Federal Court Caselaw Update:

A Seismic Shift in Constitutional Jurisprudence

School Law Section
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March 27, 2025

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The Courts, They Are a'Changin'

CNN Politics SCOTUS Congress Facts First 2024 Elections Watch Listen

Major 6-3 rulings foreshadow a sharper Supreme Court right turn

Analysis by Ariane de Vogue, CNN Supreme Court Reporter
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Top row: Chief Justice John Roberts, Associate Justices Clarence Thomas and Samuel Alito; bottom row: Associate Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett

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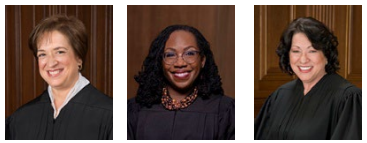
But is it really a 6-3 majority? The 3-3-3 Court

Are you surprised by the following statistics from the 2022-23 Supreme Court terms?

- About 50 percent of the court's cases were decided unanimously.
- Only five of 57 cases — just 8 percent — were decided 6-3 with the six Republican appointees all on one side and the three Democratic appointees on the other.
- Ninety percent of the 57 cases were decided with at least one liberal justice in the majority.



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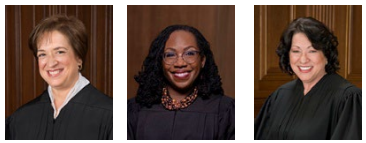
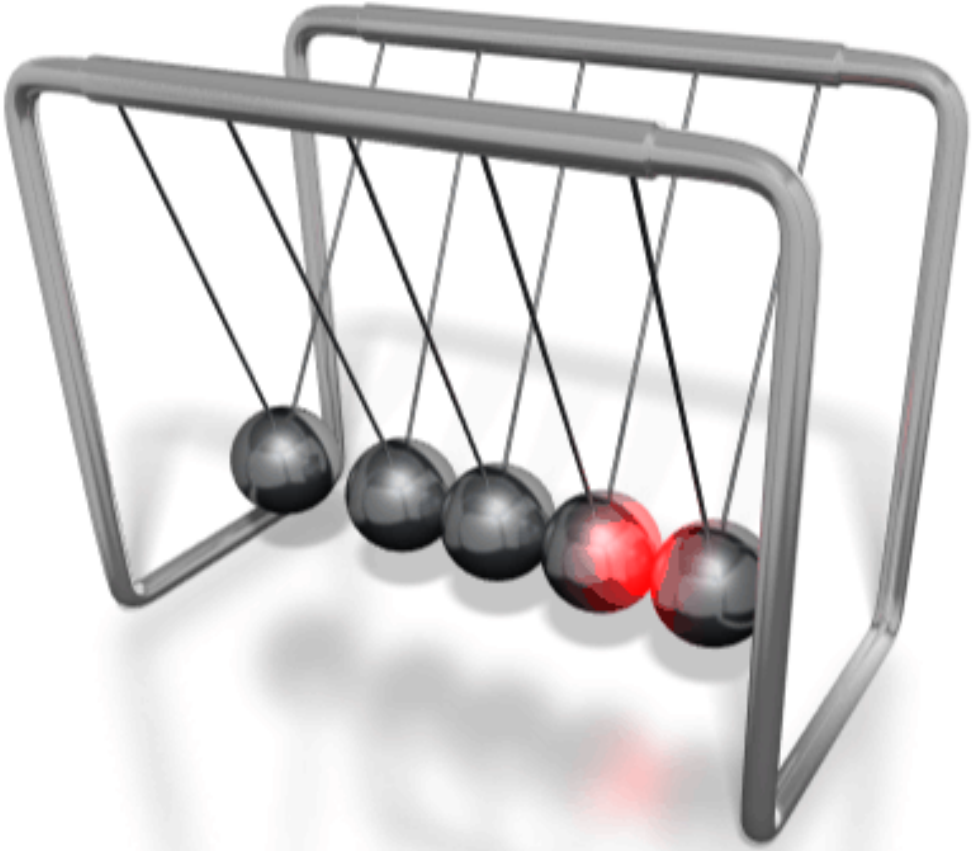
But is it really a 6-3 majority? The 3-3-3 Court

Are you surprised by the following statistics from the 2022-23 Supreme Court terms?

