Supreme Court Update for North Carolina Counties

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Oh, What A Term!

Overview of the Presentation

- SCOTUS in the big picture
- Impact of the three big cases on North Carolina counties
- Cases of interest for counties from last term
- One special case (just for) counties for next term

Big Picture Basics

First full term with a 6-3 conservative Court

All three huge cases went conservative

Lots of local government cases—big shifts in religion

What I Learned about our Conservative 6-3 Court this Term

- Just getting started
- Conservative not just in big cases
- Doctrinal shifts
- Some ideas where the Court may go in the future
- State and local governments caught in the cross hairs
- Court's reputation has suffered

Just Getting Started

On the docket next term

- Affirmative action—North Carolina case!
- Independent states legislature—North Carolina case!

Pace didn't have to be this quick

- Court hadn't taken a major gun case in almost 15 years
- Court could have denied cert in the abortion case
- Abortion could have been dismantled incrementally

6-3 Conservative Dominates Big Cases & 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

Doctrinal Shifts: Common Theme?

- Abortion—due process
- Guns—history and tradition
- Establishment Clause—accords with history and tradition
- Administrative law—major questions

Crystal Ball: Where Does the Court Want to Go Next/Continue?

Last term

- **Religion**
- First Amendment
- Administrative law
- Guns

Next term

- Race—affirmative action
- 5-4 decisions of the last 50 years—WOTUS wetlands definition
- **Religion**—*303 Creative v. Elenis*

Local Governments are in the Crosshairs

- Counties aren’t a target
- All HUGE decision have collateral impacts
- Some counties will be affected more than others
- Exception: religion!

Court's Reputation: Marquette Law Polling

SCOTUS overall approval rating July **2021**: 61%

SCOTUS overall approval rating July **2022**: 38%

Interesting side notes:

- Enthusiasm and likelihood to vote haven't increased much since May
- Those who favored **overturning** *Roe* are more enthusiastic and likely to vote

VIP Question: Mainly Law or Politics?

September 2019

- Mainly law: 64%

July 2022

- Mainly law: 48%

Justices Aren't Helping—Alito

- "I had the honour this term of writing I think the only supreme court decision in the history of that institution that has been lambasted by a whole string of foreign leaders who felt perfectly fine commenting on American law"
- "One of these was Boris Johnson, but he paid the price"
- "What really wounded me was when the Duke of Sussex addressed the United Nations and seemed to compare the decision whose name may not be spoken with the Russian attack on Ukraine"

Justices Aren't Helping—Kagan

- 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. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence.
- "**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**."

Dobbs v. Jackson Women's Health Organization

Biggest impact of the decision to date in North Carolina *may* be the influx of out of staters seeking abortions in one of North Carolina's 14 abortion clinics (who seek abortions before 20 weeks)

State house elections could change access

This decision may cause different people to run for local office

What's Next for Substantive Due Process Rights?

- This is the number one question people are asking me
- No one knows for sure
- This is the test the Court applies which abortion fails
- 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"

On the Chopping Block: Substantive Due Process Rulings (Dan Bromberg)

Contraceptives (*Griswold/Eisenstadt)*
Private consensual acts (*Lawrence*)

Same sex marriage (*Obergefell*)
Interracial marriage (*Loving*)
Ability to reside with relatives *(Moore)*

Sterilization (*Skinner*)
Involuntary surgery (*Winston*)
Forced administration of drugs (*Rochin*)

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

- People are concerned because of what Justice Thomas said
- "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?

Kavanagh: 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**."
- "A thoughtful Member of this Court once counseled that the difficulty of a question "admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Whitehouse v. Illinois Central R. Co.,* 349 U. S. 366, 372–373 (1955) (Frankfurter, J., for the Court)."

IMHO Opinion these Rights are Safe (for Now)

- Alito (joined by Thomas, Gorsuch, Kavanaugh and Barrett): "But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."
- No one joined Thomas opinion
- Taking Kavanaugh (and Roberts) at their word aren't 5 votes for that **now;** there really might only be one (Thomas) now

That Said a Good Argument Can be Made

Few (none) of the substantive due process rights SCOTUS has identified are "deeply rooted in this Nation's history and tradition" **AND** "implicit in the concept of ordered liberty"

Real question: does this Court want to go there?

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 covering 25% of the U.S. population
- "Shall issue"—an applicant is presumptively entitled to receive a conceal carry permit pending things like and fingerprinting and a background check
- About 25 of "shall issue" jurisdictions allow permit less conceal carry
- NC is a "shall issue" jurisdiction

“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—Text and History

- "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.'"

