The Politics Classroom
Professor Floros
Episode 2022.18: SCOTUS Summer School II (Religion, Guns, and Federal Regulation)
Recorded on June 30, 2022

Professor Floros

Hi, I'm Professor Floros in The Politics Classroom, a podcast of UIC Radio. You can interact with me on Twitter and TikTok @DrFloros.

Because the decisions of the US Supreme Court announced during June 2022 are so momentous, my guest, UIC political science professor, Evan McKenzie and I couldn't get through as many decisions as I would have liked in my last episode. So, this episode presents the rest of our conversation. While we covered abortion access and the Dobbs decision, today in Supreme Court Summer School, we will discuss rulings on guns in public, public funding for religious schools, praying on the 50-yard line after football games, and whether the US Environmental Protection Agency has the power to regulate power plants to prevent climate change. Here's a hint: It can't. There were also consequential criminal justice decisions that we didn't have time to cover. So I'm hoping to interview a law professor in the fall semester to dig more deeply into those cases. But for now, let's get started in The Politics Classroom with SCOTUS Summer School II, recorded on June 30, 2022.

Intro Music: Three Goddesses by Third Age

Floros

So, let's talk about two cases involving religion that were decided by this Court. And I'm talking about Carson versus Makin and Kennedy versus the Bremerton School District. So, in the Carson versus Makin case, this dealt with a law in Maine, which allowed the state to pay tuition for students to attend an accredited private high school if the county in which they reside, didn't have a public high school of its own, which rural counties sometimes did not. So, they just paid tuition to attend a private high school. However, this tuition would not be paid for private schools that provided religious instruction with the basic idea that public money should not fund religious schools. However, in another 6-3 decision, the Court ruled that if the state subsidized private schools, it could not discriminate against a private school just because it offered religious instruction and to do so would violate the Free Exercise clause of the first amendment.

In the second religion case, Kennedy versus Bremerton School District, a football coach prayed at the 50-yard line after football games, and after parents complained, the school asked him to stop, but he continued. The district decided not to renew his contract, and he sued saying that the school violated his first amendment rights of free speech and to freely express his religion by firing him for praying on the 50-yard line. In, you guessed it, a 6-3 decision, the Court held that the Free Exercise and Free Speech clauses of the first amendment protect an individual engaging in a personal religious observance from government reprisal, and the constitution neither mandates nor permits the government to suppress such religious expression.

The phrase right before the Free Exercise clause is known as the Establishment clause that says that government can't make laws respecting an establishment of religion, meaning that there can't be a state-sanctioned religion. So, how does public funding for religious schools or allowing prayer on school property after a school event not violate the Establishment clause?

Professor McKenzie

Right. Well, see, I'm glad that you phrased it that way, Kate, because this is the first part of the first amendment. The first thing that they put in the first amendment was "Congress shall make no law respecting an establishment of religion." Number one, before anything else in the Bill of Rights, no official religion. And then it said, "or prohibiting the free exercise thereof." And as the Court has always understood, there's a tension. There has always been a tension between these two provisions because they both sound like, you know, like all these rights, they sound absolute, but clearly they're in conflict with each other, you know? And, and they have to be because if government tries to avoid having an established religion, there are all kinds of ways in which that could interfere with people's exercise of their religion. So, for example, in the, you know, the clearest case is things like school prayer...

Floros

Mm-hmm, <affirmative>

McKenzie

...proselytizing. The teacher like this Kennedy guy who says... but let's take, you know, classroom prayer. Let's say, you know, the district says, "well, let's, let's have a, a classroom prayer, you know, be-, every day before school." Well, the teacher says, "I just wanna do this. You know, I, I, I, I wanna do it." Maybe the, maybe the district lets the teacher decide or maybe the teachers does it on their own, you know, and "okay, class, let's all say this prayer." And they say, "well, you don't want us pray. You don't have to pray." So they say, "all I'm doing is freely exercising my religion," but you can see, if you just use that example, how immediately the school district, if they're concerned the Establishment clause, they're gonna say, "whoa, well, wait a minute. That really looks like we're endorsing whatever your religion is."

And so whenever the state tries to create a separation between church and state, which is what's in the, that's what that Establishment clause is about, that inevitably is gonna bump up against the expressive liberties so to speak: the freedom of expression of people who have these expansive notions of what they should do. "Well, I'm, I'm a Christian. I have to evangelize, uh, you know, I," or maybe you, you're a Muslim, or maybe whatever. "I have to, I have to try to expand my religion cuz I have the one true religion and everyone needs to hear it. You know, my students need to hear it," it said.

So there's gonna be conflict. And the Supreme Court has always recognized that there's potentially conflict in the way these two clauses interact with each other. And so they use the term "play in the joints" and this is over and over throughout the dissent, it says, we've always recognized there's gonna be some quote, play in the joints, meaning there's no way, no way we can enforce the Establishment clause without sometimes infringing on what somebody wants to do in the way of expressing their religion. Because if you have a government job and you start expressing your religion all over the place, at some point, your boss is gonna say, "Hey, wait a minute, you're a government employee. We, we can't have you promoting your religion on the job." And so there's just all these problems that have arisen. And then there's generally applicable laws like a law against, you can only have one spouse and somebody has a religion and they say, "I want to have six spouses." "Now, no, no, no, wait a minute. You know, we've

got a generally applicable law here and we can't in, you know, expand the law to include your religious practices." So there there's just an inherent tension. Now there have been, again, this is like with the other decisions, we've had established law, established tests on this. One is called the Lemon test.

