SCOTUS Update for Colorado City Attorneys

Lisa Soronen

lisasoronen@gmail.com

Overview of Presentation

- SCOTUS in the big picture
- Replacing Justice Breyer and introducing Justice Jackson
- Future of privacy/substantive due process rights
- Other big cases: guns and Clean Power Plan
- Brief commentary on *Austin* and *Boston*
- Important local government cases from last term
- Brief preview

SCOTUS in the Big Picture

Oh, What A Term!

First Full Term with a 6-3 Conservative Court

- Way too soon to predict what the future will bring (but let's look into my crystal ball anyway…)
- Not too soon to make some observation (only time will tell if these become trends)

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
- Local governments caught in the cross hairs
- Court's reputation has suffered

Just Getting Started

On the docket next term

- Affirmative action
- Independent states legislature theory

Pace didn't have to be this quick

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

6-3 Conservative Court Dominates Beyond Big Cases

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

Local governments aren’t a target

All HUGE decision have collateral impacts

Some local governments 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

- Keynote address at 2022 Notre Dame Religious Liberty Summit in Rome
- "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

- Dissent in the Clean Power Plan case
- 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**."

Replacing Justice Breyer

Very Special Justice for Local Governments

Pragmatic liberal—if your lens starts in the 1930s, he is a moderate

Total skeptic of the *Reed* decision; tried to overrule it in a dissent two terms ago; cited to an SLLC brief in a *Reed*-related case this term

Trust, respect, and concern for government

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)

Worried about her on QI? Read *Kyle v. Bedlion*

Beyond Abortion: What's Next for Substantive Due Process Rights?

- 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?

Other Big Two: Guns and Clean Power Plan

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 (proper cause)

"Shall issue"—an applicant is presumptively entitled to receive a conceal carry permit pending things like and fingerprinting and a background check

Colorado is a shall issue...but this case could have a HUGE impact

“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”

Colorado is a Shall Issue Jurisdiction with Some Discretion

- The sheriff shall deny, revoke, or refuse to renew if any criterion is not met and may do the same even if all criteria are met if there is a **reasonable belief based on documented previous behavior that the person will present a danger to themselves or other**
- Much less discretion than "proper cause" but discretion

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?

Message to lower courts: uphold these regulations!?

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
- Right to have a gun range despite zoning not allowing for gun ranges?

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" will lower courts apply the Thomas decision; how quickly will SCOTUS review lower court gun cases allowing regulation
- My crystal ball says: not all gun regulation will be struck down by the lower courts or SCOTUS

What is the Historical Pedigree of These Colorado Requirements?

- Colorado resident (or military stationed in Colorado)
- 21 or older
- Not be ineligible under federal law or as a previous offender

What is the Historical Pedigree of These Colorado Requirements?

- You have not been **convicted of perjury** in relation to information provided or deliberately omitted on a permit application;
- You do **not chronically and habitually use alcoholic** beverages to the extent that your normal faculties are impaired
- You are not an unlawful **user of, or addicted to, a controlled substance** as defined under federal law and regulations
- You are not subject to a permanent or temporary **protection order** including "extreme risk protection orders" under red flag laws and orders related to being charged with a crime
- You **demonstrate competence with a handgun**

What is the Historical Pedigree of Local Gun Regulation per this NEW Statute?

- "[U]nless otherwise expressly prohibited pursuant to state law, a local government may enact an ordinance, regulation, or other law governing or prohibiting the sale, purchase, transfer, or possession of a firearm, ammunition, or firearm component or accessory that a person may lawfully sell, purchase, transfer, or possess under state or federal law. The local ordinance, regulation, or other law may not impose a requirement on the sale, purchase, transfer, or possession of a firearm, ammunition, or firearm component or accessory that is less restrictive than state law, and any less restrictive ordinance, regulation, or other law enacted by a local government before June 19, 2021, is void and unenforceable."

Is This Definition of "Sensitive Places" too Broad?

- A local government can prohibit concealed carry in "a building or specific area" in the jurisdiction with posted notice. CRS 18-12-214(C)(I)
- If certain procedures are followed, into public buildings (security screening, can leave weapon with security)
- It is also prohibited on school or college grounds (unless locked in vehicles) or where prohibited by federal law

Are These "Dangerous and Unusual"?

- Colorado prohibits possession of silencers, machine guns, short shotguns, short rifles, ballistic knives, blackjacks, gas guns, and brass knuckles. CRS 18-12-102
- Do they have historical analogues?

