

Supreme Court Update for Georgia Cities

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Overview of Presentation

Hot topics before SCOTUS not involving local governments

Big cases for cities before SCOTUS



Imagine Yourself Volunteering on MLK Jr Day of Service

- And SCOTUS comes up
- What might people be talking about (that doesn't relate to local government)?

Abortion



Court Has Three Options

1

Overturn *Roe v. Wade*—
hold no federal right to
an abortion at all

2

Narrow *Roe v. Wade*—
federal right to abortion
up to...say 15 weeks (or
14, 13, 12, etc.)

3

Leave *Roe v. Wade* as is—
reaffirm federal right to
an abortion until to
viability (23-24 weeks)

Oral Argument Analysis

- *Roe* is most likely to be overturned
- Only **Roberts** seemed clearly interested in narrowing *Roe*
- Barrett was hardest to read but expressed no interest in narrowing *Roe*
- Kavanaugh said repeatedly he thinks the constitution is neutral as to abortion to Congress and state legislatures should decide
- Gorsuch discussed narrowing *Roe* but his questions seemed to indicate he didn't think doing so was possible

Biden Vaccine Mandate

- 100 or more employees vaccinate or test weekly+ masks
 - Does not apply to local governments in GA
- Health care workers at facilities that participate in Medicare/Medicaid must be vaccinated
- Oral argument Jan. 7
- "This isn't really a case about emergency public health powers or even vaccination law, so much as it's a case about how much flexibility do administrative agencies have to respond to a problem or a threat without waiting for specific authorization from Congress," said Lindsay Wiley, a health law professor at American University's Washington School of Law.

Local Government Docket

- Guns
- Signs
- Flags (government speech)
- Board members behaving badly

Guns, Guns, and More Guns!

- The Supreme Court that ultimately decides what the Second Amendment means
- Supreme Court has only decided **one big gun case ever**
- In 2008 in *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation”
- Narrowest reading: handgun in your home for self-defense reasons is okay

New York State Rifle and Pistol Association v. Corlett

- Issue: may states (or local governments) prevent persons from obtaining a concealed-carry license for self-defense if they lack “proper cause”
- New York case law requires an applicant to “demonstrate a special need for self-protection distinguishable from that of the general community” to satisfy the proper cause standard
- Wanting a gun, liking guns isn’t “proper cause”

Georgia's Conceal Carry Requirements

- Are much more rigorous than some states
 - No drug convictions
 - No mental health hospitalization or drug treatment in the last 5 years
- But nothing like New York's requirements

Before Oral Argument

- Easy to find five votes (probably 6 counting Roberts) to overturn New York's law

Oral Argument Analysis

- No big surprises
- Conservatives don't like discretion
 - Other rights don't depend on discretion
 - Should guns be more allowed in urban areas
- Is there more gun violence in big cities in “shall issue” jurisdictions
 - Yes: John Donohue, Abhay Aneja & Kyle D. Webe, Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis, 16 J. Empirical Legal Stud. 198, 200 (2019) (right-to-carry laws increase violent crime 13-15%)

Text, History, and Tradition

- Three litigations (United States supported New York)—all said text, tradition, and history support their position
- All comes down to history (which seems to be a bit of a muddle)
- Justice Breyer: “This is a wonderful case for showing [how history supports] both sides. So, I am not sure how to deal with the history.”
- Statute of Northampton (1328)
- “[N]o man great nor small ... except the King’s servants in his presence” shall “go nor ride **armed** by night nor by day, in fairs, markets ... nor in no part elsewhere” or “forfeit their armour ... and their bodies to prison at the King’s pleasure.”
- Was this law intended only to restrict “dangerous and unusual weapons” that would “terrify” the public?

Polling Questions

- Does your city's sign code treat off-premises and on-premises signs differently?
 - Yes
 - No

City of Austin v. Reagan National Advertising

- Issue: whether allowing on-premises billboards to be digitized but not off-premises billboards is “content-based” under the First Amendment
- On premises: McDonalds sign at a McDonalds location
- Off premises: McDonalds billboard on a highway
- Why might a local government adopt a policy like this one?
- No ruling in the 11th Circuit on this issue

It is all about *Reed*

- Non-lawyers always give me this look: What does “content-based” mean and why does it matter?
- In *Reed v. Town of Gilbert* (2015), the Supreme Court held that content-based restrictions on speech are subject to strict scrutiny, meaning they are “presumptively unconstitutional” under the First Amendment
- In *Reed* the Court defined content-based broadly to include distinctions based on the “function or purpose”
- Bottom line: if treating on-premises and off-premises signs differently is content-based local governments can’t do it

Read the Sign=Content Based?

- The City argues that the definition of off-premises is a time, place, or manner restriction based on the location of signs
- Sign company argued if you have to read a sign to know whether it is on-premises or off-premises regulation on that basis is content based
- According to the Fifth Circuit, “To determine whether a sign is ‘off-premises’ and therefore unable to be digitized, government officials must read it. This is an ‘obvious content-based inquiry,’ and it ‘does not evade strict scrutiny’ simply because a location is involved”

Reed was 9-0

- Thomas wrote the opinion
- Alito concurrence (Kennedy and Sotomayor joined)
 - Rules distinguishing between on-premises and off-premises signs aren't content-based
- Breyer wrote his own concurrence
- Kagan wrote a concurrence Ginsburg and Breyer joined

Liberals are Disenchanted with *Reed*

- In 2020 Justice Breyer wrote an opinion which Ginsburg and Kagan joined to basically overrule *Reed*; Sotomayor would probably agree as well
- Barrett's views on *Reed*?
 - *Reed* can help religious claims
- Court can narrow *Reed* in this case or double down