- Kavanaugh, Roberts, and Barrett were all in the majority over 90 percent of the time, while Justices Jackson, Sotomayor, and Kagan were all more likely to be in the majority than either Samuel Alito or Clarence Thomas.
- The three liberal justices voted together in fewer than a quarter of the non-unanimous cases, and the six conservatives voted together only 17 percent of the time.
- Roberts and Kavanaugh agreed with each of the liberals more often than they did with Thomas.



Case Study: A Huge Change in First Amendment Jurisprudence!



Establishment Clause

- The Establishment Clause requires that a governmental entity refrain from any activity which may tend to "establish" or promote any specific religion or religion in general.

- The Establishment Clause has also been interpreted to forbid practices or acts that are hostile toward religion.

  - *See, e.g.,* ***Lee v. Weisman***, 505 U.S. 577, 112 S. Ct. 2649, 2661 (1992) ("[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.")

The Old Test: *Lemon v. Kurtzman*

- Developed by the Court in 1971, under *Lemon* an activity of a governmental entity will pass constitutional muster if it complies with the following three-prong test:

  (1) there is a legitimate, secular, non-religious purpose for the activity;

  (2) the primary effect of the activity neither advances nor hinders religious belief or practice; and

  (3) the activity does not foster excessive entanglement between the governmental entity and religious concerns.

- If an activity meets these three requirements, it is deemed constitutional and permissible. If it fails any one of them, it is unconstitutional.

403 U.S. 602, 91 S. Ct. 2105 (1971).

The Historical Test

- Derived from ***Marsh v. Chambers***, 463 U.S. 783 (1983).
- *Marsh* involved a challenge to the Nebraska state legislature's practice of starting its sessions with a prayer given by a state-funded chaplain.
- *Marsh* was decided at the height of the popularity of the *Lemon* test, and could not have passed any of its three prongs.
- The Supreme Court upheld the practice, however, based in large part on the long history of starting legislative sessions with prayers, concluding that the First Amendment could not have been aimed at practices like those being carried out by the Nebraska legislature.

Town of Greece, New York v. Galloway, 134 S. Ct. 1811 (2014)

Town of Greece, New York v. Galloway, 134 S. Ct. 1811 (2014)

- agreed that *Marsh* could be extended to permit at least some local governmental bodies to start their legislative sessions with brief prayers – based largely on the history of the practice.

- Court next held that legislative prayers do not have to be nonsectarian in nature

Town of Greece, New York v. Galloway, 134 S. Ct. 1811 (2014)

- "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historic foundation."

- basically suggested that it was the connection of legislative prayer to the original Congress that made it permissible

American Legion v. American Humanist Association, 139 S.Ct. 2067 (2019)

Issue: whether Maryland's maintenance of a 93-year old WWI memorial in the shape of a 40-foot cross violates the Establishment Clause.

American Legion v. American Humanist Ass'n, 139 S.Ct. 2067, 2101 (2019) (Gorsuch, J, concurring in the judgment).

"As today's plurality rightly indicates in Part II–A, however, *Lemon* was a misadventure. It sought a 'grand unified theory' of the Establishment Clause but left us only a mess."