Floros
I was gonna ask about that. Yeah. Can you explain that?

McKenzie
Yeah. The Lemon from Lemon versus Kurtzman; it's been on the books for a long time,

Floros
1971.

McKenzie
Yeah. It, it basically says that laws that are in this area.

Floros
And what did you say that was? The joint of...? What?

McKenzie
"Play in the joints." Like, like imagine these, these are like mechanical parts. If clause number, you know, the Establishment clause and the Free Exercise clause, they don't work completely smoothly. There's gotta be some rattling back and forth and, and courts know this.

Floros
Okay.

McKenzie
And what it really amounts to is we know that it is inevitable to avoid Establishment clause problems, governments will have to infringe on people's freedom, exercise of religion. They have to, there's no way not to.

Floros
Okay.

McKenzie
Otherwise, they're gonna be endorsing and allowing people to promote their own religion in government jobs or giving them exceptions from generally applicable laws, which they don't wanna do.

Floros
Right.

McKenzie
So, because, you know, we, we have many, many, many secular laws. So the Lemon test says, all right, the test is the law should have it's primary effect should be neither to advance nor inhibit religion.

So, in other words, the primary effect of the law is supposed to be secular, that its main impact.

And then its primary intent should be neither to advance or inhibit religion. You know, we look at the law, the judge look at it and say, "was this intended to impair religion? No. Okay. Does it have the effect of really significantly impairing religion?" And if the answer to that is no. Then the third one is, does it excessively entangle the government with religion? Does it gets you all wrapped up in religion? Like for example, the classic problem with private schools is if we start having, giving government aid to private schools, if we say, "well, you know, let's, let's help out the private schools." Like in this case, let's give 'em tuition. Well, okay. But how do we avoid promoting religion? And the only way, if you, this is a religious school and you send students there and they're proselytizing their Christian religion to these students day and night and having them pray and all this stuff, isn't the government paying for that?

Floros

Yeah.

McKenzie

And isn't that an Establishment clause problem? Well, the way to fix it, one way to fix it would be to go in and say, "all right, look, we're gonna make sure that in use of the government aid, that you only promote your religion to the students who are here voluntarily, uh, on their parents' bill. The students who come here on public payment, you can't proselytize them." For example, you could do that. Now that's an entanglement issue because now you've got government people running around inside the school and we don't want that.

Floros

Right.

McKenzie

That's that's, that's, entangles the government with religion in all sorts of ways that we don't want to happen. So, the Lemon test has been in effect since '71. And that's the test that we've used to try to sort these situations out. Now there are some other rules as well, what the Supreme Court did in this case. They said, "Hey, you know, eh, uh, we don't really wanna use that." Uh, you know, they didn't overrule it. They just said, "no, we're not gonna use it." Which is, which is not gonna use it.

Floros

Didn't one of the opinions say something about how well Lemon has been basically...

McKenzie

Unworkable

Floros

Unwork-, yeah? Like we're not... yeah.

McKenzie

Yeah. In, in the abortion case, they say that the undue burden test is unworkable in the religion cases. They say the Lemon test has been unworkable. And in the gun case, they say the test that the courts evolve, the two-part test that the Courts evolved for doing the gun decisions, that's unworkable. All these things are unworkable

Floros

But wait,

McKenzie

There's unworkable. So we're starting over.

Floros

But last term, the case that dealt with Section II of the Voting Rights Act and they come up with this like really complicated test to determine whether or not Section II could be applied in a circumstance. So, aren't, didn't they just create a test that is probably unworkable?

McKenzie

Huh. Well, my view is what they're doing in all these recent cases where they abandon established tests that have been in place for decades and they say, "oh, that's unworkable." What they put in its place is basically just idiosyncratic and allows them to make case by case decisions.

Floros

Oh, okay.

McKenzie

See, now what, what a good judicial test is one that stands, and everyone can see it and they say, okay, strict scrutiny or the rational basis test or whatever and, and "okay, what is it? Okay. Let's see, uh, necessary to a compelling government interest. All right. Let me see." Or "rationally related to a, to a legitimate government. Okay. I get it." But what these people are doing is saying history and tradition and then, and, and it's all textual meaning and, and everyone looks at it and says, "well, what, what is the test?"

Floros

Yeah.

McKenzie

And the test is, it's power.

Floros

Yeah.

McKenzie

And someone, someone has been pointing this out, this, they're, they're setting themselves up to simply, to simply be able to make whatever decision they want.

Floros

Yeah.

McKenzie

Or lower courts can do the same.

Floros

So, if the football coach had rolled out a Muslim prayer mat at the 50-yard line, or Maine had refused to pay tuition to a Jewish high school, do you think these rulings would've been the same?

McKenzie

No, they would... Well, they never would've taken the case. They just let the, they just, if he'd lost in the lower courts, if the Mus-, if he'd been a Muslim with the Muslim prayer rug, he lost in the lower courts. And the grounds that, you know, the, the school district was justified in, in preventing it, they just never would've taken the case.

Floros

Okay. If someone challenges the abortion ban in their state, based on the fact that Jewish law doesn't consider life until birth, that they should be able to get an abortion and their inability to get one is in violation of their religious liberty. How do you think the Court would decide on that?