Oral Argument Analysis

- Not content based: the liberals
- Content based: Thomas and Gorsuch
- Maybes: Alito, Kavanaugh, Roberts, Barrett
- Amanda Karras, IMLA: I'm a little worried about Alito doing something super narrow in this case that is unhelpful to everyone in terms of the clarity issue (like the case only has to do with digitization not on/off-premise)

Oral Argument Highlights

- JUSTICE KAVANAUGH: -- as you well know, people will pay close attention to the opinion. And unlike some of our decisions, this decision is going to affect every state and local official around America, and they spend a lot of money and a lot of time trying to figure out how to comply with the First Amendment implications of sign ordinances. **So I -- I -- I'm just going to push back a little on, like, oh, this is a nice, easy, narrow case.** If you look at the *amicus* brief of the planning association, for example, I thought was pretty telling about *Metromedia*. It said, **"experts have spent decades in the intellectual wilderness disagreeing about *Metromedia*. Their debates leave planners in the same wilderness yet under the cover of night with no flashlight or map."** You know, that -- that's a pretty evocative way to describe what we potentially would be doing. **So I think we owe some clarity.** That doesn't mean you lose or win. I'm just saying the idea of, oh, we can just kind of do a little narrow thing, I'm not so sure.

Shurtleff v. City of Boston

- Government speech case
- Government speech doctrine is amazing for states and local governments
- Government speech=NO First Amendment

Shurtleff v. City of Boston

- Issue: whether flying a third-party flag on a flagpole owed by a government entity is government speech
- If it is, the city may refuse to fly a Christian flag
- Most cities don't fly third-party flags
- But this case isn't really about the flag



Facts

- Boston owns and manages three flagpoles in an area in front of City Hall
- Boston flies the United States and the POW/MIA flag on one flagpole, the Commonwealth of Massachusetts flag on another flagpole, and its own flag on a third flagpole
- Third parties may request to fly their flag instead of the city's flag in connection with an event taking place within the immediate area of the flagpoles
- Camp Constitution asked the City twice to fly its Christian flag while it held an event near the flag
- The City refused its request to avoid government establishment of religion

Government Speech

- The First Circuit held that flying a third-party flag on a City Hall flag poll is government speech

Precedent

- *Pleasant Grove City v. Summum* (2009) (monuments in a public park are government speech; city can reject a monument containing the Seven Aphorisms of Summum)
- *Walker v. Texas Division, Sons of Confederate Veterans* (2015) (vanity license plates are government speech; Texas could reject a plate with the Confederate flag)

Government Speech Test

- History of governmental use
- Whether the message conveyed would be ascribed to the government
- Whether the government “effectively controlled” the messages because it exercised “final approval authority over their selection

History

- “[T]hat a government flies a flag as a ‘symbolic act’ and signal of a greater message to the public is indisputable”

Reasonable Observer

- Would likely attribute the message of a third-party flag on the City's third flagpole to the City
- [A]n observer would arrive in front of City Hall, “the entrance to Boston's seat of government.” She would then see a city employee replace the city flag with a third-party flag and turn the crank until the third-party flag joins the United States flag and the Massachusetts flag, both “powerful governmental symbols,” in the sky (eighty-three feet above the ground). A faraway observer . . . would see those three flags waiving in unison, side-by-side, from matching flagpoles.

City Controlled the Flag

- “Interested persons and organizations must apply to the City for a permit before they can raise a flag on this flagpole”

Camp Constitution Argues

- Camp Constitution argues the First Circuit should have applied First Amendment **forum analysis**, not the government speech doctrine, to determine whether Camp Constitution had a First Amendment right to fly its flag
- According to Camp Constitution, City Hall flag poles are a designated public forum where **viewpoint discrimination, including discrimination against a religious viewpoint, is prohibited**

What Gives?

- First Circuit's analysis of the government speech doctrine is pitch perfect
- Supreme Court reverses 80% of the time
- Religious speech is being treated worse and was singled out (Boston had never rejected another flag)

What is the Court Going to Do?

- *Summum*: 9-0; Justice Alito author
- *Walker*: 5-4; (dissent: Alito, Roberts, Scalia, Kennedy) (majority: Breyer, Thomas, Ginsburg, Sotomayor, Kagan)
- Probably won't go so far as to overturn *Walker* and *Summum*
- Can't be that Boston has to fly the KKK flag
- Somehow carve out an exception for religion?

Houston Community College System v. Wilson

- Issue: whether a board member can sue a board claiming his or her First Amendment rights were violated by a censure
- 5th Circuit said a censure may violate the First Amendment
- Eleventh Circuit has no ruling on this issue

Facts

- David Wilson was an elected trustee of the Houston Community College System (HCC)
- In response to the board's decision to fund a campus in Qatar, which he disagreed with he arranged robocalls and was interviewed by a local radio station
- He sued HCC after it allowed a trustee vote via videoconference, which he contended violated the bylaws
- He sued the board again when it allegedly excluded him from an executive session
- He hired a private investigator to investigate HCC and to determine if one of the trustees lived in the district in which she was elected
- He maintained a website where he discussed his concerns, referring to other trustees and HCC by name

Would you Also Want to Censure Wilson?

- The board publicly censured him for acting in a manner “not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct”

Arguments

Houston

- Censure doesn't chill speech Wilson can (and probably has) continued speaking
- Why can't the board speak through a censure?

Wilson

- Censure is punishment; I can't be punished for my speech
- Censure okay for speech outside the legislative process; I only spoke as part of the legislative process

IMHO

- Of course, censuring this guy doesn't violate the First Amendment
- SLLC didn't file a brief in this case
 - Who are the members of NLC?
 - City council members
 - City councils
 - Both
- Oral argument analysis: Amy Howe at SCOTUSblog predicts Houston Community College will win narrowly

Questions?!

Thanks for attending