

Alison Key: Do like my diagram of core functions and duties?

Mark Thomson: Love it.

Alison Key: Welcome to The ComMN Law, a show about the Minnesota Supreme Court. My name is Alison Key. I clerked for Justices David Stras and Natalie Hudson during the 2016-2017 term of the Minnesota Supreme Court.

Mark Thomson: My name is Mark Thomson. I'm an attorney at Nichols Kaster in Minneapolis and I was a law clerk for Justices David Lillehaug and Anne McKeig in that same term. Uh, so this is a show about the Minnesota Supreme Court, which hears about a dozen cases every month. We're going to give you an in-depth look at what we think is the most interesting case each month and we're also going to touch on other interesting Minnesota Supreme Court cases and a cover a bit of Minnesota legal news each episode.

Alison Key: As former employees of the court and its current admirers, we actually think the court is really interesting and could also be covered much better. Right now there's no real reliable outlet for the in-depth discussion of the biggest Minnesota Supreme Court cases, hopefully until now. So we are going to try to be your go to source for that.

Mark Thomson: Right. And we'll get rolling in just a second. A couple of notes before we do. Um, we were both clerks for the court for one year, so we won't be talking about anything that happened during our year there, but that is rapidly receding into the past so it shouldn't come up much. So today we're going to talk about the State Auditor's Office, but before we do that, we've got a few fun items of legal news. Uh, this one was mine: Star Tribune article, "Saint Paul lawyer moonlights as junk food king on instagram, reviewing snacks for thousands." Instagram handle @Snackcellar. Twenty-six thousand followers! I'm going to just quote you from the article, "The 28 year old lawyer works out religiously, then eats ice cream, chips, Oreos, ding-dongs, M&Ms. Basically all the food that many people try to avoid so that he can review them for thousands of followers." A quote from this attorney named Ben Passer, "Snacks are having a moment right now."

Alison Key: Are they?

Mark Thomson: Um, no, I don't think so, but good for him. Also really liked that they use this, like, the headline was like, It's a lawyer, but he's fun! And in that spirit they're zero details about what is legal job is. I creaped it on LinkedIn. You can too. I won't ruin it. He's a fun dude.

Alison Key: Oh, good for him. Nice little side hustle he has going on there. Another interesting piece of the legal news floating around lately is centered around the Fischbach case. So with Al Franken's resignation from the Senate, which made huge news nationally. So Tina Smith, who was the lieutenant governor of Minnesota, was the nominated by Governor Dayton to replace Al Franken in the

US Senate until the upcoming 2018 elections. Now, what's interesting about that for Minnesota is that according to the Minnesota Constitution, the line of succession dictates that the [MN] Senate president, currently Republican Michelle Fishbach, then would elevate to the now-vacant lieutenant governor position. So what's interesting about this is that the Republicans now have a majority in the Minnesota Senate and Fishbach doesn't want to leave her post there to serve as lieutenant governor because through various special elections, there might be a change in the balance of the Senate. So she loses this seat if she has to become lieutenant governor, have a special election to replace her, Democrats win, then they lose that majority. So to solve this problem, she says she's going to hold both positions simultaneously. So she's going to take the lieutenant governor position, as the constitution requires, and she's also going to stay in the Senate. And she said that her primary focus will actually be in the senate.

Mark Thomson: Right. Clever move. I know some republicans feel that Governor Dayton was trying to game the system, so this was their counter move.

Alison Key: So, a lot of interest has been and whether this is constitutional, so the constitution has what people are calling the incompatibility doctrine that says no legislature may hold any post besides postmaster or notary public while remaining in office. So that would appear to prevent Fishbach from being able to be a senator and be lieutenant governor at the same time.

Mark Thomson: Do we have, is there a lawsuit live?