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”

NLC & USCM filed a SCOTUS brief in support of the CPP

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 Clear 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 Cities 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
- 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

Brief Commentary *Austin* and *Boston*

I think the Dissent in *Austin* is Correct

- Austin's sign code treats on-premise and off-premise signs different IMHO
- "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"
- Remember: no new off-premises signs are allowed

Thomas's Catholic Book Store Example

- It is the content not the location that determines whether a sign is off-premises
- "Visit the Holy Land"—off premises, disallowed
- "Buy More Books"—on premises, allowed
- "Go to Confession"—does a priest do confession at the store; if yes sign is on premise and allowed; if no sign is off-premises and disallowed

Practical Impact of *Austin* Likely Limited

- "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
- Depends on what the lower courts have to say about it
- More of a symbolic victory

Real Victory: Getting Kavanagh (and Roberts) to Join the Majority Opinion

- So as to prime them for further narrowing of *Reed*?

Boston and the Values of *Amicus* Briefs

- 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
- SLLC asked for a narrow ruling with advice and got it

Don’t Discount this Case as a Government Speech Case

- Narrow, hardly any cities have third-party flag programs
- But this is one of only a few government speech cases
- “The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program”

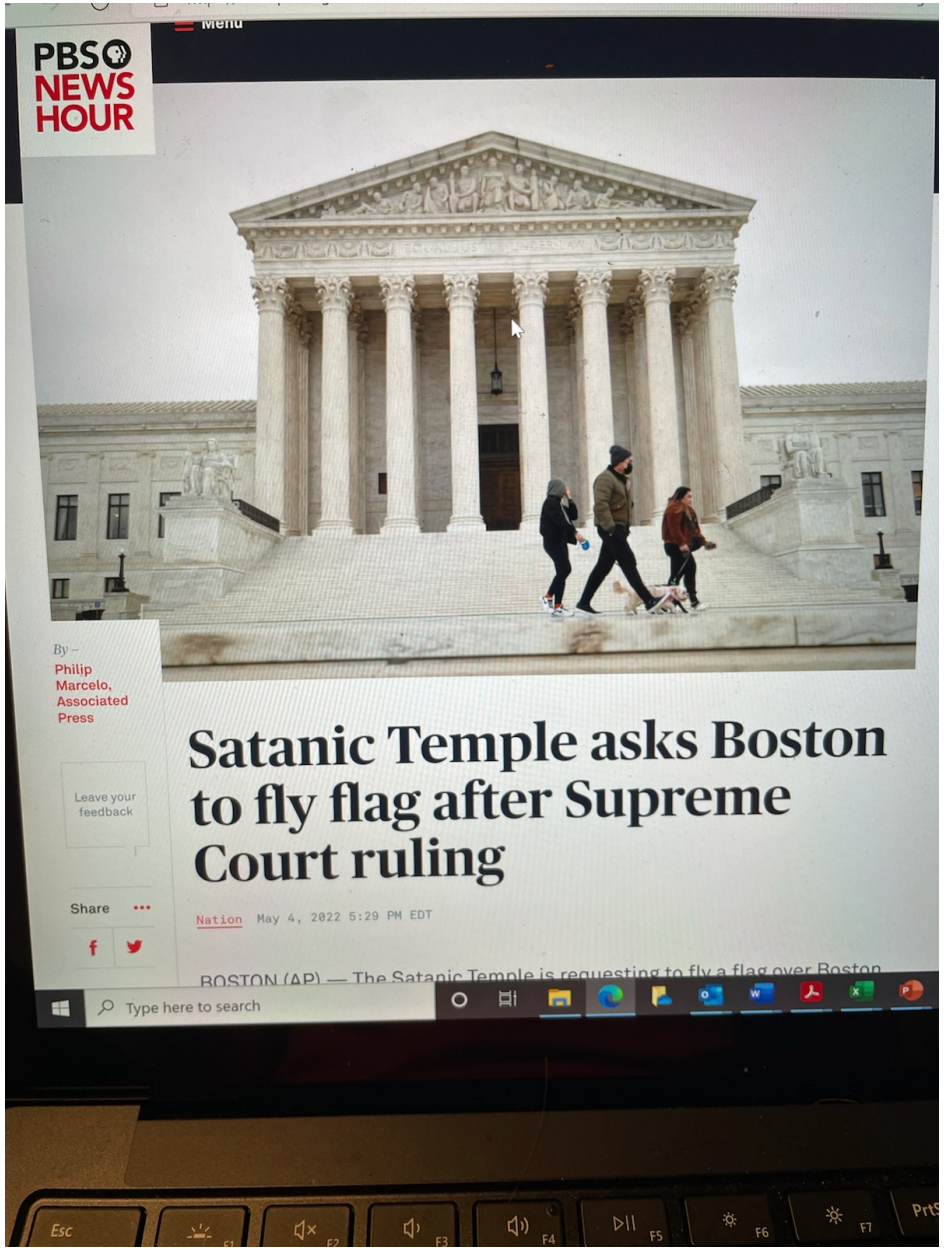
Gorsuch Really Went After Boston

- Per 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).