McKenzie

Yeah, that is really interesting. I don't know, but that's a fascinating one. And the way that would get framed is so you have a state - let's say Texas or Iowa or whatever - and they ban abortion. And someone who is Jewish, a woman who is Jewish, who gets pregnant, says I want to get an abortion, and it is part of my religion that I have to be, have this available to me into certain circumstances. And so the abortion law violates my first amendment rights to free expression of religion. That is the way it would be framed. I don't know what's gonna happen. I have no idea. I've seen, you know, I've seen it discussed and I've seen conservative writers who are already trying to distinguish that away by saying, "well, you know, Christian doctrines are different than Jewish doctrines."

Floros

Oh, my gosh.

McKenzie

"And Christian doctrines, Christian doctrines are very, very specific and they actually are doctrinal. Whereas, you know, the Jewish tradition is a much more expansive discursive kind of tradition. These aren't really, these are just words that you find here and there and they are, you know..." So, you see, you could, they could go the same route that they did with the gun laws and the abortion laws where they just pick and choose from whatever history it suits their purposes and they disregard everything that doesn't. And that is another way it could go. But I don't know what's gonna happen with that one. That's a very interesting one.

Floros

Okay. Let's take a break before our next case. This is Professor Floros in The Politics Classroom, a podcast of UIC Radio.

Music Interlude: School Lunch by Nu Alkemi$t

Floros

Welcome back to The Politics Classroom. I'm Professor Kate Floros, and on this special Supreme Court Summer School edition of the podcast, I'm speaking with UIC political science professor and affiliated faculty member of the UIC School of Law, Evan McKenzie.

So, we've already brought up the gun case multiple times, but let's dive a little bit deeper into it. So, this decision in New York State Rifle and Pistol Association versus Bruen comes after

years of horrific mass shootings and a summer in which there were well publicized shootings at a supermarket in a predominantly Black neighborhood in Buffalo, New York, and at an elementary school in Uvalde, Texas. The US Congress finally passed gun safety regulations for the first time in 30 years. And yet in a 6-3 decision determined that New York's requirement that a person show a proper cause to obtain an unrestricted license to carry a concealed firearm violates the 14th amendment in that it prevents law abiding citizens with ordinary self-defense needs from exercising their second amendment right to keep and bear arms.

In 2008, the Court decided in the Heller decision that people have a constitutional right to keep a firearm in their homes for self-defense. And this ruling extends that right to carry weapons for self-defense outside the home. Why is the second amendment so revered <laugh> that absolutely nothing can be done to limit it, or very little can be done to limit it?

McKenzie

Yeah. Well, here again, this is another situation where the Supreme Court chooses to disregard what has evolved here as the standard in these cases. Now, just to back up just a bit.

Floros

Sure.

McKenzie

The Heller versus DC case that you talked about says that the second amendment protects a personal right to keep and bear arms. And in that case, it was in the home. They invented that. I mean, that is the first case in the history of the United States of America that said the second amendment was a personal right to keep and bear arms, because it says, the actual text of the amendment. They're so concerned about the text and, and the history un-, until the text and the, don't suit them. And then they ignore it. It says, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

Well, what does that mean? What about that whole clause? "A well-regulated militia being necessary to the security of a free state"? Well, they just read it right out and said, "well, I didn't mean anything." Real historians, as it distinct from the law clerks who do all this history work for Clarence Thomas and all these people, real historians say, "well, wait a minute. That's a reference to the fact that we really didn't have a standing military back then. And the purpose of the second amendment was so that the federal government could never disarm, basically, state militias. And the reason that it refers to the right of the people to keep under arms is because these militias were ordinary citizens who had guns in their homes. So, they had guns in their homes so that they could serve in the state militia. And the federal government was prohibited essentially from interfering with the formation and the arming of state militas..."

Floros

Mm-hmm <affirmative>

McKenzie

"...which would've meant, involve people having guns in their homes."

So, when the Supreme Court in Miller versus US many years ago, when they ruled on a, a particular case involving a sawed-off shotgun, they said, "yeah, you know, uh, these laws, the National Firearms Act, et cetera, question is whether the guns would give you the sort of guns

that were using a militia." Cause that's really what the second was about. Now. That is all we had to go on really. They had never said it was a personal right. And then Scalia wrote this opinion...

Floros
Mm-hmm <affirmative>

McKenzie
...and basically came up with all this, again, ignoring all the history that's contrary and says that, "you know, it's a personal, right." Okay. So that's where, that's where we are with this. But since then, and then, then it got applied to the states through McDonald versus City of Chicago. So it applies to state laws as well as federal.

Okay, fine. So that's, that's established law now, but then the question is, how does a court evaluate any particular gun restriction? I mean, what standard do you use to judge it? Are they all invalid unless they're necessary to a compelling in-, what standard do you use? So the courts all across the country, and this is for every single Circuit, this is the lower level, the Circuit Courts below the, uh, Supreme Court, all the Circuits basically had evolve to the same approach, which is a thing that we call intermediate scrutiny. They had evolved a way of doing this kind of means-end testing saying, "let's see these gun laws. They should be involving the protection or the advancement of an important government objective. What is the objective? What is government trying to accomplish and how serious an infringement is this on the right?" So, it was a balancing or what we call a means-end type of a test.

Floros
Okay.

McKenzie
It was a balancing test. They were using, this is very common. This is the way most of these things work. Okay. Now, if you look at this decision, they threw that completely out. They threw that out explicitly. They said means-end, that is rejected. Intermediate scrutiny, rejected. Then, and every Circuit was doing it this way.

Floros
Yeah.