Alison Key: There is a live lawsuit. Yes. So she says, no, I am allowed to do this. There's Minnesota Supreme Court precedent from 1898 supporting this, but just recently, like you were mentioning on January 12 one of her Senate district constituents sued her claiming that she's violating the constitution by holding both posts and that the constituent then is not getting effective representation in the Senate. So that case is called Dusosky v. Fishbach. And that case may likely end up in the Minnesota Supreme Court. Again, another political turmoil that I'm sure the Minnesota Supreme Court is just dying to get involved because they haven't had enough of those. Um, but what's interesting about this actually is even though it will maybe end up in the Minnesota Supreme Court, it has already involved the court in a weird way. So the lieutenant governor as a position by statute, chairs an Advisory Committee on Capitol Area Security. That's just a statute that says the lieutenant governor is then in charge of that committee. So the committee had a meeting on January 3, but Fishbach actually did not chair the meeting. She just sat in the audience. So the meeting then was chaired by none other than Chief Justice Lorie Gildea of the Minnesota Supreme Court. So a senator kind of got confused by this and asked Chief Justice Gildea why Fishbach was not acting as chair and instead was sitting in the audience because he apparently came late to the meeting and I think there was a motion to permit the Chief Justice to chair the meeting in the stead of the lieutenant governor. Minnesota Lawyer had an article kind of retelling the events that happened. And

I'll just read you a part of the article. It's kind of interesting. So Minnesota Lawyer says,

MN Lawyer: " 'I understand we have in the room and an acting lieutenant governor,' he [meaning the senator] told Gildea. 'Why would Senator Fishbach not be considered the chair if Lieutenant Governor by state statute is the chair of this entity? Do we know?' Gildea firmly shut him down. 'I'm not sure that question is germane to the motion,' she said, 'So I'm going to rule it out of order.' Dibble then says, 'it's important to my understanding of the purpose for appointing the chair. Does anyone know?' " Minnesota Lawyer says, "a suspended moment of silence followed, which a Democratic senator finally broke. 'Since it was clear that Fishbach had no intention of chairing the meeting,' the Democratic senator told Dibble, 'elevating guild a temporarily had to happen.' The motion allowing Gildea to proceed carried and the committee did it's work."

Alison Key: So I think it's interesting that the Chief Justice has kind of already accidentally gotten involved in this whole "Is she lieutenant governor or is she not?" situation. So eyes on that for if and when it comes to the Minnesota Supreme Court

Mark Thomson: Very strange move by the Chief Justice, although she is a woman who just solves problems, so I respect her for that. She just chairs the meeting and gets it over with. However, it's not strictly legally germane, but I feel like we're looking at why you don't have a lieutenant governor be a senator. You have to decide on what your job is and then once you decide on the job, you have to chair the meetings that you're in charge of. So if you try and do both or neither, then you end up with the Chief Justice cheering administrative meetings and it's weird.

Alison Key: Right. And I'm not sure if it's because [Fischbach] hadn't been sworn in yet at that time, or is she just decided to focus on being a senator versus being lieutenant governor and then started deciding not to do parts of some? Allegedly she's already declined the salary of lieutenant governor, which I think is just--- Her constitutional claim does not rely on her actually refuting salary, just take the money. Like it's been a rough few months. Her argument is, "I'm allowed to do this." So presumably she would also be allowed to take the money. So I'm not sure what she thinks she's gaining by that. Especially because legislators don't make that much money. She could use a couple extra bucks, I'm sure.

Mark Thomson: Alright one more. Kare 11 story, entitled "Minnesota courtrooms become more diverse." Just a few encouraging statistics. In the first seven years of Governor Dayton's tenure, the number of judges of color has increased by 93 percent, the number of female judges is up 35 percent, the number of Hispanic judges is up 84 percent. And of course more notably, at least in the press, Governor Dayton has appointed to the Minnesota Supreme Court that court's first and second black women on the court in Mimi Wright and Natalie Hudson. And the first Native American justice, in Anne McKeig. And the first openly gay justice in Margaret Chutich. So some positive efforts going on as far as diversity in Minnesota court. So another thing we're going to do is, just do a little roundup of the cases that we find interesting from the Minnesota Supreme Court other than

the featured case. And we have just one of those cases this month, it's called State v. Decker, or as we refer to it in The ComMN Law headquarters here, "the Dick Pic case." So, Decker sent a 14 year old girl a photo of his penis on Facebook Messenger. Bad move. He was then found guilty by a jury under two statutes. One for first degree criminal sexual assault for engaging in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16. The second, indecent exposure for willfully and lewdly exposing his body or the private parts thereof in the presence of a minor. So the Supreme Court's considering basically two issues in this case, the simplest version of it is: does it count as sexual conduct and indecent exposure if you had sent pictures over the internet, in this case Facebook Messenger? And secondly, it does it count as indecent exposure and fifth degree criminal sexual conduct if the exposure is via an image rather than your traditional a in-person criminal sexual exposure, exposing yourself in the traditional sense. So an interesting case as we wind our way into the horrifying 21st century.