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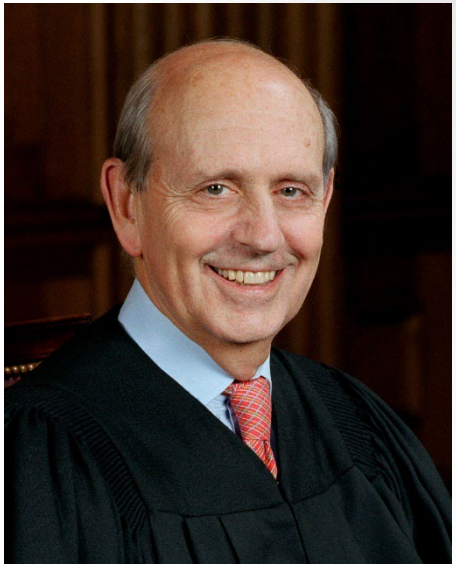
The *American Legion* Establishment Clause Categories

1. religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies;
2. religious accommodations and exemptions from generally applicable laws;
3. subsidies and tax exemptions;
4. religious expression in public schools;
5. regulation of private religious speech; and
6. state interference with internal church affairs.

American Legion v. American Humanist Ass'n, 139 S.Ct. 2067 (2019)

"These four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality."

But what did "History" mean? Justice Stephen Breyer



- "Nor do I understand the Court's opinion today to adopt a "history and tradition test" that would permit any newly constructed religious memorial on public land."

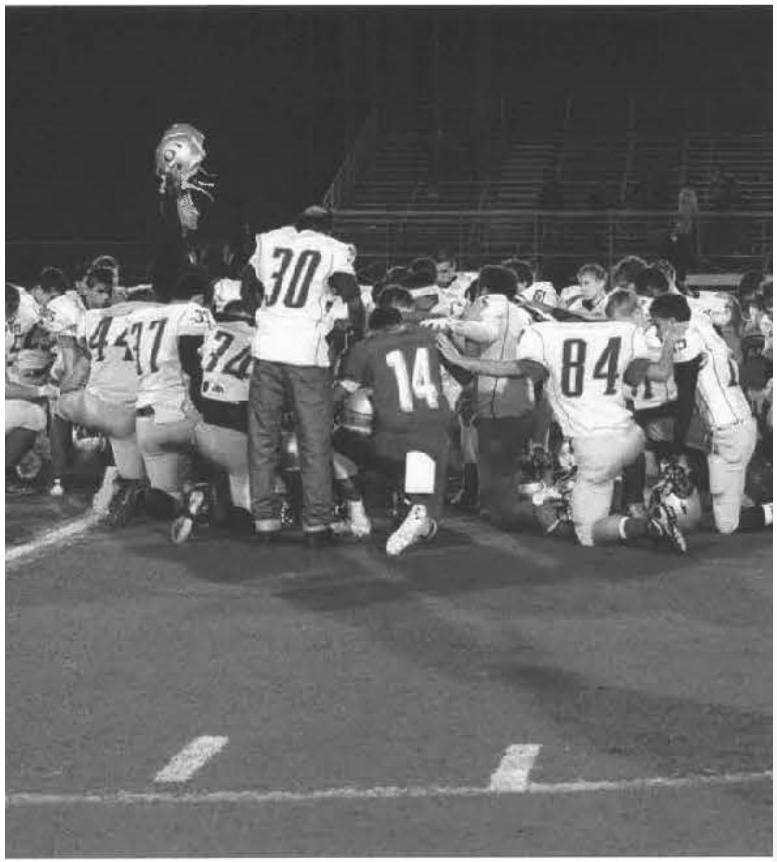
- "A newer memorial, erected under different circumstances, would not necessarily be permissible under this approach."

Kennedy v. Bremerton School District

- The court further reasoned that the Establishment Clause does not "compel the government to purge from the public sphere" anything that could be perceived as endorsing or "partake[ing] of the religious".

- In rejecting the school district's Establishment Clause defense, the court flatly dismissed as "long ago abandoned" the test from *Lemon v. Kurtzman* and its progeny.

SOTOMAYOR, J., dissenting



graph of J. Kennedy standing in group of kneeling p

Kennedy v. Bremerton School District
The Opinion – Establishment Clause

- After setting aside *Lemon*, the Court determined that the correct test was that established in *Town of Greece v. Galloway* (and related cases), which require that courts interpret the Establishment Clause by "'reference to historical practices and understandings,'" drawing "'the line' … between the permissible and the impermissible [in] 'accor[d] with history and faithfully reflec[ting] the understanding of the Founding Fathers.'"