Test Not Applied

One that includes the **governments interests in regulating guns**

Most lower courts considered this as a factor (and upheld most gun regulations)

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"

Kavanaugh and Roberts Try to Limit Majority Opinion

"[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"

This Language is a Big Deal—Why?

- On one hand it comes directly from *District of Columbia v. Heller* (2008) (individual right to a handgun in the home for lawful purposes)
- Do some of these limits have a weaker historical analogue than NY's long standing conceal carry law?
- Is the message to lower courts: uphold these regulations regardless!?
- Kavanaugh using his role as the Justice in the middle to narrow the Court's holding

What's Next for Gun Litigation?

- Sensitive places
  - New York law: Times Square, bars, theaters, stadiums, museums, casinos, polling places, parks, mass transit
  - Joke: SCOTUS building yes; what about floating bubble around the Justices?
- Dangerous and unusual
- Bans on felons and those with mental illness
- Per Roberts' solo concurrence these "objective" requirements are okay: fingerprinting and background check, a mental health records check, and training in firearms handling and in laws regarding the use of force

What's Next for Gun Litigation? Challenging Test!

- Known, definitive text—text and history
- How will the "history" test be applied
  - Thomas opinion offers some guidance
  - In oral argument Breyer called the history a "muddle" in this case
  - How far back to you look, what sources must be considered, how much of a historical consensus must there be, etc.?
- Big questions: how "literally" with lower courts apply the Thomas decision; how quickly will SCOTUS review lower court gun cases allowing regulation

North Carolina's Gun Laws

Open Carry

- Counties may regulate the display of firearms on public roads, sidewalks, alleys, or other public property, § 153A-129. Firearms.
- Sensitive places—schools, courthouses

Conceal Carry

- Permit
- Firearms training
- 21 years old

What Should North Carolina Counties Do?

- Any aspect of gun regulation could result in a lawsuit—but not all should be losses
- NC's gun regulations are pretty modest and/or a function of state law
- Biggest question for counties: historically could counties regulate the display of firearms on public roads, sidewalks, alleys, or other public property?

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”

Even if every NC county cares ZERO about climate change this case is still a HUGE deal

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."

Implications for Counties that Want to Do Something about Climate Change

They still can!! This decision limits only federal agency authority NOT local (or state) regulatory authority

According to a recent American Council for an Energy-Efficient Economy (ACEEE) blog posting 20 of the 38 large cities which ACEEE follows are “on track to achieve greenhouse gas reductions in 2050 in line with global benchmarks”

According to ACEEE, urban areas currently account for more than 70% of greenhouse gas emissions globally

Beyond CPP: Implications Every Federal Agency Decision that is New and/or Big

- Does the major questions doctrine apply to them; if so, do they pass?
- Various Justices had discussed major questions before; now it is a full-throated legal doctrine
- Six Justices are on board!!

Major Questions: Discussed Before

FDA banning tobacco as a "devise"

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

Major Questions: Coming to a Court Near You?

- SEC corporate disclosure of greenhouse gas emissions
- DACA—Texas immediately sends court of appeals a letter citing this case!
- FCC net neutrality and broadband regulation
- FDA ban methanal cigarettes
- FERC greenhouse gas policy
- FTC rules for new mergers

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

Most Important Point of this Presentation

- SCOTUS has made some changes to **First Amendment religion** doctrine which apply to local governments
- Unclear: how big the changes are how and in what contexts the "new law" will be applied
- Various Justice said explicitly in two case that local government lost because they were applying the wrong First Amendment religion law
- **Elected officials AND <u>regular employees</u> must be educated on these changes because they may come up in more mundane contexts**

SLLC Webinars

Sour *Lemon*: Recent Changes to the U.S. Supreme Court's Establishment Clause Jurisprudence

- September 12
- Open to anyone; designed for elected officials
- NLC host

Seismic Shifts: SCOTUS, Religion & States and Local Governments

- September 21
- Open to anyone; designed for lawyers
- NCSL host

My Focus is on the Establishment Clause but see Free Exercise Changes

- *Employment Division v. Smith* (1990) is a dead letter (law is neutral and generally applicable rational basis applies even if religion is burdened) because *Fulton v. City of Philadelphia* (2021) SCOTUS is going to find that most laws aren't neutral or generally applicable
- Religion has most favored nation status—see *Tandon v. Newsom* (2021) (religion must be treated the same as *any* comparable secular or strict scrutiny applies)
- "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly or even less favorably than the religious exercise at issue."