Alison Key: Right. Still kind of surprises me. This is the first time the supreme court has taken up this issue.

Mark Thomson: You've got to think it's certainly not the first time it's happened on Facebook. So.

Alison Key: Or over image. We've had that technology for awhile.

Mark Thomson: Our feature case this week is Otto v. Wright County. Another big constitutional case at the Minnesota Supreme Court.

Alison Key: My first thought about this case. Right out of the gate, is looking at oral argument and seeing that one justice already recused. Justice Lillehaug out, presumably because Fredrikson & Byron is involved, though justices don't share why they're recused. Justice Stras is no longer on the court. He's now a judge on the Eighth Circuit. So we have five justices deciding this huge constitutional issue. So they way I read it, Donald Trump possibly handed Rebecca Otto a win in this case.

Mark Thomson: Well, we'll see about that. And we should note that five is the minimum number of justices you can have before somebody gets pulled in on the case from the Court of Appeals.

Alison Key: So anyway, those are my first thoughts about the case. But let's talk about how this case came about. Started back in February 2015 legislative session. But the actual events occurred in February 2016, which goes to show you how long it takes litigation about these kinds of things to travel up through the court. So the law that's actually an issue in this case, it's the 2015 legislative session's Appropriations Bill. And the specific provisions at issue in this case surround the ability of the State Auditor to conduct audits of the 86 or 87 state counties. And the legislation made it a choice of the counties to choose to go through the State Auditor's office or to hire private CPA firms to audit their county's finances. Is that correct?

Mark Thomson:

That's right. And so we should get a little context about where the state of things was before the new law. So there's quite a bit of argument between the parties about the kind of historical role of the Auditor and we'll get into that. But over the last several decades, the State Auditor's office has audited counties, Minnesota counties. And then in 2003 that changed a little bit. There were budget cuts by the legislature and so the Auditor started having to determine only certain counties that her office would audit. The rest of the counties she had a choice to audit, but would be in the first instance audited by a private CPA firm. So that the change that's being made by the new law is that rather than the Auditor having the first choice about whether to audit a county, the county itself can decide whether it's audited by a private firm or by the state.

Alison Key:

The locus of that choice shifted from her office to the counties. And in addition, I think it's important to note that the legislation that was passed at issue in this case, did actually two things. First, it required annual audits. Whereas before there wasn't a requirement that each county had to be audited annually. The State Auditor could choose whether or not it was necessary and who was to conduct that audit. And in addition to requiring annual audits, then as Mark was discussing, there was that component that said the county was able to choose who was going to audit its books. So I think also, in addition to the substantive provisions of the law, how the law came about becomes relevant in this case, particularly to the Single Subject Clause violation that becomes relevant later. So maybe just an intro into the process of how this law was passed. So as mentioned in the 2015 legislative session, the house introduced a bill permitting these counties to have the private accounting firms conduct their audits rather than the State Auditor's office. This house bill then was later amended to include all appropriations that the House wanted for the 2015 legislative session. The Senate had no analogous private audit provision in its version of the appropriations bill, but did pass an appropriations bill. Then two versions of the appropriations bills had to come together and be combined in a conference committee. And there's some confusion about the deals that were made in that conference committee. The Democrats say there was a compromise about these private audit provisions that said, instead of permitting counties to let private firms audit their books, this bill would only have a study of the Auditor's office to say, do people like the State Auditor's office, is she charging too much, are the counties happy with her services? So that was the Democrats understanding of what was going to come out of this conference committee. But instead the conference report in its final version of the appropriations bill then had this provision that outright outsourced the choice of who was going to audit, to the counties to say private firms are perfectly fine if you want to use them to audit your books. So then that appropriations bill went to [Governor] Dayton's desk. And Dayton publicly objected to the private audit provisions in the appropriations bill, but said he had no choice, because if he vetoed the entire appropriations bill, then the government will be defunded and the government would be shut down. So Dayton reluctantly signed the entire appropriations bill, including a provision, a substantive provision, that he disagreed with, which was the private audit provision. So that's the backdrop of how this law with the private audit provisions came to be.