McKenzie
They just threw it all up. And they said, "no, we got a special test now for second amendment, special test. And the test is if the plain text of the constitution encompasses what was being regulated." So in this case, concealed carry.

Floros
Yeah.

McKenzie
Right? Concealed carry permit. Should you have to show proper cause, a reason why do you want it? Uh, and you need an actual reason. Uh that's what, that's what New York required. So it, does that follow the second amendment? Well, sure it does. I mean, yeah, that, that part I think is pretty clear. Yeah. If it's a personal right to keep and bear arms, then I suppose, yeah. Concealed carry laws are regulating that right. Okay.

Then, at that point, the government, the burden shifts, this is the new test, the burden then shifts. If you are regulating anything covered by the second amendment for personal protection, the burden shifts to the government, the government has to show that their regulation is consistent with the history and tradition of firearms regulation in the country. Meaning the 1790s, basically.

Floros

<laugh> Okay.

McKenzie

That's exactly what they go back to. Your regulation has to place a comparable burden on the right of armed self-defense as what the government was placing on in 1791. However, you infringe on the right to keep and bear arms has to be basically the same kind of burden that they would've placed in 1791. That's what they said.

Floros

<laugh>

McKenzie

But here's the thing. Right at the outset, he says, "well, you know, we understand that the guns, the arms that are covered by the second amendment, well, that's not limited to the arms we had back then. Obviously that's not. It encompasses all the arms that we have today. You know, the Glocks and the, uh, AR-15 copies and all this sort of thing. Well, obviously that's in-, included." That we don't use that definition anymore. We know cuz then, you know, so we have modern guns being regulated in a comparable way to the way muskets were regulated in 1791. And anything else is presumptively unconstitutional.

Floros

So, the government can't have an interest or the interest...? Can you explain that again? How the government's interest to protect people from gun violence isn't good enough?

McKenzie

Well, they, uh, really in, Alito's got a concurring opinion here in which he just goes, launches a scathing attack on Breyer cuz Breyer, you know, in his dissent goes on and says, "look, let's, let's talk about what's happening with gun violence in this country. You know, we have more guns in the country than we have people. We have all these terrible rates, 30,000, 40,000 people getting kill, et cetera." And Alito said, "that's all just completely irrelevant. Just ridiculous." Just scathing denunciation of it. Now that's that's ridiculous argument. That's why he even bothered to write a concurrent opinion.

Floros

Right. <laugh>

McKenzie

You know, just so he could, he could insult Breyer. The only way to understand this is to look at what the rule was, what the law was. The law said, if you want a concealed carry permit, you need a reason. You need a reason that's more than just the ordinary person. "Well, I'm a person. I want a gun. I wanna protect myself." And, and what specifically the Supreme Court said is that it's okay to ask people to get licenses. I mean, one thing we should keep in mind,

they are saying that, Supreme Court is saying that it's okay for states to say, "we want you to have a license, you know, before you carry a concealed weapon." They are. So let's give them credit for at least that because there's an argument being out there, out there for what's they're calling constitutional carry, which means in ah, it's like 20 states have this already. You don't even need a permit to carry a gun. You just do ah, buy a gun, stick in your pocket and walk around.

Floros

Yeah.

McKenzie

You know, the Supreme Court is saying, it's okay to require a license, but you can't require people to show any need, other than I want a gun for personal protection, that's all. And you don't have to say, "oh, I'm a jeweler. I carry jewelry." Or "uh, I carry a lot of cash" or you don't have to give any re-, they can't require you to give any reason at all. But you know, they can do background checks. They can require you to know how to use a gun. They can give you a safety check, you know, that sort of thing. They can require you to license the guns that you have. They can do those things. So that's a good thing. I think the, the way I look at this decision is the particulars of this, this ruling, this New York law, it only affects about seven states and it's not that big a deal. And they can rewrite these laws so that they will be, you know, they can scrutinize people pretty closely and it'll be okay. The real issue here is the standard they've created.

Floros

Yeah.

McKenzie

Because they're just swinging the door open for the National Rifle Association and all these other groups to come in and challenge all sorts of gun laws on the grounds that, "well, wait a minute. That's, that's not the way they regulated guns in 1791," because what they said here was, they said, "well, prove to us, New York, that good cause requirements were in effect in, uh, 1791. Prove to us that they were." So, so the state of New York says, "oh, okay." And they come up with all these basically good cause requirements from England and from Texas and from all these other places. And, and then Clarence Thomas says, "oh no, no, no. Well, you know, in this case that wasn't a state, it was a territory at the time they did that. And at Texas, those are, those are..." He calls 'em "outliers."

"Those are outliers. In England, well, you know, we were a frontier country. I don't think they wanted to adopt England's gun laws." By the way, if you look at the Heller decision, there's all kinds of talk in there, uh, from Scalia about England's gun laws as precedent. But now, now, now that it cuts the other way now. "Oh no, we're, we're not county England." So this is why I, I keep coming back to this notion that this is what used to be called results oriented jurisprudence. In my view, it is where you are going to get the result that you have decided to reach, these five, or in this case, six justices are going to reach this decision. This is the decision they're going to reach and somehow or another, they're just gonna get there. And, and that's just the way it is.

Floros

Judicial activism at its finest!

McKenzie

Oh, it absolutely is. All these decisions really are basically on a wishlist that the right wing of Republican party and organizations farther to the right than that have had on their wishlist for decades and decades. The religious right has wanted Roe gone and they wanted to get prayer back in schools. And you know, this, we, we kind of, didn't talk too much about this Kennedy case, but...

