SCOTUS Update for Pools

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Overview of Presentation

First Amendment	Guns	Police
• Establishment Clause • Government speech/public forum • Free speech board censure • Free speech sign	• Need I say more?	• Qualified immunity • Malicious prosecution • *Miranda* liability

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Biggest Thing that Happened to Pool Members Last SCOTUS Term

- Court overruled *Lemon v. Kurtzman*, 403 U. S. 602 (1971), and replaced it with a new test
- The *Lemon* test applied to establishment of religion cases
- Local governments lost two cases last term before SCOTUS because they were relying on *Lemon*

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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

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Kennedy v. Bremerton School District

- Holding: The First Amendment protects an assistant football coach who "knelt at midfield after games to offer a quiet prayer of thanks"
- SCOTUS overrules *Lemon* in a 6-3 opinion written by Justice Gorsuch

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Majority and Dissent Disagree About FACTS of 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 pre- and post-game
- High school principal found out from opposing team's coach when his players were invited to join in the prayers
- 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

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Bye Bye, *Lemon*

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

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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"

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Lots of Challenges With Doing 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)?

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Details Fuzzy; General Trend is Clear

- SCOTUS is taking a **narrower** view of the Establishment Clause
- Government can (must?) be more involved with religion without establishing religion
- In three words: More religious liberty? (which government has to respect)

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What Pools Need to Do

- Employees of all pool members and elected officials and attorneys representing all pool members must be informed of the change in the law
- **Front line employees must be trained** to "spot" Establishment Clause issue and to run the issue by an attorney—principal alerted in this case
- Making the calls on Establishment Clause issues are often regular employees with limited or no legal training

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Pools and Members Should Expect Lawsuits Regardless of Best Efforts

- Test is new
- It will likely be hard to apply
- It provides no clear answer on its face
- Lower courts haven't had time to apply it

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Shurtleff v. City of Boston

ABOUT:

- Government speech v. public forum case
- Third-party flag case
- Religion case

REALLY ABOUT:

- **"The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program."**

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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

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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

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Public 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"

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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"**

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What Pools Need to Do

- All pool member with third-party flag programs must be informed of this decision to determine if they want to modify their policy
- May not be that many; from the SLLC *amicus* brief:
  - Out of the 115 local governments that responded to this question, most answered that they do not fly third-party flags. Indeed, 78 local governments—nearly 68%—answered that they do not fly third-party flags, and that number goes up to 84 (or 73%) when those who otherwise explained that they do not fly third-party flags are included.

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Front Line Employees of ALL Pool Members Must Know About This Decision

- Front line employees will be making the call about whether a government message is "government speech"
- Local governments want their speech to be government speech **as often as possible**—the First Amendment doesn't apply and they can say whatever they want
- I can think of only a FEW instances when government speech won't include some participating from the community—health notices, information about local government programs

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City of Austin v. Reagan National Advertising

- **Free speech case**
- SCOTUS held local governments may have different rules for on-premises and off-premises signs as long as such rules are "narrowly tailored to serve a significant governmental interest"
- Must comply with "intermediate scrutiny"
- Really a different-rules-for-billboards case
- 6-3 opinion by Justice Sotomayor

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This Case is a Huge Win for Local Governments Because …

1. Court could have held that strict (so-called fatal) scrutiny applies to such distinctions
2. From the SCOTUS opinion: "Tens of thousands of municipalities nation-wide have adopted analogous on-/off-premises distinctions in their sign codes"

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What Pools Need to Do

- **Tell members about this great win!**
  - Most important for **elected officials** and **planners** to know
- **Remind members different rules aren't *automatically* okay**
  - Local governments must cite to significant, narrowly tailored reasons for treating on-premises and off-premises signs differently
  - Traffic safety and aesthetics are typical reasons
  - "If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based"

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Great Information on Traffic Safety

"[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')."

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Houston Community College v. Wilson

- Holding: A board censure of a board member doesn't violate the First Amendment
- Unanimous, very narrow opinion written by Justice Gorsuch

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What Pools Need to Do

- Tell members about this decision
- Most important for **elected officials** to know
- Most important message to convey:
  - This case couldn't have been narrower
  - The Court's decision raises more questions than it answers!