Mark Thomson: Right. And you can see there's, this is a legal case, but there's a lot of politics everywhere and that carries over definitely into the oral argument, where at times I think the justices and the parties struggle to figure out what the heck we're really even talking about here as far as guiding principles.

Alison Key: Right. And it's a familiar story for them because as we know this happened in 2011, this happened in 2013, this happened here in 2015, and this also happened in 2017 when the court was also weighing in on last minute appropriations deals that legislature was making.

Mark Thomson: So as far as what law working with, it's pretty thin. The State Auditor, Rebecca Otto, who was the plaintiff and now the appellant, brought the challenge under two sections of the Minnesota Constitution. One that says, no branch of government can exercise any powers belonging to another branch. Another that just says, the executive department includes an auditor. So those don't really get you very far and I think the justices keyed into that pretty quickly. So here's Justice Gildea talking about that:

Chief Justice: Counsel, with respect to the first issue. The issue that you frame is a separation of powers issue. Is there a specific provision in the constitution that you contend section 6.481 alters in some way---a provision in the constitution?

Alison Key: I have no thoughts about that because I don't understand what that question is getting at.

Mark Thomson: I think she's just saying, we get that you, the Auditor, are upset, but you're making a constitutional challenge here. And is there anything in the constitution guaranteeing you to what was taken away from you?

Alison Key: I think that's the entire premise of her [Otto's] argument, is that Mattson interprets those provisions to say that auditing is a core function of my office and you can't interrupt a core function in my office, but we can get into that when we talk more about the framing exactly of this argument when you go into the other provisions.

Mark Thomson: And Justice Anderson have followed on later, making a point, another point about kind of the vagueness of what we're dealing with.

J. Anderson: Does it matter, Counsel, I spent a little time looking through the constitution, and I think I'm right about this, that there are nine references to the Auditor somewhere in that neighborhood. Most of them are non substantive. The only two substantive ones I could find were in Article 11, sections 6 and 7, that talked about certificate of indebtedness and bonds. The constitution really doesn't set out a clear description of what the Auditor's functions are supposed to be. At least that's the way I read it. Does that matter here? How does that cut?

Alison Key: And I think that gets back to the entire framing of Otto's argument, which relies on a series of constitutional provisions and then one Minnesota Supreme Court case, Mattson, that kind of all tell a story of why this legislation violates separation of powers because it removes a core function of her office.

Mark Thomson: Right. I think it's a fair point by Justices Gildea and Anderson, that we do not have a ton of law to stand on here. So it's going to get a little theoretical and a little vague pretty fast, but we should talk about Mattson, which is the case that really sets the table here.

Alison Key: So as mark said, Article Five of the Constitution, section one sets out the executive branch and what that consists of, including the State Auditor. In section four of that same article, Article Five, says that "the duties of the executive officers shall be prescribed by law." And Mattson, then, which was a case in 1986 by the Minnesota Supreme Court, expanded on what those sections of Article Five meant by saying that the legislature then has the authority to prescribe the duties of the executive branch, which includes the Auditor. So the legislature now has the authority to decide what the executive officer's duties are. But in Mattson the court also said something else that was important. Which is that, the legislature can't use that authority to abolish what are called "core functions" of any executive office. So there's a limitation in the legislature's ability to change the duties of the Auditor's Office because it cannot abolish all functions of an executive office that would "do violence to the title the drafters afforded the office and the core functions necessarily implied therefrom."

Mark Thomson: Right. So now we've kind of moved from debating the shifty constitutional language to debating the meaning of this phrase "core function." And Chief Justice Gildea has some thoughts on that.

Chief Justice: You use the word or the phrase "core function." And I think sometimes in our case law we talk about "core function," sometimes we talk about "inherent authority." I want to see if we can agree on a definition. It seems to me that what we're getting at are the powers and duties that the entity came into the government with at the time the government was created. Does that fit with your notion of what we're talking about here?

