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U.S. Supreme Court Update

July 2022

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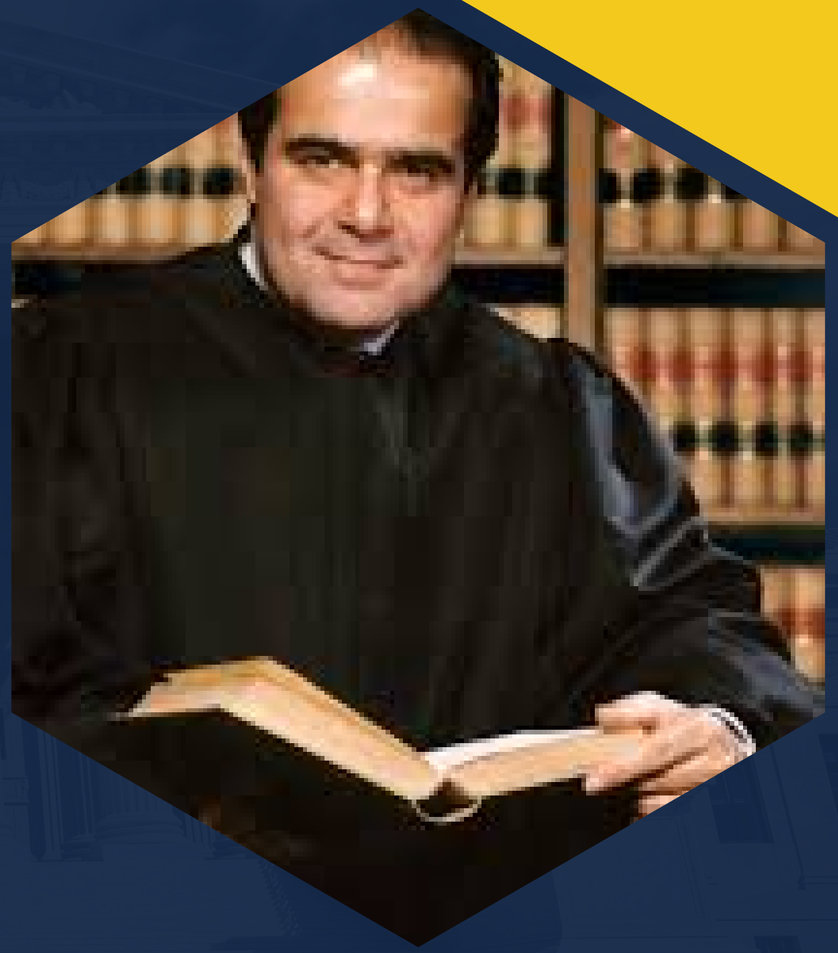
SCOTUS 2021-22
Big Picture Takeaways

- Less concern with "legitimacy" of the court as an institution
- Willingness to revisit and overturn decades of settled precedent in furtherance of far right, minority interests
- Justice's individual religious viewpoints guiding decision-making
- Significant (and often problematic) decision-making on the emergency (aka "shadow") docket
- Reliance on "originalism" as a primary mode of constitutional interpretation



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Carson v. Makin

Question Presented

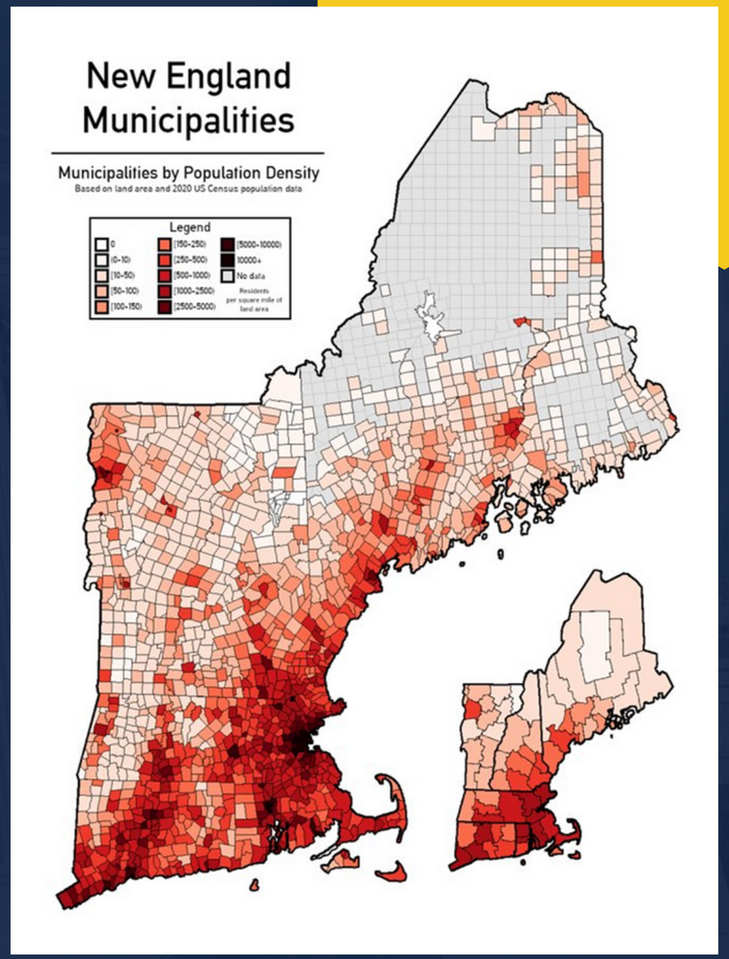
Does a state violate the Religion Clauses or the Equal Protection Clause of the U.S. Constitution by prohibiting in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction?