Justice Gorsuch on Why Boston Followed *Lemon*

Local government officials are biased or lazy	My response
• "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"	• Court has never overruled *Lemon* • Establishment Clause has to mean something? • If not *Lemon* then what?

Never Fear the Satanists Are Here!



Important Local Government Cases from Last Term

- One more First Amendment case
- Couple of cop cases

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 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 (and therefore receives some First Amendment protection)

"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 Local Governments?

Every Establishment Clause religion question should go to you for a historical evaluation

Is that possible/likely?

How do you do a historical evaluation?

Lots of Challenges with Doing a Historical Analysis

- What historical sources must be considered?
- What if the Founding Fathers disagreed?
- What if the Founding Fathers didn’t contemplate a particular issue?
- (What if their views are significantly out of step with modern life)?

Employee v. Citizen Angle

- Kennedy was at work in front of students and parents when he was praying
- He had access to the field because he was an employee
- IMHO he commandeered his job for his personal agenda
- Of course the school district didn't ask him to pray but why should that necessarily matter?
- Employees are going to argue for a very narrow scope of job duties

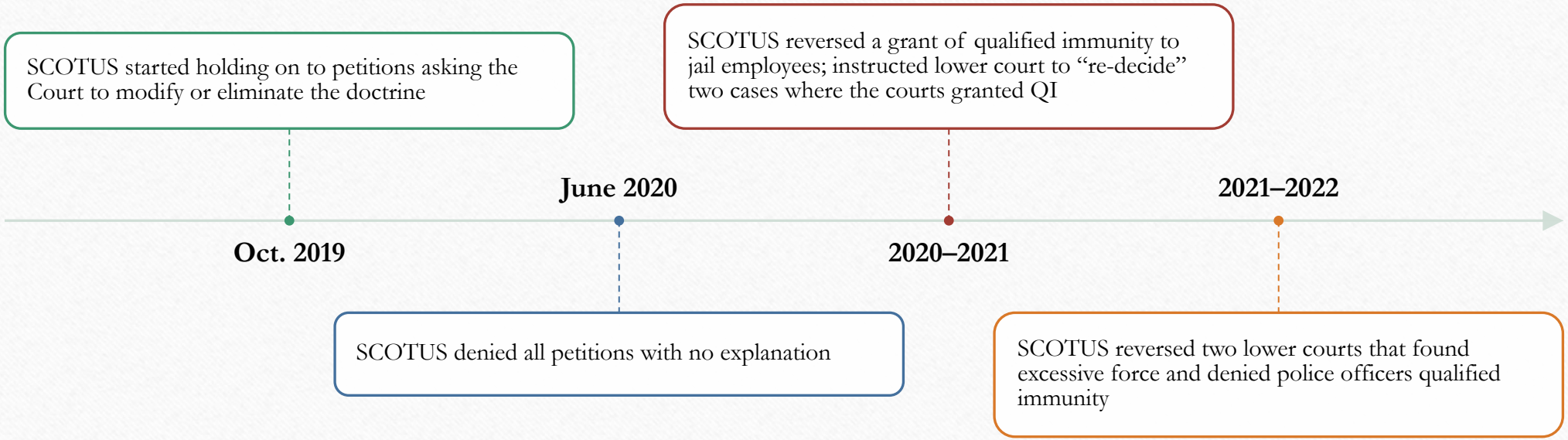
Drawing the Line Between *Kennedy* and *Ceballos*

- Both did something their employer didn't want them to do on work time
  - Kennedy—praying
  - Ceballos—wrote a memo with a recommendation his supervisors didn't like
- For sure it was Ceballos's job to write memos with recommendations
- For sure it wasn't Kennedy's job to pray
- I don't this line is fair to employers because it allows commandeering on work time