Alison Key: So what Chief Justice Gildea is getting at there, I think relates to this framing that we've set up that there are some inherent core functions in every executive office that Mattson says the legislature can't touch, but then there are these additional duties of the office of the legislature can create, can abolish, can modify. So the question becomes what is the "core function" and what is not? And does this legislation that was passed in the appropriations bill of the 2015 session relate to a "core function" or one of the peripheral duties that the legislature has the ability to modify? And it becomes really important how you define core functions because that's exactly how you answer this question. And Chief Justice Gildea there is saying, well, I would guess we would define "core function" as whatever functions existed in the office when it was created because otherwise who else would decide what that "core function" is and what

a peripheral duty is that the legislature is allowed to weigh in on? What do you think about that?

Mark Thomson: That sounds right, but that's an argument with the motivation. Because I think it's established that the Auditor did not have a specific duty to audit counties at the inception of the office, is that right?

Alison Key: I agree, but that's just a fair conclusion. Because you have to tack the idea of "core function" to something and I think Chief Justice Gildea's point is, what else is there to tack it to? What else is so inherent in the office? What other definition could you use besides what existed in the framers' minds at the inception? And there are some other theories that Otto has, but I think that's what Chief Justice Gildea is [saying], the most concrete answer to that question goes back to the founding of the office.

Mark Thomson: So it's probably useful to do a little background on the history here. It's always dangerous when lawyers start making arguments steeped in history, but we kind of have no other choice. So the briefs layout that in the territorial period and Minnesota, in the mid 19th century, the legislature created a statutory office within the executive department called the Public Examiner. This was a supplement to the State Auditor. And the Public Examiner was auditing county's finances. In 1973, the legislature abolished the Office of the Public Examiner and transferred those duties to the State Auditor. And up until this most recent bill, the State Auditor had been officially in charge of auditing counties. The Chief Justice again got involved in a fight about that history.

Otto Counsel: What has happened, first the Auditor was performing her function by auditing warrants and, and from the beginning of time she was, the State Auditor was, auditing counties. And we established this in the record and it was a different way . . .

Chief Justice: That just not true factually, counsel.

Otto Counsel: Factually, they were auditing the flow of tax dollars from the counties to the state, which was what was important to this state back in the late 18, the mid 1800s.

Alison Key: Kind of makes you wonder what the Chief's objective in fighting about factual details was, but I think it does get to the broader question of, then what is Otto's formulation of how you define a "core function"?

Mark Thomson: Right. Because Otto makes a point in her brief that I think something like 40 or so of her 90 employees are primarily devoted to auditing counties. She's arguing, how can this not be a "core function"? This is what a big portion of my employees are doing every day. And the Chief is responding, this is a dangerous path we're heading down if we're allowing you in the year 2017 to define what the core functions are of the office. There's gotta be . . .

Alison Key: some objective understanding of what this office means. And I agree that she has a point that if the next State Auditor comes in and starts devoting 40 percent of her employees to whatever she wants is that now a "core function" of the office? So the Chief's point is, the current occupant then decides what the shifting definition of "core function" means and that can't be true.

Mark Thomson: Right. And a number of justices got involved here. So we'll play you clips from first the Chief Justice and then Justice Stras and Justice Hudson.

Chief Justice: So what the case law stands for the proposition that the current occupant of the office can decide what the office's core functions are?

J. Stras: With respect to core functions, you disagreed with the Chief and said you have to look at it over time. You have to-- You can't look at it at the beginning, even though we talk about in terms of inherent and core functions. What I worry about is not necessarily what happened here with your approach, but what would happen if a constitutional officer aggrandised their power? In other words, took power from someone else or from some other office? And under those circumstances, an evolving approach, or that approach didn't look at the time of the founding, would allow officers to aggrandize their power. They'd say, well, I've been doing this for 30 years and now only somebody now somebody challenged, even though it wasn't within the contemplation of the founders. What do we do about a situation like that? And isn't it better to have a rule that looks at what was contemplated at the time of the founding?

J. Hudson: Um, I want to go back to article five where as has been discussed, it gives the legislature the authority to prescribe the duties for the Auditor. It also gives the legislature the authority to change those duties. I'm curious, in your mind, what are the limits on their ability to do that? Because the statute, this article, also talks about the public health and welfare. And so, is that a limit in your mind? And if it is, what was the public health and welfare issue that was going on here or what are those limits?