Floros

Oh, please, go ahead. This is the, this is the football coach, right?

McKenzie

Yes. This is the guy who's a football coach. Now there's several interesting things about that ruling. One is that Gorsuch wrote it. And he states facts that the dissent says are completely false. And it is really unusual.

Floros

Yeah.

McKenzie

Basically where you have the dissent, which is, uh, Sotomayor writing and saying, "you have misstated the essential facts of the case." And she goes so far is to include photographs in the dissent that demonstrate that what Gorsuch said about the facts is false. He's, it's right there, in the opinion. This football coach was simply trying to have a private, quiet prayer just to pray while his students were otherwise occupied. And they fired him for it.

Floros

Right.

McKenzie

Really?

Floros

On the 50-yard line, a private, quiet moment.

McKenzie

That for years he and he was. And the other thing is he was not the football coach. He was an assistant coach. Ultimately the district, he caused so much chaos that the actual football coach quit. He resigned his position after 11 seasons. He quit because he couldn't stand this nonsense anymore from this assistant coach. He was the coach of the JV team but the assistant coach of the varsity team. This man created a scene at the 50-yard line. It came to the district's attention because they received a phone call from an opposing team's coach. And he said, "Hey, you know, your coach called me. And he said, 'Hey, would you and your team join me on the 50-yard line to pray after the game?'" And the district said, "what?" You know? And then it turned out that he's inviting students. He's inviting pe-, he invited the news media.

Floros

Mm-hmm <affirmative>

McKenzie

He invited TV cameras. He went on TV. He, he was, was quoted by the newspapers. He made a

gigantic scene. He, he created a big confusing, contentious scene in which, you know, people were rushing the field and cheerleaders and band members were getting knocked down and everything else. And the district tried again and again to work out an accommodation with him and he wouldn't have it.

Floros

Mm-hmm <affirmative>

McKenzie

He just wouldn't have it. His point was to have the most public prayer he could possibly have. Those pictures of him holding a football helmet up while everyone el-, he's standing holding his football helmet in the air while everyone else is kneeling. Obviously other students, uh, football players on the team, felt pressured to do this because he's one of the coaches, the coercion is obvious. There's nothing private about it.

Nothing private, nothing's discreet about it. It was a loud, obnoxious out front public prayer that he wanted to do. And he's gonna do it no matter what, no matter what they told him. And finally, the district said, you have caused so much trouble. You know, we're not gonna renew your contract. And in that case, you know, once again, what they're really doing in these religion cases, it seems to me, and this is kinda what the dissent say, is that they've got these two clauses and essentially the Free Exercise clause has essentially eaten up the Establishment clause.

Floros

Mm-hmm <affirmative>

McKenzie

And so, you know, your, the rights of people to express their religious beliefs on government time in government jobs now is apparently the only right that matters. And the government's obligation to try to remain religiously neutral, goes out the window, because if they say no, then they're not accommodating religion. Or anti-religion when what they're trying to do is be neutral. And so I think, you know, your question about the prayer rug is a very interesting one. And you know, we'll just have to see what people do with these principles now that they are out there, you know, what is gonna be the next iteration of these cases and how will they be handled?

Floros

Yeah. That, it was a free speech case in Boston, right? About, City Hall had flags and they let private entities hoist their flag in front of City Hall, but they wouldn't let someone use a Christian symbol on a flag. Shurtleff versus Boston.

McKenzie

Right. Mm-hmm <affirmative>

Floros

And that was a free speech, not a free religion, but...

McKenzie

Mm-hmm <affirmative>

Floros

...that also is, seems like it's tied up in this as well.

McKenzie

Right, it is. Well with first amendment cases, generally, there's always been this issue of what's called viewpoint discrimination. Where if you permit one type of speech, if you say, "all right, this is a free speech area." Like at UIC, we say, "okay, this is this area. This is the free speech area in the Quad." And you have a set of rules. You know, you apply for a permit or whatever to have your demonstration there whatever. You have to be, even-handed in terms of viewpoint, you can't allow people with one viewpoint to talk, but the other people, you don't let them speak. And there's a similar issue with the Establishment clause and the Free Exercise clause. If you permit one type of religious display, you have to permit others.

Floros

Okay.

McKenzie

See? And so it's always been, there's always been this diff-, this is part of this play in the joints thing.

It, it's a difficult thing. And we have in many, many cases where school districts would say, you know, any student group can use a classroom to have a meeting, any club after hours, but then along comes, you know, a Christian group and they say, "well, we wanna do it." "Oh, well, wait a minute. Should we have a Christian religious group? Or, yes or no? If we say, yes, are we violating the Establishment clause? But if we say no, are we violating their Free Exercise rights?" See? So these have always, there are many, many difficult questions here and, uh, that more, the two clauses can't come into conflict. And that's why the play in the joints language is used so often where you say, "look, let's give them some latitude to just maintain a secular school. And if people wanna meet, they can meet wherever they want." So there have been so many of these cases from Sherbert versus Verner back in the Sixties, up to the present. And this one, what troubles, uh, the dissenters about this particular one,

Floros

The Kennedy one,

McKenzie

The Kennedy one...

