With growing concern for where this Court will lead us next,** I respectfully dissent.

Southern States with Voucher Programs—Do any Exclude Religious Schools?

Disability

- Arkansas
- Florida
- Georgia
- Mississippi
- Oklahoma

Disability and poverty

- Louisiana
- North Carolina

Kennedy v. Bremerton School District

The First Amendment protects an assistant football coach who “knelt at midfield after games to offer a quiet prayer of thanks”

Lemon v. Kurtzman (1971) is overruled

6-3 opinion written by Justice Gorsuch

The SLLC filed an [amicus brief](#) in this case supporting the district

Majority and the Dissent Disagree about the FACTS of this Case

- Both sides agree assistant football coach Joseph Kennedy had a long history of praying alone and with students at midfield after football games and praying with students in the locker room pregame and postgame
- When directed to, Kennedy stopped the latter practice
- But he told the district he felt “compelled” to continue offering a “post-game personal prayer” midfield
- The district placed Kennedy on leave for praying on the field after three particular games
- No students joined him at 50-yard line after those particular three games

Initial Showing: District Violated Free Exercise Rights

School district burdened his sincere religious practice pursuant to a policy that is neither “neutral” nor “generally applicable”

The district’s actions weren’t neutral because “[b]y its own admission, the District sought to restrict Mr. Kennedy’s actions at least in part because of their religious character”

The district’s actions weren’t “generally applicable” because while the district stated it refused to rehire Kennedy because he “failed to supervise student-athletes after games,” the district “permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls”

Initial Showing: District Violated Free Speech Rights

The Court first had to decide whether Kennedy was speaking as a government employee (who isn't protected by the First Amendment) or as a citizen (who receives some First Amendment protection)

The Court determined Kennedy was acting as a citizen

“When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech ‘ordinarily within the scope’ of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach.”

No Burden Shifting Needed Here

- While the Court would have normally shifted the burden to the school district to defend its actions under the Free Exercise and Free Speech Clauses, the Court didn't in this case noting that under whatever test it applied the school district would lose

Bye Bye *Lemon* and No Coercion Here

The district explained it suspended Kennedy because of Establishment Clause concerns namely that a “reasonable observer” would conclude the district was **endorsing** religion by allowing him to pray on the field after games

In response the Court overturned the so-called *Lemon* test

“But in this case Mr. Kennedy’s private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion”

Lemon Test v. New Test

Lemon test

- Called for an examination of a law's purposes, effects, and potential for entanglement with religion
- In time, the approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion"

New test

- Court adopts a view of the Establishment Clause that "accor[ds] with history and faithfully reflec[ts] the understanding of the Founding Fathers"



Where Does this New Test Come From?

- *Town of Greece v. Galloway* (2014) (prayer at board meetings) quoting *Marsh v. Chambers* (1983) (another legislative prayer case)

Dissent's View of this Case

Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. **This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched.**

The Court's primary argument that Kennedy's speech is not in his official capacity is that he was permitted "to call home, check a text, [or] socialize" during the time period in question. **These truly private, informal communications bear little resemblance, however, to what Kennedy did. Kennedy explicitly sought to make his demonstrative prayer a permanent ritual of the postgame events, at the physical center of those events, where he was present by virtue of his job responsibilities, and after years of giving prayer-filled motivational speeches to students at the same relative time and location.**



SLLC *Amicus* Brief is More Diplomatic

- Lower courts applying *Garcetti*, however, have encountered more nuanced fact patterns, where the relevant employee speech occurs on the job in a context generally aligned with—though “not necessarily required by”—the employee’s job duties. In these cases, the employee’s speech is often “unauthorized by [his employer],” “in contravention of the wishes of his superiors,” and designed to pursue personal expressive aims. And courts have held that this type of speech is “pursuant to [an employee’s] official duties.”

What Does the End of *Lemon* Mean?

Every religion/Establishment Clause question should go to a lawyer for a “historical” analysis

And how exactly will that analysis be conducted?

What is the status of cases that relied mostly/solely on *Lemon*?

Carson (voucher) case + *Kennedy* = generally/always religion has to be treated like everyone else?

Thanks for
attending!

Enjoy the rest of the conference!