- But after it firmly dismissed the *Lemon* test, the Court never really applies its "correct" test to the facts of *Kennedy*.

Is *Kennedy*'s "history and tradition" test a constitutional aberration?

Not even close….consider the Second Amendment!

New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022)

- Opinion by Justice Clarence Thomas
- "[In] New York, the government further conditions issuance of a license to carry on a citizen's showing of some additional special need. Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State's licensing regime violates the Constitution."
- "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."

New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022)

- "We assessed whether our initial conclusion was "confirmed by the historical background of the Second Amendment." *Ibid.* We looked to history because "it has always been widely understood that the Second Amendment ... codified a *pre-existing* right." *Ibid.* The Amendment "was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors." *Id.*, at 599, 128 S.Ct. 2783 (alterations and internal quotation marks omitted). After surveying English history dating from the late 1600s, along with American colonial views leading up to the founding, we found "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."

So *Bruen* tells us that "text, history and tradition" is not just a test specific to the First Amendment, but is a "new" method of constitutional interpretation.

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So everyone is good with "text, history and tradition", right?

- ***Vidal v. Elster***, 602 U.S. 286 (2024) ("Trump too small" trademark case) (Amy Coney Barrett, concurring)
  - "[T]he Court never explains why hunting for historical forebears on a restriction-by-restriction basis is the right way to analyze the constitutional question."
  - "[T]he Court's laser-like focus on the history of this single restriction misses the forest for the trees."

United States v. Rahimi, 144 S. Ct. 1889 (2024)

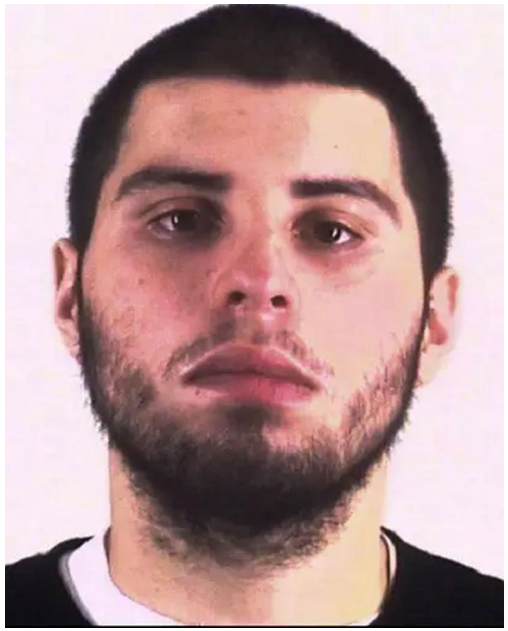
"Bad Guys go to Jail"

- 8-1 decision by Chief Justice Roberts in which 6 justices issued or joined concurring opinions (Sotomayor/Kagan, Gorsuch, Kavanaugh, Barrett, Jackson)

BY JAY WILLIS | NOVEMBER 7, 2023

For Zackey Rahimi, the solution for just about every problem in life seems to be to shoot a gun in its general direction. In December 2019, he fired a shot at a bystander who'd seen him shove his girlfriend in a parking lot, then threatened to shoot his girlfriend too if she told anyone about it. When an acquaintance posted something rude about him on social media, he fired an AR-15 into their house. When he got into a car accident, he shot at the other driver; when a truck flashed its lights at him on the highway, he followed the driver off the exit and, for some reason, shot at a *different* car that was behind the offending truck. After Rahimi's friend's credit card was declined at a Whataburger, Rahimi pulled out a gun and fired several shots into the air, a choice that I doubt made terrified employees any more inclined to fulfill his order.