Floros

mm-hmm <affirmative>

McKenzie

...is what they call kind of the disingenuousness of Gorsuch and representing this as a purely private thing that just went on. <sarcasm> He just, the poor man just wanted a place to pray after the game. And they told him he had to wait until everyone left and you know, why should he have to wait until everyone? </sarcasm> Well, because the, there are hundreds of people around and you're causing a gigantic scene at that 50-yard line with news cameras!

Floros

Yeah.

McKenzie
That's why.

Floros
I mean, if he were standing at the 50-yard line with his head bowed, not saying anything out loud, no one would've had an issue, right? Because...

McKenzie
Right.

Floros
...and who knows what he's doing? But it's when he starts being a public about it.

McKenzie
You know, see, here's the thing. What, what I find really troubling about this decision is it embraces this somewhat disingenuous line that Republicans and religious fanatics of one type or another have always used. If you say they have always said, "you're banning prayer in schools." And the response to that used to always be, "are you kidding me? As long as we have math tests, we're gonna have prayer in schools."

Floros
<prolonged laugh>

McKenzie
It's like, I mean, so, point being, they've never banned private prayer in schools, no one has ever banned private prayer in schools. It's impossible. And no one ever wanted to. What they have banned is teachers standing up in front of the classroom and saying, "okay, get going. We're gonna say the Lord's Prayer." Okay? That is what they have banned.

Floros
Yeah.

McKenzie
They don't. And, and there's all kinds of good reasons why we do not want our public school teachers doing that stuff.

Floros
Sure.

McKenzie
This is exactly what this coach was doing.

Floros
Yeah.

McKenzie
It is exactly what he was doing. And if Gorsuch acknowledged that that is what he was doing, he could never have made this decision. So, he just changes the facts to embrace this fallacy that we've been listening to for 60 years, which is they're banning private prayer in public school. No, they're not. They're banning using the government property, the government game,

the government football game that got everyone together on Homecoming night for the Homecoming game so he can have his own personal Christian religious ceremony at the 50-yard line. That's what they're banning.

Floros
Yeah.

McKenzie
After they've told him again and again not to do it and he does it anyway, and now he's being fired simply because he prayed privately at school. No, that is not what happened. It's kind of unfortunate. This is the lack of civility, the lack of norms, the lack... And just to expand it just a bit.

Floros
Sure.

McKenzie
Here we are in a society right now where we have people defying objective reality in political discourse. The prime example is Donald Trump.

Floros
Right

McKenzie
Over and over and over and over lying again and again about the 2020 election.

Floros
Sure.

McKenzie
And now many Republicans lying right along with him. And so now we hear the Supreme Court where, you know, Gorsuch goes out and clearly mistakes what happens. I mean, I'm, and I don't think that I'm being ideological when I say this, read the opinion. You can see what happened this, see what he says happened is not what happened. Look at the pictures in the, in the dissent. There are photographs in the dissent. Look, this is not what happened. And it is really troubling to see the six members of the Supreme Court, basically having alternative facts. You know,

Floros
Mm-hmm, <affirmative>

McKenzie
...saying, "well, we can have alternative facts. We don't like your history. We got our own history. We, we don't like your version of what happened to Kennedy. We're gonna, we're gonna make up our own version of what happened to him." And I, I think that's really troubling.

Floros
Yeah.

McKenzie
Because you know, you can make any decision if you can rewrite the fact.

Floros
Yeah. So, let's take another break. I'm Professor Floros, and you're listening to The Politics Classroom, a podcast of UIC Radio.

Music interlude: School Lunch by Nu Alkemi$t

Floros
Welcome back to The Politics Classroom, a podcast of UIC Radio. The final two cases of this term were announced on the morning of June 30. They were Biden versus Texas in which a 5-4 majority found that President Biden is allowed to end the Trump era Remain in Mexico policy that forced asylum seekers to wait in Mexico while their asylum application is processed rather than allowing them entry into the US to await processing. And this decision is consistent with other decisions this term, giving the executive branch wide leeway over immigration policy. The other decision in West Virginia versus the Environmental Protection Agency, the Court ruled that the EPA could not enforce sweeping regulations across the power sector under the Clean Air Act to fight climate change. For such actions to be permissible, Congress must pass legislation, giving the EPA powers in that area.

McKenzie
Mm-hmm <affirmative>

Floros
So, one is upholding the executive's right to craft policy, and the other is constraining the executive's right to regulate the most serious scientific threat to humanity's existence.

McKenzie
Right. Now, uh, on the immigration decision. If you don't mind, I'm gonna kind of give that short...

Floros
Sure.

McKenzie
...shift because, because I, I think that is a very... What's remarkable is they didn't do something horrifying with it.

Floros
<laugh>

McKenzie
But, but that is a, to me, this is, should have been an absolutely routine decision because presidents have great deal of authority over issues of naturalization and citizenship and immigration, great authority. The federal government has enormous discretionary authority over the border and they always have. And so if they'd done anything else other than this, I think it would've been really shocking. The fact that they took the case, I suppose, is shocking,

but can you imagine, like, Trump can make a rule and, and the subsequent president can't change it? I mean, just like, why are they even doing this? But the EPA decision, as you said, this is a very, very significant, uh, issue.

It pertains to the EPA's ability to do something about global warming. It is the agency. There's no other agency of our government. This is the agency that has unquestioned, so far, authority to regulate greenhouse gases. There is no other agency in the federal government that could do this, or that has that authority. And it has been clear for a long time that the Clean Air Act is a law that empowers them to do that, to regulate greenhouse gas emissions, but administratively there's a, a bit of history to this that complicates it and it's just kind of revealing, okay? So let me just state briefly what happened here.

