SCOTUS Review

Organized by the **State and Local Legal Center**

Hosted by the **National Association of Counties**

Featuring **Dan Bromberg**, Roman Martinez, and **Luke McCloud**

About the Webinar

Speakers' bios and handouts

Questions

Recording

Technical difficulties

The views expressed in this webinar do not necessarily reflect the views any of the sponsoring organizations

About the SLLC

- National Governors Association
- National Conference of State Legislatures
- Council for State Governments
- National Association of Counties
- National League of Cities
- U.S. Conference of Mayors
- International City/County Management Association
- International Municipal Lawyers Association
- Government Finance Officers Association

About NACo

- **NACo strengthens America's counties,** serving nearly 40,000 county elected officials and 3.6 million county employees. Founded in 1935, NACo unites county officials to:
  - **Advocate county priorities** in federal policymaking
  - **Promote exemplary county policies** and practices
  - **Nurture leadership skills** and expand knowledge networks
  - **Optimize county and taxpayer resources** and cost savings, and
  - **Enrich the public's understanding** of county government.

Big Picture Thoughts on the Term?

About the Speakers

Dan Bromberg, Pillsbury

Roman Martinez, Latham & Watkins

Luke McCloud, Williams & Connolly

Dobbs v. Jackson Women's Health Organization

Dobbs v. Jackson Women's Health Organization—Background

- The Mississippi Gestational Age Act § 4(b):

  Except in a medical emergency or in the case of a severe fetal abnormality , a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.

- The question presented

  Whether all pre-viability prohibitions on elective abortions are unconstitutional

- Justice Barrett joins the Court, and Mississippi raises the stakes

Dobbs v. Jackson Women's Health Organization—The Majority's Ruling

- Five Justices (Alito, joined by Thomas, Gorsuch, Kavanaugh, and Barrett)
- No constitutional right to an abortion
  - *Roe* was "egregiously wrong"
  - Right to abortion not deeply rooted in history and not essential to ordered liberty
- Stare decisis inapplicable
  - Egregiously wrong and exceptionally weak grounds
  - Unworkable in practice and no significant reliance
  - Unimportant that appear to be submitting to social/political pressure
- Rational basis scrutiny

Dobbs v. Jackson Women's Health Organization— The Majority's Assurances

- Substantive due process "has long been controversial" and applies only where deeply rooted in history or an essential component of ordered liberty
- Disclaims intent to overrule other substantive due process precedents
  - "What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'"
  - "the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. But we have stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.'"

Dobbs v. Jackson Women's Health Organization—Concurrences

- Thomas

  "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*"

- Kavanaugh
  - Abortion is a "profoundly difficult and contentious issue" on which the interests on both sides are "extraordinarily weighty," but asserts that the Court "must be scrupulously neutral."
  - Retroactive punishment and prohibition against travel to another state for abortion likely unconstitutional
- Roberts

  Concurs in the judgment, but argues Court should exercise restraint and reject the viability line in favor of a "reasonable opportunity to choose" standard

Dobbs v. Jackson Women's Health Organization—The Dissent

- Breyer, joined by Sotomayor and Kagan
- Choice words
  - "The Court reverses court today for one reason and one reason only: because the composition of this Court has changed."
  - "The majority thereby substitutes a rule of judges for the rule of law."
  - Justices who wrote the *Casey* decision—O'Connor, Kennedy, and Souter—were "judges of wisdom."
  - "To the majority 'balance' is a dirty word, as moderation is a foreign concept."
- Historical focus "consigns woman to second-class citizenship."

Dobbs v. Jackson Women's Health Organization—Immediate Impact

- State legislation
  - Over half likely to ban abortion or severely restrict time.
  - Criminalization
  - Exceptions: life/health, rape/incest, and fetal abnormality
  - Focus likely on medicated abortions, now used in 54% of abortions, including advertising and interstate shipments
  - Insurance coverage
  - Support services
- Federal legislation
- State constitutional law
- Federal constitutional limits

Dobbs v. Jackson Women's Health Organization— Substantive Due Process Precedents

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*)

West Virginia v. EPA

- Power Plant Emissions
- The Clean Power Plan (CPP) requires "generation shifting"
  - Coal => natural gas => zero or low emissions (hydro, solar, thermal)
- CPP never implemented
  - CPP stayed and replaced by Affordable Clean Energy (ACE) plan
  - After ACE overturned, Biden Administration request stay pending new rule
- Nevertheless, Supreme Court grants review

