The Atlantic

The Right's Time in Court Is Now

Garrett Epps

December 9, 2019

In the 1969 Monty Python sketch "Dead Parrot," the outraged customer John Cleese complains to the pet-shop owner Michael Palin about a parrot he sold.

"What's wrong with it?" Palin asks.

"'E's dead, that's what's wrong with it!"

Palin responds that the parrot, motionless in its cage, is just resting, or stunned, or "pinin' for the fjords" of its native Norway.

Cleese explodes:

'E's not pinin'! 'E's passed on! This parrot is no more! He has ceased to be! 'E's expired and gone to meet 'is maker! 'E's a stiff! Bereft of life, 'e rests in peace! If you hadn't nailed 'im to the perch 'e'd be pushing up the daisies! 'Is metabolic processes are now 'istory! 'E's off the twig! 'E's kicked the bucket. 'E's shuffled off 'is mortal coil, run down the curtain, and joined the bleedin' choir invisible! THIS IS AN EX-PARROT!

Last Monday, Paul Clement, one of the most persuasive advocates of his generation, did a passable imitation of the shopkeeper in front of the Supreme Court. Any minute now, he told the justices, his case—*New York State Rifle & Pistol Association v. City of New York*—would wake up and flap its wings.

But *Rifle & Pistol*—the Court's first gun-rights case in a generation—really is an ex-case. Nevertheless, a majority of this conservative Court, eager to make new Second Amendment law, may agree to pretend that the parrot is merely stunned. And for that matter, two of the other high-profile conservative-agenda cases on the Court's docket this term don't look all that healthy either. All three aim at achieving long-sought goals of the right, and all seem to me like ginned-up disputes designed to elicit broad right-wing opinions on facts that do not hold up under close examination.

Begin with *Rifle & Pistol*. Some New Yorkers have "premises" pistol licenses—meaning that they can have a gun in their home for self-protection but can't carry it outside their home. Until

recently, city law allowed only one narrow exception—gun owners could take their guns, locked away and unloaded, to any of the city's seven licensed pistol ranges to receive training and practice their skills.

The plaintiffs in the case wanted to take their pistols to out-of-town gun ranges or out-of-town shooting competitions. One plaintiff owned a second home upstate and wanted to take his gun there for protection.

Gun-rights advocates have been very frustrated with John Roberts's Court. A decade ago, the Court decided twin cases establishing an individual Second Amendment right to handgun possession in the home. After that, the Court has steadfastly refused to elaborate, and the lower courts have almost uniformly refused to extend the Second Amendment to other contexts such as openly carrying weapons in public, carrying weapons licensed in one state to other states where they aren't licensed, or possessing semiautomatic weapons..

Then, in October 2018, Donald Trump's administration muscled Brett Kavanaugh onto the Court in place of Anthony Kennedy. Three months later, the Court granted review of the New York ordinance. In light of the extreme views Kavanaugh expressed as a lower-court judge, it seemed possible that the Court would announce new restrictions on local and state gun laws.

New York City, and New York State, understandably reacted with alarm. The City hastily repealed the ordinance; the state legislature passed a statute that provided the City could never again pass a similar law.

You asked for it, the City then told the plaintiffs, *you got it.* This parrot has ceased to be.

Not so fast, said the plaintiffs. What if the City used previous violations of the old law to refuse licenses under the new one? Beyond that, the new law required license holders going out of town to make "continuous and uninterrupted transport" of their guns once placed in a car. This, the plaintiffs claimed, forbade "a stop at a gas station or coffee shop en route." The new law also, they argued, "require[s] written permission before a handgun can be taken to a gunsmith, and preclude[s] transport to a summer rental house."

These injuries seem to have been mostly made up after the fact. Richard P. Dearing of the city's Law Department told the justices that the "no coffee" rule wasn't in the regulations—the plaintiffs invented it—and that previous noncompliance had not ever been and would not ever be used against license holders. No state court has interpreted the meaning of *continuous and uninterrupted* yet, and for the Supreme Court to step in to construe a city ordinance would be quite unusual.