Floros

Sure.

McKenzie

So, in 2015, when Obama was president the, uh, EPA, that is, when the EPA under his authority, cuz he was the president, they promoted something called the Clean Power Plan rule.

Floros

Okay.

McKenzie

Clean Power Plan, right? And the idea was to address CO2 emissions from existing plants, existing power plants that use coal and natural gas, right? Now, what they wanted to do here, they set guidelines. This gets really complicated, but it actually is simple. And it basically was like this. They created rules. The EPA did under this Clean Power Plan that basically required these plants to change the way they generate energy. It's called generation shifting. That's the term they use.

Floros

Okay.

McKenzie

But what that means is moving from coal to natural gas or moving from natural gas to wind farms or solar and that sort of thing. In other words, it means basically to comply with these new regulations that the EPA came up with, you'd really there, it says, the opinion put it, they were so strict that no existing coal plant would've been able to achieve them without engaging in some kind of generation shifting. See?

Floros

Okay.

McKenzie

And you know, and, and why are we doing this? Because it's such a pressing emergency, they're trying desperately to comply with international conventions and, and to prevent catastrophe for, for the civilization.

Uh, and what happened was, this is where the Supreme Court first intervened, because the first thing they did was in 2016. The Supreme Court did something extraordinary and they in, they

stayed it, they enjoined it from being enforced. They prevented the rule from taking effect.

Floros
Okay.

McKenzie
And, which is extraordinary. Why? Because it was still in the lower courts. It was still being litigated in the lower courts. It's extraordinary for the, for the Supreme Court to intervene, preempt all this fact-finding going on in the lower courts saying, "okay, stop it. You can't enforce the Clean Power Plan." And then after Trump became president with a different EPA administrators, et cetera, they basically, um, repealed it.

Floros
Okay.

McKenzie
So the bottom line here is, and this may sound strange, but the law that this Supreme Court decision is about never went into effect. It never went into effect.

Floros
Ah!

McKenzie
And it was stayed by the Supreme Court, and then it was repealed. And then the Biden administration. Now we're onto a third president.

Floros
Mm-hmm <affirmative>

McKenzie
The Biden administration says, "okay, look, we're gonna develop a new rule on this whole, this whole issue of, you know, changing generations and all this stuff. And we're gonna come up with a new rule," and the Supreme Court, you know, the three dissenters basically saying, "we didn't need to take this case. This case is moot. We didn't, we didn't need to take this case. We're talking here about a regulation that never went into effect and was re-, was, uh, abolished before it was ever put into place. And we don't have the new one yet." But the Supreme Court's, uh, we're gonna come in and weigh in on this anyway. And we're gonna say that the EPA did not have the authority. They exceeded their authority under of the Clean Air Act, Section 111 of the Clean Air Act to pose this generation shifting, uh, approach upon the industry, because there's no quote, clear congressional authorization to do it that way.

Floros
And so this is to prevent Biden, limit what Biden can do in his new plan?

McKenzie
Yes.

Floros
Because it's, anything like generation shifting has already been ruled unconstitutional.

McKenzie

Exactly. So, they're, that's right. They aren't even waiting to see what Biden does. The, these six people they can't wait. See, and that's why this, I'll just talk about judicial activism is, is so fascinating because they can't even wait for the new rule to come in to be put in place. They're already trying to preempt it and saying only that Congress would have to do it. Congress would have to specify how these, uh, targets are gonna be achieved in reducing CO2 emissions in industry. And, and, and we know what's gonna go on there, right?

Floros

Yeah, of course. It's gonna be get blocked. Yeah.

McKenzie

It'll, it'll get blocked. Yeah. It'll get blocked. And so, you know, the EPA under Biden, which will be under Biden for the next two years will be hamstrung from doing anything unless Congress approves it. And Congress is not gonna approve anything because Republican obstruction

Floros

Mm-hmm <affirmative>

McKenzie

And so, you know, we're, we're not gonna have these more dramatic reductions in greenhouse gas emissions through generation shifting, except for the fact that here's a really, something really funny. For a whole lot of reasons, industry itself is making a lot, is making a lot of these changes anyway.

Floros

Yeah.

McKenzie

Without being told to, you know, I mean. I don't know that it's universal, but, but a lot of, um, power plants are converting anyway. They're changing the, the, the power generators are converting anyway, because it simply makes sense to do,

Floros

Can state laws limit the generating plants within their own borders?

McKenzie

Yes. State EPAs can do these things.

Floros

Okay.

McKenzie

Yes. They can. State agencies can do the, can do the same things if they want to. Yes.

Floros

Okay.

McKenzie

But then the problem with the state, states doing these things has always been this, what we

sometimes call the race to the bottom.

Floros
<laugh>

McKenzie
You know, where, you know, a state like Texas might say, "well, you know, we don't wanna regulate where, you know, we're open for business" is sort of thing.

Floros
Right.

McKenzie
And they've got these well documented episodes of entire flocks of birds drop, falling dead from the sky onto the street because the air is so polluted. But you know, in other states like Illinois, New York, California, you know, have a lot more concern, but absolutely. Yes, yes they can.

Floros
Okay. Okay. So, but what you're saying about this case is that (a) they acted strangely in stopping the implementation of the plan while it was still being litigated. And then,

McKenzie
mm-hmm <affirmative>

Floros
...they ruled on the constitutionality of a plan that didn't exist.

McKenzie
Right.