West Virginia v. EPA – The Clean Air Act

- Regulatory Programs
  - Sections 108-10: National Ambient Air Quality Standard
  - Section 112: Hazardous Air Pollutants
  - Section 111: New (Stationary) Source Performance Standards
- Standard of performance:

  the degree of emission limitation achievable through the application of the *best system of emission reduction* which (taking into account the cost of achieving such reductions and any nonair qualify health and environmental impact and energy requirements) the Administrator determines as been adequately demonstrated

West Virginia v. EPA – The Majority Opinion

- Adopts Major Questions Doctrine
- The underlying rationale
  - Congress is unlikely to make extraordinary grants of power in seemingly minor, ambiguous provisions
- Clear statement requirement
- Minimal textual analysis

West Virginia v. EPA – Gorsuch concurrence

- Argues Major Questions Doctrine applies broadly:
  - Matters of great political significance
  - Subject to earnest and profound debate across the country
  - Affecting a significant portion of the economy
  - Intrude into traditional state law domain
- Clear statement requirement bars extension of old statutes or rejection of past agency interpretations

West Virginia v. EPA – Kagan Dissent

- Criticizes majority for ignoring text
- Possibly best zinger of the Term

  The current court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major question doctrine' magically appear as *get-out-of-text free cards*.

- Defends delegations of broad administrative power

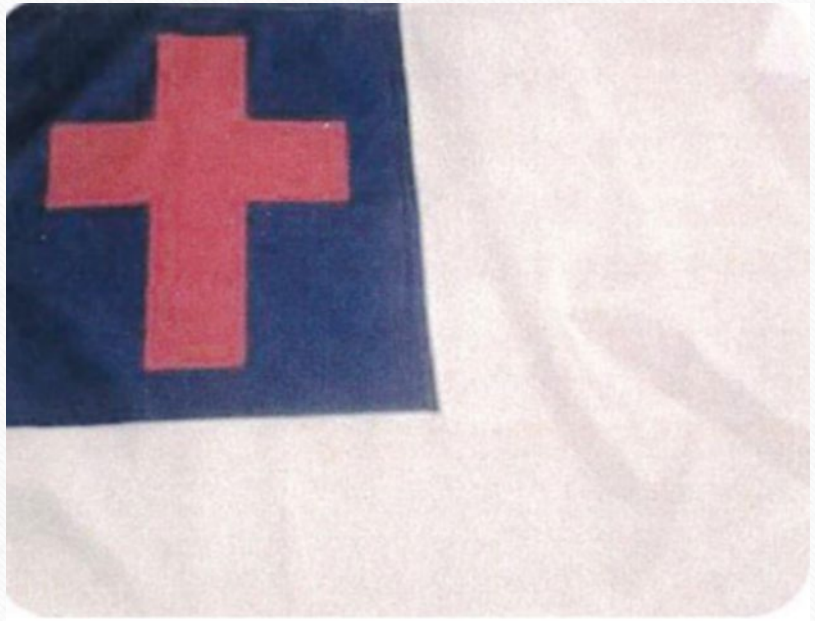
West Virginia v. EPA – Assessment

- Immediate impact limited
  - CPP goals already met
  - Section 111 still allows EPA to severely limit emissions
- Does not reach *Chevron*
- Nonetheless, aggressive change in administrative law

Shurtleff v. City of Boston— The "Christian Flag"

Source: Preservation Priorities, Boston Preservation Alliance (Feb. 3, 2022), https://boston-preservation.org/news-item/preservation-priorities-letter-mayor-wu

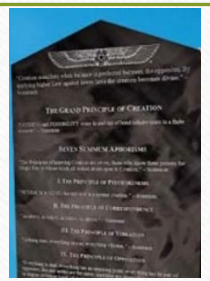
Shurtleff v. City of Boston— The "Christian Flag"



Source: App. to Pet. for Cert. 132a

Shurtleff v. City of Boston— Government v. Private Speech

- The Establishment Clause does not prohibit religious speech in public fora. *See, e.g., Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).
- Government may not bar speech because it expresses a religious viewpoint. *Rosenberger*; *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).
- Government may engage in speech and select the viewpoint expressed in that speech. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). *But see Matal v. Tam*, 137 U.S. 1744 (2017).