Additional Reading on Changes to Free Exercise

- Jim Oleske, *Tandon* steals *Fulton*'s thunder: The most important free exercise decision since 1990, SCOTUSblog
- Jim Oleske, *Fulton* quiets *Tandon*'s thunder: A free exercise puzzle, SCOTUSblog
- Maybe *Smith* doesn't matter—Court has given religion "most favored nation status"—see Linda Greenhouse, *What the Supreme Court Did for Religion*, NYT
- Lael Weinberger, *The Surprising Future of Free Exercise of Religion at the Supreme Court*, Newsweek

KISS Analysis

Narrower view of the **Establishment Clause** (government can be more involved with religion without establishing religion)

Broader view of the **Free Exercise Clause** (people have more freedom to express their religion—which government must respect)

In three words: more religious liberty? (which government has to respect)

Shurtleff v. City of Boston

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

Not really about religion; case would have been decided the same if the City refused to fly the KKK flag

Decided in early May 2022

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

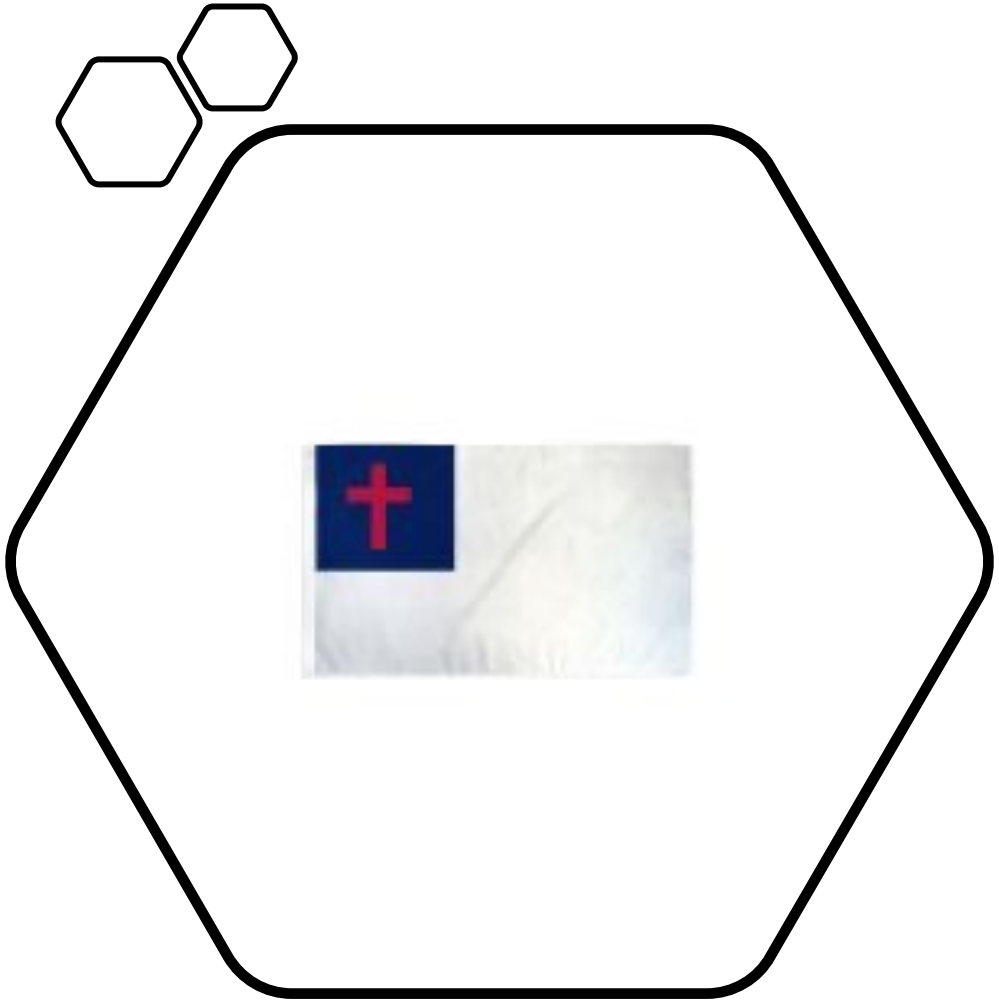
Since 2005 Boston has allowed third parties to fly flags during events held in the plaza

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
- Mr. Rooney was Commissioner of the City's Property Management Department



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[ling] 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

Analysis from SLLC Brief Writer

Dan Bromberg, Pillsbury Winthrop

Win Disguised a as Loss?