IMLA Webinar on Religion

- **September 29 @ 1:00 pm - 2:00 pm**
- **Seismic Shifts: SCOTUS, Religion & States and Local Governments**
- In the past few years, the U.S. Supreme Court has issued several significant decisions regarding its legal doctrines involving religion. Most notably, local governments lost two cases last term for applying incorrect legal tests! Last term SCOTUS embraced a narrow view of the Establishment Clause in a tuition assistance case and a public forum case and overturned *Lemon* in a public employment case. Recently, SCOTUS has embraced a broad view of the Free Exercise Clause in a series of COVID cases and a case involving the City of Philadelphia. And it may continue this trend in the upcoming term in a case involving a web designer who objects on religious grounds to making custom wedding websites for same-sex couples. The presentation will discuss these cases, trends, and practical guidance on SCOTUS and religion.
- **Speaker:** Lisa Soronen, Erin Murphy & Joshua Matz

Qualified Immunity: A Timeline



What is SCOTUS Thinking about QI?

- Holding onto the petitions asking to eliminate/modify the doctrine and reversing grants of qualified immunity raised concerns
- The QI decisions last term have reduced my worry

Rivas-Villegas v. Cortesluna (9th Circuit)

- A girl told 911 she, her sister, and her mother had shut themselves into a room because their mother's boyfriend, Cortesluna, was trying to hurt them and had a chainsaw
- Officers ordered Cortesluna to leave the house
- They noticed he had a knife sticking out from the front left pocket of his pants
- Officers told Cortesluna to put his hands up. When he put his hands down, they shot him twice with a beanbag shotgun
- Cortesluna then raised his hands and got down as instructed
- Officer Rivas-Villegas placed his left knee on the left side of Cortesluna's back, near where Cortesluna had the knife in his pocket, and raised both of Cortesluna's arms up behind his back
- Another officer removed the knife and handcuffed Cortesluna. Rivas-Villegas had his knee on Cortesluna's back for no more than eight seconds

Two Ships Passing in the Night

- The Ninth Circuit concluded that circuit precedent, *LaLonde v. County of Riverside*, indicated that leaning with a knee on a suspect who is lying face-down on the ground and isn't resisting is excessive force
- The Supreme Court reasoned *LaLonde* is "materially distinguishable and thus does not govern the facts of this case"
- In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. In addition, LaLonde was unarmed. Cortesluna, in contrast, had a knife protruding from his left pocket for which he had just previously appeared to reach. Further, in this case, video evidence shows, and Cortesluna does not dispute, that Rivas-Villegas placed his knee on Cortesluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. LaLonde, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police.

City of Tahlequah v. Bond (10th Circuit)

- Dominic Rollice's ex-wife told 911 that Rollice was in her garage, intoxicated, and would not leave
- While the officers were talking to Rollice he grabbed a hammer and faced them
- He grasped the handle of the hammer with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level
- The officers yelled to him to drop it
- Instead, he came out from behind a piece of furniture so that he had an unobstructed path to one of the officers
- He then raised the hammer higher back behind his head and took a stance as if he was about to throw it or charge at the officers
- Two officers fired their weapons and killed him

Two Ships Passing in the Night

- *Allen v. Muskogee* circuit court precedent
- "[T]he facts of *Allen* are dramatically different from the facts here. The officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands. Officers Girdner and Vick, by contrast, engaged in a conversation with Rollice, followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer."

Make Sure Cops are Educated about Circuit Court Precedent

- But police officers **aren't actually educated about the facts and holdings of cases** that "clearly establish" the law, so it makes no sense that victims of police misconduct are denied relief unless and until they can find them.
- I examined hundreds of use-of-force policies, trainings and other educational materials received by California law enforcement officers. **I found officers are educated about watershed decisions like Graham but are not regularly or reliably educated about court decisions interpreting those watershed decisions** – the very types of decisions that are necessary to clearly establish the law for qualified immunity purposes.
- Joanna Schwartz, *Supreme Court just doubled down on flawed qualified immunity rule. Why that matters*, USA Today

Thompson v. Clark

- Holding: to demonstrate a favorable termination of a criminal prosecution in order to bring a Fourth Amendment malicious prosecution case a plaintiff need only show that his or her prosecution **ended without a conviction**
- Per Second Circuit precedent a malicious prosecution case can only be brought if the prosecution ends not merely without a conviction but with **some affirmative indication of innocence**
- 10th Circuit agreed with the Second Circuit: *Cordova v. City of Albuquerque*, 816 F.3d 645, 651 (10th Cir. 2016) (citing *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008)) "Instead, the termination must in some way 'indicate the innocence of the accused'"
- 6-3 decision written by Justice Kavanaugh