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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

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Guns: *New York State Rifle & Pistol Association v. Bruen*

- Holding: states and local governments may not require "proper cause" to obtain a license to carry a handgun outside the home
- I don't know of any local government that had a similar restriction; 6 states covering 25% of the US population did
- 6-3 decision written by Justice Thomas

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Test Applied: Text and History

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"

"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.'"

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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)

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Kavanaugh and Roberts Try to Limit Majority Opinion in Concurrences

"[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**"

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Why is This Language a Big Deal?

- 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 regardless!?

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Some Local Governments Regulate Guns

North Carolina: Counties may regulate the display of firearms on public roads, sidewalks, alleys, or other public property

Arizona: State or local government/private establishments or events when asked by the operator/sponsor/agent. (Most government facilities will provide a location to temporarily store a firearm)

Friedman v. City of Highland Park Illinois, cert denied 2015, city banned semi-automatic assault rifles

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What Does This Decision Mean for Pool Members?

- **Any** gun regulation may be challenged
- We have an explicit (if not clear) test for gun cases
- We have a Court willing to decide big gun cases

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What Pools Need to Do

- **Tell members** about this decision
  - Most important for **elected officials** to know
- **REMINDER**:
  - Not all regulation of guns is going to be overturned by lower courts or SCOTUS

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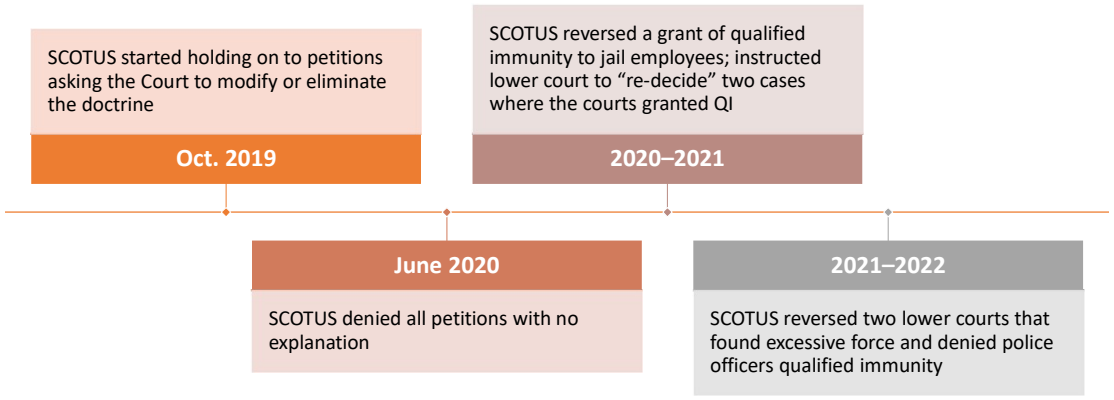
Qualified Immunity: A Timeline



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What is SCOTUS Thinking About Qualified Immunity?

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

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Rivas-Villegas v. Cortesluna (9th Circuit)

- A girl told 911 she, her sister and mother shut themselves in 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 w/a beanbag shotgun
- Cortesluna 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

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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
  - 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

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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

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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."

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What Pools Need to Do

- IMHO these weren't close cases
- Tell members (**police and elected officials** most importantly) they can EXHALE but should keep an eye on SCOTUS and qualified immunity

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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

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Two More Police Cases

- (No) liability for failure to read *Miranda*
- Requirements to bring malicious prosecution cases against police officers

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Vega v. Tekoh

- Holding: police officers can't be sued for money damages for failing to provide a *Miranda* warning
- Pool member **elected officials** and **police officers** should be informed of this big win
- 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"
- Reminder: police officers can still be sued for money damages if they use coercion to exact a confession; it doesn't matter if they read *Miranda* first

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What is a Malicious Prosecution Claim?

- Brought against police officers when someone arrested and charged with a crime thinks he/she shouldn't have been
- To sue a police officer for malicious prosecution the prosecution must have "**terminated in the acquittal or discharge of the accused**"

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Thompson v. Clark

- Holding: to bring a malicious prosecution case a plaintiff need only show that his or her prosecution **ended without a conviction** not that it **ended with some affirmative indication of innocence** (as the Second Circuit held)
- **Loss for pool members**

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What Pools Need to Do

- Inform members (most importantly **elected officials** and **police**) that the Supreme Court has **made it easier** for malicious prosecution **claims to be brought against police officers**
- Big cities have lots of these cases brought against them; can happen anywhere

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