- Concurring Justices Alito, Thomas, and Gorsuch would have taken a harder line
  - Flag flying should be treated as government speech only when the speaker is deputized to speak for the government or private speech is “appropriated” by the government
  - Even when governments apply limiting criteria, those criteria must suggest a purposeful government message

Win Disguised a as Loss?

- Majority doesn't identify a "safe harbor" ensuring a third-party program is government speech it should be that hard to make a third-party program government speech
  - Flags generally convey government messages and that a city may convey a government message by flying a third-party flag with another
  - Boston's failure to exercise sufficient control over the content of the third-party flags that it permitted as the most important factor in determining that Boston had created a public forum
  - **"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.'"**

What to Do Now?

- To be safe and satisfy Alito and his colleagues, municipalities may want to state what message that they are conveying in flying specific flags, for example, through a resolution
- Alternatively, municipalities should state that they will fly third-party flags only for certain expressive reasons (such as honoring an individual or organization, celebrating a portion of the community, or endorsing a flag's message) and should actively scrutinize each application to fly a third-party flag
- And it would not hurt for municipalities to assume ownership over third-party flags by requiring that any flags flown be donated to the municipality

Most Counties Don't Fly Third-Party Flags

- So why am I telling you about this case? From Justices Gorsuch and Thomas:
- Boston candidly admits that it refused to fly the petitioners' flag while allowing a secular group to fly a strikingly similar banner. And the city admits it did so for one reason and one reason only: It thought displaying the petitioners' flag would violate "'the [C]onstitution's [E]stablishment [C]lause.'" That decision led directly to this lawsuit, all the years of litigation that followed, and the city's loss today. **Not a single Member of the Court seeks to defend Boston's view that a municipal policy allowing all groups to fly their flags, secular and religious alike, would offend the Establishment Clause. How did the city get it so wrong?** To be fair, at least some of the blame belongs here and traces back to *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

Lemon Refresher

- Establishment Clause test asking the following:
- Did the government have a secular purpose in its challenged action?
- Does the effect of that action advance or inhibit religion?
- Will the government action “excessive[ly] . . . entangl[e]” church and state?
- In the years following *Lemon*, this Court modified its “effects” test by requiring lower courts to ask whether a “reasonable observer” would consider the government’s challenged action to be an “endorsement” of religion