No Good Deed Goes Unpunished

- Larry Thompson's sister-in-law, who lived with him and suffers from mental illness, reported to 911 that he was sexually abusing his one-week-old daughter
- Thompson refused to let police in his apartment without a warrant
- After a "brief scuffle" police arrested Thompson and charged him with obstructing governmental administration and resisting arrest
- Medical professionals at the hospital determined Thompson's daughter had diaper rash and found no signs of abuse

Holding

Before trial the prosecutor moved to dismiss the charges and the trial judge agreed to do so without explaining why

Thompson then sued the officers who arrested him for malicious prosecution under the Fourth Amendment

Second Circuit dismisses the case because there is no affirmative indication of innocence

SCOTUS held Fourth Amendment malicious prosecution case may be brought as long as there is no conviction

Reasoning

- According to the Court, to determine what favorable termination entails—a prosecution ending merely without a conviction or instead with an affirmative indication of innocence—the Court had to determine what courts required in 1871 when Section 1983 was adopted
- The parties "identified only one court that required something more, such as an acquittal or a dismissal accompanied by some affirmative indication of innocence"
- So, the Supreme Court reasoned, no conviction is enough for a prosecution to be favorably terminated

SLLC *Amicus* Brief

Thompson described his claim as malicious prosecution under the Fourth Amendment and the Court treated it as such

The SLLC *amicus* brief argued Thompson was really making a false imprisonment claim under the Due Process Clause

Favorable termination isn't an element of a false imprisonment claim

Dissenting Justices Alito, Thomas, and Gorsuch agreed and would have held malicious prosecution claims can't be brought under the Fourth Amendment

Dissent Reasoning

"The Fourth Amendment and malicious prosecution have almost nothing in common"

The Fourth Amendment prohibits "unreasonable searches and seizures"

Such claims don't involve a prosecution, malice, and are "not dependent on the outcome of any prosecution that happens to follow a seizure"

Likewise, "[s]ince a malicious-prosecution claim does not require a seizure, it obviously does not require proof that the person bringing suit was seized without probable cause"

Vega v. Tekoh

- Issue: whether a police officer can be sued for money damages for failing to provide a *Miranda* warning
- Ninth Circuit held yes; SCOTUS held no
- No change in the law in the 10th Circuit
- Bennett v. Passic, 545 F.2d 1260 (10th Cir. 1976) ("[e]ven assuming that Bennett's confession should have been excluded from the evidence at his trial, . . . [t]he Constitution and laws of the United States do not guarantee Bennett the right to Miranda warnings")

Ninth Circuit Ruling: Very Bad Cities

- Police officers must constantly decide whether *Miranda* rights must be read; depends on whether someone is in "custody"; not all that clear when someone is in "custody"
- The prosecutor and the judge not the police officer decide whether evidence obtained without reading *Miranda* rights is admitted in a trial
- Exclusionary rule is the remedy for *Miranda* violations

Key to Understanding This Case

- Fifth Amendment which protects against self-incrimination including forced confessions
- Local governments officials can be sued for money damages for obtaining a **coerced** confession
- *Miranda* is supposed to stop police officers from obtaining **coerced** confession
- But failing to recite *Miranda* warning may not result in a coerced confession
- Million dollar question: is *Miranda* a **right** (if it is money damages are available if it is violated)

Vega v. Tekoh

- SCOTUS reverses in a 6-3 opinion written by Justice Alito
- *Miranda* isn't a **constitutional right**; it is **rule** that intended to prevent a constitutional violation coercion
- "In *Miranda,* the Court concluded that additional procedural protections were necessary to prevent the violation of this important right when suspects who are in custody are interrogated by the police." So, *Miranda* imposed a set of prophylactic rules. "At no point in the opinion did the Court state that a violation of its new rules constituted a violation of the Fifth Amendment right against compelled self-incrimination. Instead, it claimed only that those rules were needed to safeguard that right during custodial interrogation."

Local Government Preview

- *303 Creative v. Elenis*: does the First Amendment Free Speech Clause require Colorado to carve out an exception to a public accommodations statute for speakers whose religious beliefs include opposing same-sex-marriage
- *Sackett v. EPA*: what is the proper test for determining when wetlands are "waters of the United States" per the Clean Water Act
- *Harper v. Moore*: Whether a state's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives ... prescribed ... by the Legislature thereof," and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election

Thanks for attending!

Safe travels home!