Shurtleff v. City of Boston— The SLLC Amicus Brief

Shurtleff v. City of Boston— Important Government Messages

- Celebrating diversity of citizens
- Commemorating city heritage
- Celebrating individuals or institutions
- Welcoming tourists and foreign dignitaries
- Political Messages (POW/MIA, LGBTQ Pride, Black Lives Matter)

Shurtleff v. City of Boston— The SLLC Amicus Brief

Shurtleff v. City of Boston— Public Forum May Be Unacceptable

- "no local government would grant a request to fly the Irish flag on St. Patrick's Day if doing so would force it to fly an ISIS flag upon request. Nor would any local government fly a Kiwanis Club flag if doing so also would force it to fly the KKK or Nazi flag."
- "no Michigan town would accept being forced to fly the Ohio State University flag if its flagpole were deemed a public forum. And if Boston were forced to hoist the Yankee flag over its city hall, there would likely be tea in the harbor."

Shurtleff v. City of Boston— Oral argument

- Justice Kagan (at 9)

  "so the city has [a policy of allowing third-party flags], and then somebody comes to it and says, we'd like to put up this swastika on your pole. Does the city really have to say yes at that point?

- Justice Kavanaugh (at 10)

  "Can the City allow patriotic flags or messages of support and not those that are anti-American? For example, to pick up on Justice Kagan's question, someone wants to fly the al Qaeda flag at City Hall in Boston. You're -- you're saying they would have a right to do so?"

- Justice Breyer (at 14)

  - Record shows that Boston has flown numerous flags but "[t]hat does not show they's going to have every conceivable group, including the KKK and so forth."

Shurtleff v. City of Boston— Majority Opinion

- Breyer, J., for unanimous court,
- Finds public forum created under *Summum*/*Walker* test
  - General history
  - Public perception
  - Active control ("the most salient feature of this case")
- Advice = make it clear that speaking for itself by raising flags
    - San Jose: written statement that "flagpoles are not intended to serve as a forum for free expression" and that lists flags that may be flows "as an expression of the City's official sentiments"

Shurtleff v. City of Boston— Concurrences

- Alito, joined by Thomas and Gorsuch
  - Active control is a dangerous criterion
  - Government speech should be defined as "the purposeful communication of a governmentally determined message by a person exercising a power to speak for a government"
- Kavanaugh
  - Establishment Clause does not bar religious viewpoints from public fora
- Gorsuch, joined by Thomas
  - "*Lemon* devolved into a kind of children's game. Start with a Christmas scene, a menorah, or a flag. Then pick your own "reasonable observer" avatar. In this game, the avatar's default settings are lazy, uninformed about history, and not particularly inclined to legal research. His default mood is irritable. To play, expose your avatar to the display and ask for his reaction. How does he feel about it? Mind you: Don't ask him whether the proposed display actually amounts to an establishment of religion. Just ask him if he feels it "endorses" religion. If so, game over."

Shurtleff v. City of Boston— Practical Recommendations

- Limit the number of third-party flags permitted
- Actively review requests
- Do not connect with private events
- Issue resolutions each time and identify message conveyed
- Follow San Jose and say in writing that expressing official sentiment and not creating public forum
- Impose subject matter limits (just in case)

Shurtleff v. City of Boston— Postscript

Following Supreme Court ruling, Salem's Satanic Temple wants to fly its flag at Boston City Hall

By Danny McDonald Globe Staff, Updated May 4, 2022, 2:29 p.m.

88

New York State Rifle & Pistol Association Inc. v. Bruen

- Plaintiffs challenged a New York state law that required a person to show "a special need for self-protection" in order to receive an unrestricted license to carry a concealed firearm outside the home.
- **Question Presented:** Whether New York's licensing regime violated the Second Amendment right to carry handguns in self-defense.

New York State Rifle & Pistol Association Inc. v. Bruen

Holding: New York's proper-cause requirement for obtaining an unrestricted license to carry a concealed firearm violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms.

Votes: Justice Thomas wrote the majority opinion. Justice Alito filed a concurring opinion. Justice Kavanaugh filed a concurring opinion, in which Chief Justice Roberts joined. Justice Barrett filed a concurring opinion. Justice Breyer filed a dissenting opinion, in which Justices Sotomayor and Kagan joined.