Justice Gorsuch on Why Boston Followed *Lemon*

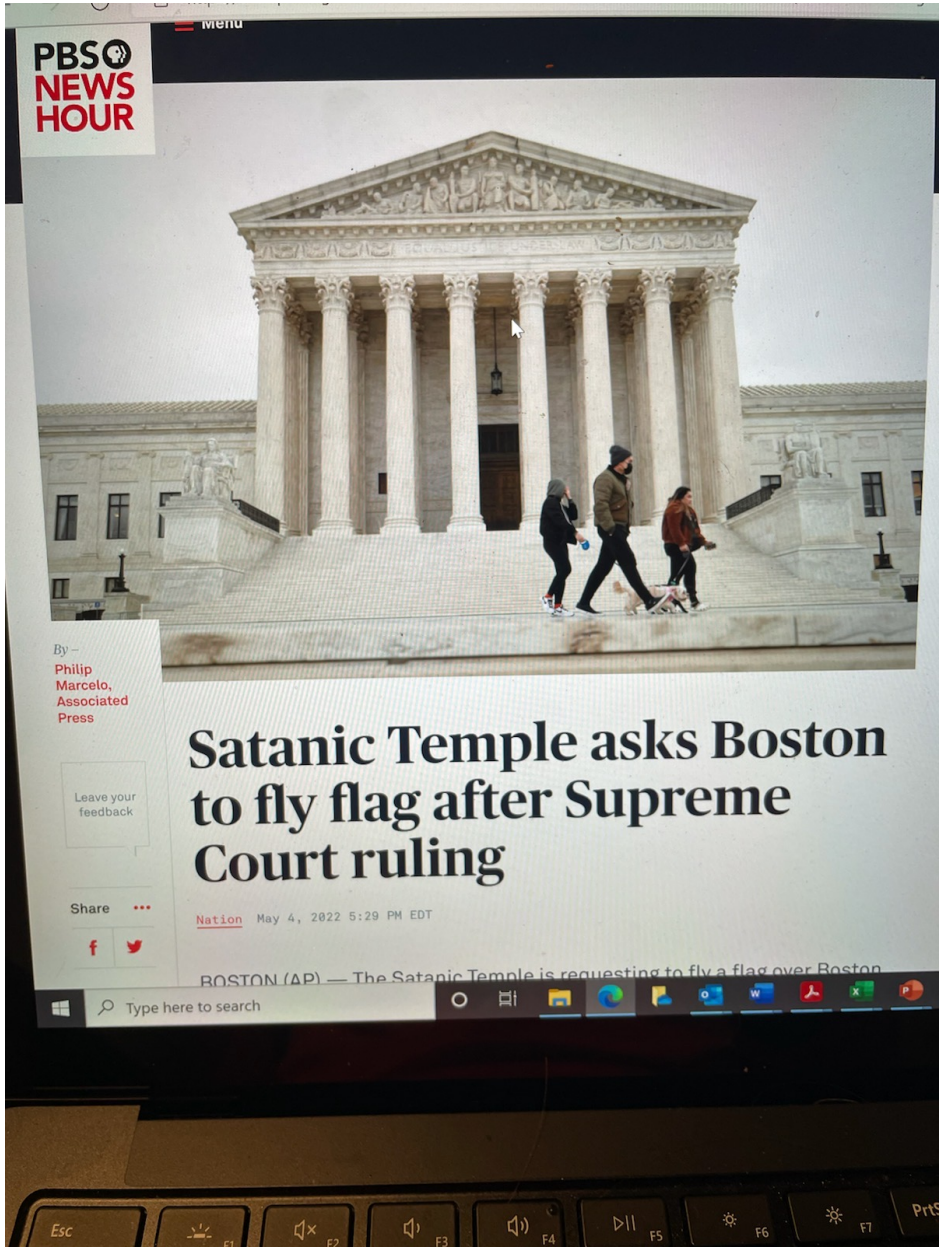
Local government officials are biased or lazy

- "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?
- If not *Lemon* then what?

Never Fear the Satanists Are Here!



Kennedy v. Bremerton School District

- 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 appliable" 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**"

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**.

Initial Showing: District Violated Free Speech Rights

Was 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**."

SLLC *Amicus* Brief is Disagreed

- 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."**

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"

Here is the 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"

What Does this Case Mean for Counties?

Every employee has to be trained to spot what might be an Establishment Clause problem and told to bring that problem to you

You must now do a historical evaluation

I have no idea what an historical evaluation entails

City of Austin v. Reagan National Advertising

Holding: regulating on-premises and off-premises signs differently isn't a content-based distinction

6-3; Justice Sotomayor author

No ruling in the Fourth Circuit on this issue

And Everybody Does it (Disallows Digitized Off-Premises Billboards)

"Tens of thousands of municipalities nation-wide have adopted analogous on-/off-premises distinctions in their sign codes"

Since the Highway Beautification Act of 1965 "approximately two-thirds of States have implemented similar on-/off-premises distinctions"

This is Really a Digitized Billboard Case…or is it?

- 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 strict scrutiny applies to not allowing off-premises signs to be digitized

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**."

If You Read *Reed* Literally the Dissent is Right

"Off-premise sign" 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"

IHMO the real issue isn't whether you have to read a sign to determine whether it is an off-premises or on-premises sign

The real issue is off-premises signs are disallowed based on their message

Justice Thomas (Gorsuch & Barrett) Example

Sign outside a Catholic bookstore

"Visit the Holy Land"—off-premises sign so disallowed

"Buy More Books"—on-premises sign

"Go to Confession"— does a priest hold confession at the bookstore?

How Big Will be the Impact of this Case?

- Depends on what the lower courts have to say about it
- "As a practical matter, I doubt that this holding will affect the results of many cases (other than the ones dealing with the on-/off-premises distinction, which does indeed appear in many sign codes and is now likely to be adopted even more broadly)"
- Eugene Volokh, Supreme Court on What Counts as a Content-Based Speech Restriction, Volokh Conspiracy
- Any narrowing of *Reed* is a win for local governments!

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')."