Holding

In a 6-3 decision, the Court ruled that states providing tuition assistance to secular private schools must also allow public funding to go toward private religious schools.

Impact

The opinion by C.J. Roberts defied the fundamental principle of separation of church and state and opened the door for taxpayer dollars to flow to schools that may not welcome all children.



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Carson v. Makin

* The Court reaffirmed that states have no obligation to fund voucher programs for private schools.
But it ruled that when states do choose to subsidize private education, they cannot exclude schools providing religous instruction.

* The Court ignored the fact that private schools -- including the schools that the plaintiffs sought tuition assistance for -- can deny enrollment to students based on gender, gender identity, sexual orientation, and religion and require their staff to be "born-again Christians."

* * *

What a difference five years makes. In 2017, I feared that the Court was "lead[ing] us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment." *Trinity Lutheran*, 582 U. S., at ___ (dissenting opinion) (slip op., at 27). Today, the Court leads us to a place where separation of church and state becomes a constitutional violation. If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens. With growing concern for where this Court will lead us next, I respectfully dissent.

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Carson v. Makin - The Future?

It will be critical to fight vouchers of all forms at the state level to prevent discrimination in education.

Anti-discrimination laws and fair school funding need to be strengthened at the state level.

Future litigation will likely center on whether schools receiving public funds can discriminate under state and federal law.

Maine Attorney General

"The education provided by the schools at issue here is inimical to a public education. They promote a single religion to the exclusion of all others, refuse to admit gay and transgender children, and openly discriminate in hiring teachers and staff.

All schools receiving state tuition must abide by the Maine Human Right Act, which bans discriminating against someone because of their race, gender, sexual orientation, ethnicity or disability."

Kennedy v. Bremerton School District

The case was brought by a Washington high school football coach who left his position after being directed to cease conducting public prayers at the 50-yard line at the end of football games.

Kennedy sued, arguing that the district's actions in prohibiting this public display of religion while on duty as a public-school employee unconstitutionally burdened the free exercise of his religion under the First Amendment.

Questions Presented

- Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection
- Whether, assuming that such religious expression is private and protected by the free speech and free exercise clauses, the establishment clause nevertheless compels public schools to prohibit it.

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Kennedy v Bremerton: The Facts

The undisputed record showed that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line.

He consistently invited other students and coaches to join his prayers.

For years prior to the lawsuit led student-athletes in “motivational” prayers as part of his coaching.

He went on a media tour, presenting himself as a coach who “made a commitment with God” to several local and national news outlets.

The coach’s conduct also created significant safety concerns for students, as coaches, players, and members of the public would “stampede” the field when Kennedy knelt to pray.

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Kennedy v Bremerton: Key Takeaways

Holding

“The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression.”

"Respect for religious expressions is indispensable to life in a free and diverse Republic. Here, a government entity sought to punish an individual for engaging in personal religious observance, based on a mistaken view that it has a duty to suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.”

Implications for Employee Speech

“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 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. Simply put: Mr. Kennedy’s prayers did not ‘ow[e their] existence’ to Mr. Kennedy’s responsibilities as a public employee.”

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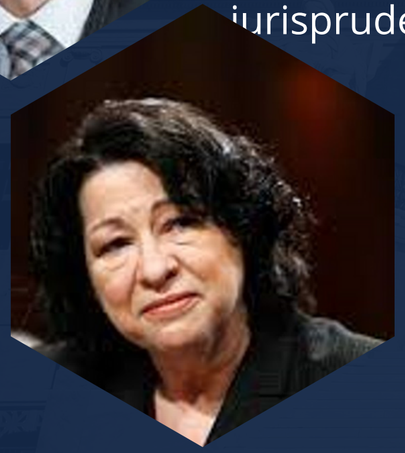
What does Kennedy v Bremerton mean for the separation of church and state?