Why it matters: Limits the government's ability to restrict the possession of firearms in public places. Also announces a history-and-tradition test for analyzing Second Amendment claims.

Kennedy v. Bremerton School District

- Joseph Kennedy, a high school football coach, engaged in prayer voluntarily joined by a number of students during and after games. His employer, the Bremerton School District, terminated him.
- Kennedy sued the school district for violating his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.
- **Question Presented:** Whether terminating Kennedy violated his rights under the First Amendment.

Kennedy v. Bremerton School District

Holding: The free exercise and free speech clauses of the First Amendment protect from government reprisal a school employee engaging in a personal religious observance on school property during school sporting activities.

Votes: Justice Gorsuch wrote the opinion, in which Chief Justice Roberts, Justices Thomas, Alito, and Barrett joined, and in which Justice Kavanaugh joined except as to Part III-B. Justices Thomas and Alito filed concurring opinions. Justice Sotomayor filed a dissenting opinion, in which Justices Breyer and Kagan joined.

Why it matters: Limits the ability of state and local governments to prevent employees from engaging in religious practice on the job and narrows the margin of error for government entities seeking to avoid violating the Establishment and Free Exercise Clauses.

Vega v. Tekoh

- Plaintiff: Terence Tekoh was an orderly in an L.A. hospital accused by a patient of sexual assault.
- Defendant: Deputy Carlos Vega went to the hospital to question Tekoh and take his statement. Vega did not advise Tekoh of his *Miranda* rights. At Tekoh's trial, two state judges agreed that Miranda warning were not required.
- After being acquitted, Tekoh sued Vega under Section 1983, arguing that Vega violated Tekoh's Fifth Amendment right against self-incrimination by taking Tekoh's statement without first advising him of his *Miranda* rights, even if the statements were not actually compelled. The Ninth Circuit agreed that Tekoh's theory was viable.
- **Question Presented:** Whether a plaintiff may sue a police officer under Section 1983 based on the allegedly improper admission of an un-Mirandized statement in a criminal prosecution.

Vega v. Tekoh

Holding: The use of an un-*Mirandized* statement against a defendant in a criminal case does not provide a basis for a claim under Section 1983.

Votes: Justice Alito wrote the opinion of the Court, in which Chief Justice Roberts, and Justices Thomas, Gorsuch, Kavanaugh, and Barrett joined. Justice Kagan filed a dissenting opinion, in which Justices Breyer and Sotomayor joined.

Why it matters: Bars civil liability for police officers for failing to read *Miranda* rights, leaving exclusion of evidence the sole remedy for violations.

Government Speech

Houston Community College System v. Wilson

Holding: Community college board's purely verbal censure of a board member did not violate the First Amendment

Notable: The decision was unanimous.

- "Adverse action" for purposes of a 1A retaliation claim must be "material"
- Leaves open the door to challenges by other kinds of litigants or involving more severe punishments

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Free Speech

City of Austin v. Reagan National Advertising of Austin

Holding: Austin's ordinance regulating "off-premises" signs more strictly than "on-premises" signs was not a content-based restriction of speech.

Notable: Case was 6-3, but the justices issued four opinions

- Justice Sotomayor (majority opinion): A law isn't content based just because you need to read the sign to apply the law
- Justice Breyer (concurring): Content-based restrictions shouldn't be subject to strict scrutiny
- Justice Alito (concurring): Some sign-owners might have won as-applied challenges
- Justice Thomas (dissenting): The majority replaces a bright line with a fuzzy, unpredictable standard

Religious Freedom

Carson v. Makin

Holding: Maine violated the Free Exercise Clause by prohibiting "sectarian" private schools from participating in a school voucher program

Notable: The Court says that in some circumstances governments *must* fund religion notwithstanding the establishment clause.

- Programs that treat religious organizations differently because of their status or their religious use of money are suspect
- Justices Breyer and Sotomayor both dissented: decision is unwise and unprecedented

Upcoming SLLC Webinars

- Establishment Clause/Kennedy
- SCOTUS and Religion
- SCOTUS Preview

Thanks for attending!

Register soon for the SLLC SCOTUS PREVIEW webinar