None of this was in dispute on Tuesday, when the Supreme Court heard oral arguments over Rahimi's bid to keep his beloved guns.



United States v. Rahimi, 144 S. Ct. 1889 (2024)

- "When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition."

Rahimi – Chief Justice Roberts

- "Nevertheless, some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber. As we explained in *Heller*, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. Rather, it "extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence." By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers."

Rahimi – Concurring opinions

- **Sotomayor/Kagan -** *Bruen*'s myopic focus on history and tradition
- **Gorsuch – "**the government need not show that the current law is a 'dead ringer' for some historical analogue."
- **Kavanaugh -** the historical approach examines the laws, practices, and understandings from before and after ratification
- **Barrett –** "for an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law."
- **Jackson - "**Make no mistake: Today's effort to clear up "misunderst[andings]," is a tacit admission that lower courts are struggling. In my view, the blame may lie with us, not with them.

BONDI v. VANDERSTOK (March 26, 2025)

- The Supreme Court on Wednesday upheld a Biden-era rule regulating so-called “ghost guns” – untraceable weapons without serial numbers, assembled from components or kits that can be bought online.

- By a vote of 7-2, the justices held that the Gun Control Act of 1968 allows the Bureau of Alcohol, Tobacco, Firearms, and Explosives to regulate at least some ghost guns, although they left open the possibility that the rule might not apply in individual challenges to particular ghost guns.

https://www.scotusblog.com/2025/03/supreme-court-upholds-regulation-of-ghost-guns/

Problems with relying on "History," "Common Traditions" and "Ageless Principles"

"The Court is staffed by lawyers who are neither trained nor experienced in making the nuanced historical analyses called for by Bruen.... The analytical construct specified by Bruen is thus a difficult one for non-historians"

Fraser v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 672 F.Supp.3d 118, 137, n. 20 (ED Va. 2023)

Are we really adopting a neutrality test?

- If schools don't want to open their facilities for use by outside groups, that's fine — but if you do, you can't keep out religious groups just because they are religious (***Lamb's Chapel***, ***Milford Central School***).

- If local government entities don't want to open their legislative sessions with prayers, they don't have to – but if they do, they can't tell the speakers what to say (***Town of Greece***).

- Cities don't have to give shredded tires to private entities to use at playgrounds – but if they do, they can't exclude entities just because they happen to be religious (***Trinity Lutheran***).

- And states don't have to give vouchers (in whatever form) to families to use at private schools—but if they do, they can't exclude religious schools, just because they happen to be religious. (***Espinoza v. Montana Department of Revenue)***

Loper Bright Enterprises v. Raimondo,
603 U.S. 369 (2024)

- Overturned ***Chevron USA v. National Resources Defense Council***
  - Step one, courts ask if the statute is clear. If it is, then no agency deference.
  - Step two: if statute is ambiguous, then courts were to defer to reasonable agency interpretations.

- Fishing company challenged a rule issued by the National Marine Fisheries Service which required vessels operating in the Atlantic herring market to pay for a government-certified observer during their fishing trips.

- Chief Justice Roberts reasoned that judicial deference to agency rulemaking under *Chevron* was incompatible with the courts' fundamental duty to interpret the law.

Is *Loper Bright* a big deal?

- Towards the end of his majority opinion, Chief Justice Roberts explains "we do not call into question prior cases that relied on the *Chevron* framework."
- *Loper Bright* merely made official what the Supreme Court has already been doing anyway.
- Courts tended to resolve a good number of *Chevron* cases at step one anyway.
- As Chief Justice Roberts pointed out in his majority opinion, the Court through the decades constantly tinkered with *Chevron*, imposing various limitations on the doctrine.
- **However***: "Loper Bright* is best understood in this larger context. It is part of a concerted judicial project to weaken the administrative state specifically and the federal government's ability to address serious problems more generally."