The plaintiffs are very annoyed at being asked to take yes for an answer. The City was supposed to lose the case; now, Clement argued, its new regulations "are premised on a view of the Second Amendment as a home-bound right, with any ability to venture beyond the curtilage with a firearm, even locked and unloaded, a matter of government grace." In an amicus brief, the Cato Institute was even more truculent: "This Court should not reward, in any way, Gotham's bad faith attempt to keep the law unclear at the expense of the people."

In other words, we all know we have five votes; can we get this done please?

"Let's get this done" might also be the theme of the two other agenda cases this term. In the first, *Espinoza v. Montana Department of Revenue*, religious groups are in effect asking the Court to order the state of Montana to create a tuition-voucher program that will benefit religious schools; in the second, *June Medical Services v. Gee*, the state of Louisiana suggests that the new majority just junk all existing precedent on the right to choose abortion.

The story of *Espinoza* begins in 2015, when the Montana State Legislature created a program by which taxpayers would receive tax credits for donations to organizations that provide scholarships to students attending private schools. The statute made no mention of religious schools one way or the other—but it did instruct the state Department of Education to issue regulations that complied with the Montana Constitution's ban on "any direct or indirect appropriation or payment from any public fund or monies" to schools "controlled in whole or in part by any church, sect, or denomination." State officials then issued regulations barring schools "owned or controlled in whole or in part by any church, religious sect, or denomination" from receiving donated funds.

Religious parents went to state court to challenge the regulations. They argued that the state constitution's prohibition violates the federal Constitution's First Amendment guarantee of the "free exercise" of religion. The state supreme court then held that, because it did not bar funds from flowing to religious schools, the statute violated the state constitution. As a result, the court held, the entire program was void under state law. Neither secular nor religious schools would get the funds.

Outraged, the religious groups sought and got review by the Supreme Court. The question they presented was, "Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?"

It's an odd argument. If the court had decided that the program could benefit nonreligious schools but not religious schools, there would have been a live federal constitutional issue. But there is no program. Thus, the plaintiffs want the Supreme Court to reach down and tell a state's highest court that it may not "invalidate" a program to avoid conflict with the state and federal constitutions. What does *invalidate*, in this context, even mean? What if the Montana legislature had considered the program, then voted it down because members thought it violated the state constitution? What if the legislature had passed the program—and the governor then vetoed it, citing the state's constitution? Could the Supreme Court order lawmakers to adopt it, or the governor to sign it?

Or is this case, too, an ex-parrot?

Finally, *June Medical Services* is a challenge to a Louisiana abortion statute that, a lower court found, will probably close all but one of the state's three remaining abortion clinics. In the 2016 case of *Whole Woman's Health v. Hellerstedt,* the Supreme Court struck down a Texas statute that was identical to this one. The Texas law masqueraded as a health regulation—but its

requirements, a 5–4 majority said, did not offer "medical benefits sufficient to justify the burdens upon access that each imposes." The requirements would, however, sharply limit women's access to legal abortion, and thus formed an "undue burden" on the right to choose.

The Fifth Circuit had approved the Texas statute, and been slapped down by the Supreme Court. Now the Fifth Circuit has approved the Louisiana statute, insisting that it is somehow totally different from the identical Texas one. Louisiana makes that argument to the Court.

But it isn't so. The Court had to take the case, because the Fifth Circuit was defying the *Hellerstedt* precedent. It should have summarily reversed; instead, some of the conservatives, at least, are clearly contemplating upholding this statute. Doing that would all but announce a new constitutional principle: *"Kennedy law" don't count round these parts any more*.

I understand why legal conservatives are in a hurry to get the results they want. Right now, the right owns the Court; it owns the legislatures; it owns the White House. But the nation is in turmoil and the wind may shift tomorrow.

So—*dead parrot or not, let's get it done.*

That's an understandable impulse for activists. But *get it done* would be an ominous methodology for what is—supposedly—still a court.