"In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by '**reference to historical practices and understandings**'... A natural reading of the First Amendment suggests that the Clauses have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others... **An analysis focused on original meaning and history**, this Court has stressed, has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.' "



"This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct... This Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment."

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

For over a hundred years, the New York made it a crime to possess a firearm without a license, whether inside or outside the home.

- An individual who wants to carry a firearm outside his home may obtain an unrestricted license to “have and carry” a concealed “pistol or revolver” if he prove that “proper cause exists” for doing so. NY Penal Law Ann. §400.00(2)(
- An applicant satisfies the “proper cause” requirement only if he can “demonstrate a special need for self-protection distinguishable from that of general community.”

Question Presented

Does the New York law violate the Second Amendment?

Holding

“New York’s proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense.”

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What does NYSRA mean for safety in public schools?

- The Court affirmed the constitutionality of laws prohibiting guns in “sensitive places” such as schools, government buildings, polling places, and courthouses.
  - Five other states have similar requirements: California, Hawaii, Maryland, Massachusetts, and New Jersey. These states have some of the lowest rates of gun violence in the country.
  - The Court changed the standard that lower courts have used for years to interpret the Second Amendment and evaluate life-saving gun safety laws, inviting a flood of new litigation from the gun lobby and its allies.
  - The Court’s opinion makes clear that states can continue to require applicants to meet public safety requirements before carrying a gun in public, such as licensing, registration, and training requirements and denial of applicants who pose a danger to public safety.

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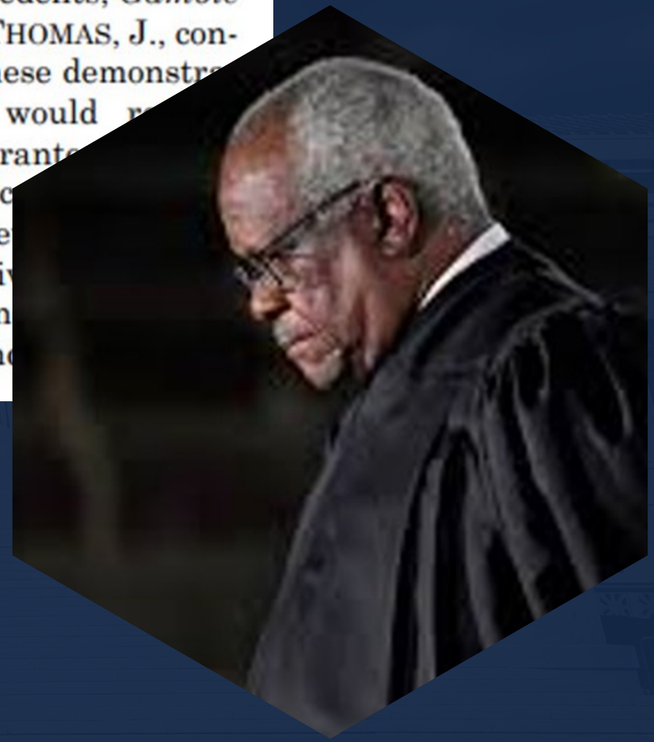
Dobbs v. Jackson Women's Health

"With sorrow – for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection – we dissent."

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," *Ramos* v. *Louisiana*, 590 U. S. ___, ___ (2020) (THOMAS, J., concurring in judgment) (slip op., at 7), we have a duty to "correct the error" established in those precedents, *Gamble* v. *United States*, 587 U. S. ___, ___ (2019) (THOMAS, J., concurring) (slip op., at 9). After overruling these demonstr
bly erroneous decisions, the question would
whether other constitutional provisions guarant
iad rights that our substantive due process
erated. For example, we could consider whe
rights announced in this Court's substanti
cases are "privileges or immunities of citizen
States" protected by the Fourteenth Amen



What does Dobbs mean for public schools?

Over the coming years, schools could see a shift in the needs of the children schools serve. Economists have documented that abortion access tends to lower poverty rates and reduce cases of childhood neglect and abuse.

While teenagers account for a relatively small percentage of those who get abortions, researchers estimate that new restrictions could lead to an uptick in teen births—putting new demands on schools in a system that some experts argue already fails to support teen parents in academic success and graduation.

The court's decision will also affect the educator workforce: About 76 percent of teachers are women, and most don't have access to paid parental leave or health plans that cover abortion. Perennial issues around child-care, breastfeeding, and work-life balance continue to make the profession difficult for new parents, teachers say.

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