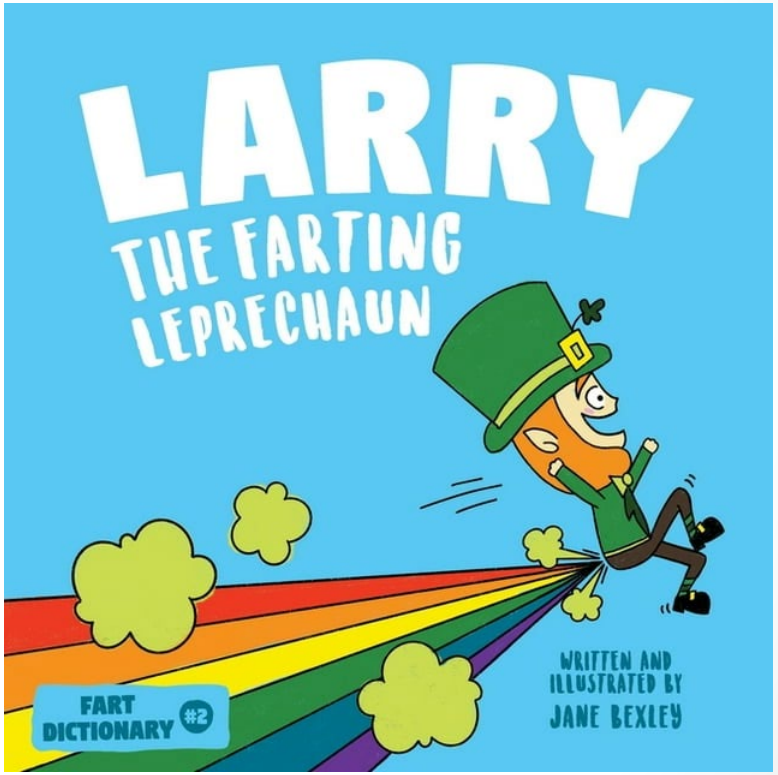
https://www.dorfonlaw.org/2024/07/is-loper-bright-big-deal.html

Fifth Circuit Cases to Watch

Little v. Llano County, 103 F.4th 1140 (5th Cir. 2024), *rehrg en banc granted*, 106 F.4th 426 (5th Cir. July 3, 2024)

- Panel of Fifth Circuit ruled that a public county library violated the First Amendment by removing seventeen (17) specific books, which addressed themes of sexuality and homosexuality; gender identity and dysphoria; and racism – and then a group of seven books that the parties and judges all referred to as "butt and fart" books, as typified by *Larry the Farting Leprechaun*.

- En banc oral argument heard 9/24/24



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Supreme Court Watch – Certiorari Granted

A.J.T. v. Osseo Area Schools (Eighth Circuit)

- Issue: whether students with disabilities are required to satisfy a "bad faith or gross misjudgment" standard when seeking relief against school districts they allege have violated the Americans with Disabilities Act or Section 504 of the Rehabilitation Act.
  - The Eighth Circuit and four other circuits (the Second, Fourth, Fifth, and Sixth Circuits) - student must prove a school district acted with "either bad faith or gross misjudgment."
  - Third and Ninth Circuits require "deliberate indifference" in ADA and Rehabilitation Act cases
  - SET FOR ARGUMENT on Monday, April 28, 2025

Ames v. Ohio Department of Youth Services (Sixth Circuit)

- Issue: in an employment discrimination case, whether a majority group member is required to meet a higher burden (i.e., show additional "background circumstances") to assert a Title VII claim
  - for example: that LGBTQ+ supervisors made the employment decision affecting plaintiff; statistical evidence showing pattern of discrimination against members of the majority; etc.
  - Argued February 26, 2025

Federal Communications Commission v. Consumers' Research, 109 F.4th 743 (5th Cir. 2024) *en banc*

- Challenge to the E-Rate program (funding for broadband and Wi-Fi)

- **Issue**: does the E-Rate program violates the non-delegation doctrine
  - Article I, Section 1 of the Constitution - legislative authority is vested in Congress (*Fifth Circuit held that it did*).