Houston Community College v. Wilson

A board censure of a board member doesn't violate the First Amendment

Unanimous, very narrow opinion written by Justice Gorsuch

- As Justice Gorsuch describes in his opinion David Wilson's tenure on the Houston Community College board was "stormy"
- He accused the board of violating its bylaws and ethics rules in the media
- He hired a private investigator to determine whether another board member lived in the district which elected her
- He repeatedly sued the board—before the censure legal fees were $270K

Everyone Knows A David Wilson

Would you Also Want to Censure Wilson?

- The board censured him stating his conduct was “not consistent with the best interests of the College” and “not only inappropriate, but reprehensible”

No First Amendment Violation

"[E]lected bodies in this country have long exercised the power to censure their members. In fact, no one before us has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson's has ever been widely considered offensive to the First Amendment"

The Court concluded a censure of a board member by a board isn't an adverse action

"In this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes"

Wilson can't use the First Amendment "as a weapon to silence" his board colleagues who want to "speak freely on questions of government policy," just as he does

Decision: Board to Member Verbal Censure ONLY

- In rejecting Mr. Wilson's claim, we do not mean to suggest that verbal reprimands or censures can never give rise to a First Amendment retaliation claim. It may be, for example, that **government officials who reprimand or censure students, employees, or licensees may in some circumstances materially impair First Amendment freedoms**. Likewise, we do not address today questions concerning **legislative censures accompanied by punishments**, or those aimed at **private individuals**. Nor do we pass on the First Amendment implications of censures or reprimands issued by government bodies against **government officials who do not serve as members of those bodies**.

Would These violate the First Amendment?

Kicked off the board

Privileges taken away

Fined

Jailed—this came up A LOT at oral argument

Censured for matters unrelated to board business

Fourth Circuit Precedent

Whitener v. McWatters, 112 F.3d 740 (4th Cir. 1997), an elected county board of supervisors censured a member for using "abusive language" toward other members of the board in private conversations about board business; court found no First Aemdment violation

Open question: what if the censure was for using "abusive language" against his or her spouse at home?

Special Case for Counties: *Health and Hospital Corp. of Marion County v. Talevski*

Issue: whether private parties may bring lawsuits for money damages under Spending Clause legislation even if the statute doesn't explicit states such suits are possible

SCOTUS has already held that they can: *Wilder v. Virginia Hospital Association* (1990)

Most Spending Clause cases (like *Wilder* and this case) somehow involved Medicaid but Spending Clause lawsuits have brought under the Adoption Act, food stamps, Low-Income Home Energy Assistance Act

See Hunt v. Robeson Cnty. Dep't of Soc. Servs., 816 F.2d 150, 151 (4th Cir. 1987) (Low-Income Home Energy Assistance Act does not 14 give rise to rights enforceable via Section 1983)

If the Court Doesn't Reverse *Wilder*

- It will decide whether private rights of action may be brought against nursing homes under the Federal Nursing Home Rights Act (FNHRA) transfer and medication rules

From the SLLC Brief

- Counties alone own and operate 449 nursing homes, and directly support 758 nationwide. See, National Association of Counties, Nursing Homes & 10 COVID-19
- As far as I can tell every North Carolina county owns/operates at least one nursing home
- The data roundly confirms that county-owned facilities often offer the best patient outcomes

Facts of these Cases Can't be Ever be Good

- Ivanka Talevski sued Valparaiso Care claiming it violated FNHRA's medication rules by giving her husband, who had dementia, unnecessary psychotropic medications for purposes of chemical restraint
- She likewise claimed it violated FNHRA's transfer rules by transferring him to another facility without consent
- (Conservative) Seventh Circuit found a private right of action in a persuasive decision

Seventh Circuit Reasoning

- First, the court concluded Congress intended nursing-home patients to benefit from these sections because it has used "rights" language. For example, the statute states: "[a] skilled nursing facility *must protect and promote the rights of each resident, including each of the following rights.*"
- Second, per the Seventh Circuit, the rights protected under FNHRA's transfer and medication provisions aren't "vague and amorphous." Nursing home facilities must not do exactly what was alleged in this case: "subject residents to chemical restraints for purposes of discipline or convenience and involuntarily transfer or discharge any resident absent one of several allowable justifications and notice."
- Finally, the court opined that the statutory provisions at issue in this case use mandatory rather than precatory terms. "Facilities *must* protect and promote the right against chemical restraints, *must* allow residents to remain in the facility, *must* not transfer, and *must* not discharge the resident; these are unambiguous obligations."

Thanks for attending!

Safe travels home!