Floros
And, all right, so then the question is, what, if any implications does this have for the executive branch's regulation authority in general? Is this specific to the EPA and climate change? Or is this, does this have broader implication for federal regulation?

McKenzie
There's one thing about it, that's a bit encouraging in terms of the potential for agency regulation in general. There is a thing called the Chevron doctrine and it is a case that I love going into all the details. Basically they assen-, the essence of it is that it prescribed a, a role for the courts in reviewing agency issues. It said, "look, we're the Courts. The agencies like the EPA and other government agencies, they're specialists. We are not. We, as a general rule, we will defer to agency interpretations of their enabling statute. If Congress is silent." Now, if Congress has spoken and the agency goes contrary to what Congress said they should be doing, well, you got a real problem on your hands then. I mean, obviously the agency's gonna probably be in serious trouble. You can see a Court saying "no, that, Congress told you to do A, and, and you did B," you know. The agency ex-, executive branch can't defy the legislative branch. But what if, what if it's not clear? And under the Chevron doctrine, the Court should defer to the agency's interpretation of its own statute. If Congress hasn't spoken on it.

Floros
Then why didn't the Chev-, Chevron doctrine apply in West Virginia versus EPA.

McKenzie
Yeah, exactly.

Floros
<laugh>

McKenzie
Exactly. That's the issue now. And what's fascinating is, is everybody thought that this is gonna be, they're gonna overturn the Chevron doctrine. Everyone thought they were gonna do it, but as nearly as I can determine, and I have not, it just, just came out an hour before you went on air here.

Floros
Right.

McKenzie
But, uh, as nearly as I can turn my quickly view, they don't even mention the Chevron doctrine in this case.

Floros
Oh.

McKenzie
And so they, they confined it. They confined this decision as far as I can see to the detailed specifics of this particular situation.

Floros
Okay.

McKenzie
With the Clean Power Plan and this one provision and the use of generation shifting that was kind of mandated by the EPA, just that. They didn't make the expansive decision. And I was looking for, and a lot of people were looking for an expansive decision, say, "okay, all this executive branch regulation has to be viewed with great skepticism and we're throwing out the, the Chevron doctrine. We're gonna scrutinize everything they do." They didn't really do that. And so it, it's a little bit encouraging in that regard and Roberts wrote this opinion. So I, you know, I have to think if, if anyone else had written it from that, you know, the other five, it would've been different.

Floros
Yeah.

McKenzie
And so that's the only good thing.

Floros
So this is basically upholding executive authority, right? I mean the powerful presidency,

Imperial presidency,

McKenzie
mm-hmm <affirmative>

Floros
Right? This just kind of goes,

McKenzie
Well, it's really the administrative state,

Floros
The Deep State, right?

McKenzie
Well, you know, for this is a type of governance, uh, there's a thing called the non-delegation doctrine. And the idea is, is invented back in the 1930s. And the idea is that, you know, Congress has the legislative power, the executive branch has the executive power to carry out the laws, right? So what's the balance between them? And with the growth of federal regulatory agencies in the early 20th century, the Supreme Court kind of backed off and said, "all right, you know, technically the legislature is supposed to be making all these rules, but we understand the agencies are gonna make the rules." Well, the agencies are in the executive branch, how do they get to make rules in legislation? They do because it's necessary. It's the only way our government can function in this highly technical age. And so the Supreme Court, all the courts have always stood back and said, "oh, we understand that agencies are gonna make rules. We understand that they have been delegated basically legislative authority by Congress to the executive branch to make rules in the executive branch. We understand that." But that's, there are safeguards, there's all kinds of due process that goes into this. There's public hearings...

Floros
Right.

McKenzie
...and all this sort of thing, all this stuff in the Administrative Procedure Act that, that regulates that process. And they said the non-delegation doctrine, meaning Congress can't just give away their legislative authority, requires that Congress give the agency what they call an intelligible principle to regulate by, you know, EPA gets a guideline, but it has to come from Congress. Here's what we want you to do. And as long as that's clear, and the agency stays within that, it's okay for them to make rules. And so what went on here was how clear <laugh> like, how specific does congressional instruction have to be? And in this case, what I see Roberts saying is, well, it wasn't clear that generation shifting was what Congress had in mind. So it, yeah, it's, it's really an unfortunate decision, but they could, it could have been worse.

Floros
Okay.

McKenzie
Is what I'm thinking.

Floros

Yeah. Okay. Wow. Okay.

Evan, I could do this all day, but I think we're gonna have to end it there. Thank you so much for explaining these monumental Supreme Court decisions. And I'm sure there will be much more to talk about, especially given some of the cases that have been accepted onto the Court's docket for next term.

McKenzie

Oh, yes.

Floros

Um, yeah. Okay. But there will be a new judge. She has been sworn in, I believe. Judge Katanji, or Justice Katanji Brown Jackson is now a justice of the Supreme Court. So, we'll have plenty to talk about going forward.

McKenzie

Yes, we will.

Floros

Professor Evan McKenzie is a professor of political science at the University of Illinois, Chicago and affiliated faculty at the UIC School of Law. You've been listening to The Politics Classroom, a podcast of UIC Radio. I'm Professor Floros, and you can find me on both Twitter and TikTok @DrFloros. Keep your eyes peeled to your podcast feed because there might be another Summer School edition of The Politics Classroom later this summer. But for now that's all I've got. Class dismissed!

Outro Music: Three Goddesses by Third Age