- **Argument**: the Constitution assigned the legislative power to Congress, and lawmakers cannot delegate that authority to another agency
  - Has not been used by the Supreme Court to strike down a federal statute since challenges to New Deal programs in the 1930s.
  - The case could open a new avenue for attacks on administrative power, building on last term's decision in *Loper Bright*, which overturned *Chevron* deference.

Mahmoud v. Taylor (4th Circuit)

- **Question Presented**: Whether public schools burden parents' religious exercise when they compel elementary school children to participate in instruction on gender and sexuality against their parents' religious convictions and without notice or opportunity to opt out.
- **Fourth Circuit**: on the "threadbare" record before it, the parents had not shown that exposure to the storybooks compelled them to violate their religion.
- Parents claimed they were not challenging the school's ability to adopt the curriculum and teach it to other children.

"…depicts a family whose puppy gets lost amidst a LGBTQ-pride parade, with each page focused on a letter of the alphabet. The three- and four-year-old audience is invited to look for items such as "[drag] king," "leather," "lip ring," "[drag] queen," and "underwear."" from 102 F.4th 191, 197 (4th Cir. 2024)

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Oklahoma Statewide Virtual Charter Sch. Bd v. Drummond
St. Isidore of Seville Catholic Virtual School v. Drummond

Issue: challenge to the constitutionality of excluding a Catholic school from a state's charter school program, alleging both Establishment Clause issues and Free Exercise issues.

- *Carson v. Makin*, 596 U.S. 767 (2022)
- *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464 (2020)

"The differences between the Free Exercise Trilogy cases and this case are at the core of what this case entails—what St. Isidore requests from this Court is beyond the fair treatment of a private religious institution in receiving a generally available benefit, implicating the Free Exercise Clause. It is about the State's creation and funding of a new religious institution violating the Establishment Clause." *Drummond ex rel. State v. Oklahoma Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1, 14 (Okl. 2024).

Supreme Court Watch – Certiorari Pending

L.M. v. Town of Middleborough, Mass., 103 F.4th 854 (1st Cir. 2024)

- Middle school was allowed to prohibit students from wearing t-shirt to school that read "There Are Only Two Genders," and then later the same shirt with the words "Only Two" covered by a piece of tape that read "CENSORED"
- Appealed to Supreme Court

L.M. v. Town of Middleborough, Mass., 103 F.4th 854 (1st Cir. 2024)

- The Court framed the test as whether and how ***Tinker*** would apply "to passive and silent expression that does not target any specific student or students but assertedly demeans a personal characteristic like race, sex, religion, or sexual orientation that other students at the school share."

L.M. v. Town of Middleborough, Mass., 103 F.4th 854 (1st Cir. 2024)

- [S]chool officials may bar passive and silently expressed messages by students at school that target no specific student if:
  - (1) the expression is reasonably interpreted to demean one of those characteristics of personal identity, given the common understanding that such characteristics are "unalterable or otherwise deeply rooted" and that demeaning them "strike[s] a person at the core of his being, … and
  - (2) the demeaning message is reasonably forecasted to "poison the educational atmosphere" due to its serious negative psychological impact on students with the demeaned characteristic and thereby lead to "symptoms of a sick school – symptoms therefore of substantial disruption.

B.W. by M.W. v. Austin Indep. Sch. Dist., 121 F.4th 1066 (5th Cir. 2024) (en banc)

- The MAGA hat case
- What began as a First Amendment political retaliation case was transformed by the Plaintiffs into a Title VI race discrimination case (but with the same detailed factual allegations)
- Fifth Circuit (panel) found that the allegations that were actually race-based were insufficient to rise to the level of severe and pervasive race discrimination.
- En banc: "By reason of an equally divided en banc court, the decision of the district court is AFFIRMED. The panel opinion was vacated by the grant of rehearing en banc." It was a 9-9 tie.

Questions? Comments?

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