Alison Key: I want to go back and maybe insert a comment after Justice Stras's line of questioning. I think this is very classic for Justice Stras to say "core functions"/"inherent authority" don't exist in a vacuum. They exist in the context they are attached to something. But I would offer in defense of Otto, that Mattson itself doesn't dictate that the core functions of the office necessarily have to come from the framers. In fact, Mattson itself literally says that the legislature cannot change any functions of the executive office that would "do violence to the title the drafters afforded to the office and the core functions implied therefrom," so it stands to reason that the court, and I think Otto argues this, is that the court could consider, what is implied in the title of an Auditor? And that is what creates the core functions versus whatever the framers intended at the time the office was created. And I think that is a fair reading of Otto's argument. One final thing before we move off this subject, I think is important to highlight is that the counties actually had another argument that they responded to Otto's central premise---that this was removing a core

function of my office by passing this legislation, permitting private firms to conduct these audits---is that the county says, well actually in the law that was passed permitting private audits of counties there's actually a line at the end of the subdivision 3 of that legislation that says the State Auditor can make additional examinations as the Auditor determines to be in the public interest. So while the legislation required an annual audit, and permitted the county to choose who conducted that audit, the State Auditor under this legislation itself still retains the power to conduct any additional audit that it deems to be in the public interest. So the county I think has a pretty good argument from the text of that language to say, even if we agreed with you that this was a core function of your office. The texts with this legislation doesn't actually prevent you from auditing absolutely any county for any reason.

Mark Thomson: Yeah. I think the response to that, which is something that drew Justice Chutich's attention, is that there was a subsequent 2017 bill on this topic, which changed how the funding related to those examinations is allocated. So previously, if the Auditor conducted such an examination, following up on a CPA firm, the county would reimburse the Auditor's office. The 2017 changes made so that that money from the county for the subsequent examination would now go to the State General Fund. So some concern about whether the Auditor is being diminished by having the ability to do the exam, but not the funding that would provide for them.

Alison Key: I think the Justices are further concerned, not only with the funding mechanism, but how they deal with the fact that there was a 2017 change. Because the text of the law, when the legislation was, excuse me, when the litigation was initiated, didn't have this 2017 change. So all of the funding for the additional examinations did go back to the State Auditor no problem, no core function violation. But can the court consider a subsequent 2017 change that hasn't been ruled on below?

Mark Thomson: Yeah. This was a particular subject of concern for Justice Chutich. So we'll play a couple of quick clips from her here.

J. Chutich: May we take into account as we decide this case, the further changes to the Auditor's Office that was made by the legislature in 2017? Counsel, there were also changes made to funding because originally when the State Auditor made additional examinations that she determined to be in the public interest, which I understand to be an important check on the process. Even when the auditor gave a CPA the duty of auditing a county, she still retained that ability to check if something seemed amiss. And that funding source went away and that 2017 amendment, which seems to me to be huge.

Mark Thomson: A couple spare notes before we move on to the Single Subject Clause portion of the argument. One, Justice Lillehaug, known at the court for his baroque hypotheticals, was recused from this case. Justice Chutich came to the rescue. Had a couple of hypotheticals that I thought were really worth listening to. Here they are.

J. Chutich: Let me ask you this, could the legislature have directly given these auditing duties to private accounting firms? Would that have been constitutional?

County Counsel: Boy, I haven't thought of that. Fortunately they didn't. So I'm not sure why not.

J. Chutich: But why can they do it indirectly by letting counties choose if counties aren't part of the executive? That's the question that we have today is where's the line between? Clearly Mattson was an extreme case. We said, no, you can't do that. But there's, I don't think Mattson stands for the proposition that unless you gut an office, it's permissible to alter. Like, let's take an example of the attorney general. Would it be proper for the legislature to say you can't bring any actions on this, you know, this set of causes of action, but you can certainly still give advice to a state agencies. You know, that's not gutting the whole office, but would that be constitutional?

Mark Thomson: One more weird thing about this portion of the argument is because there's so little law, you had Otto bringing in strange sources of "authority," two of which were affidavits by previous State Auditor's, Mark Dayton and Arnie Carlson, both later governors. So you'll see in Otto's brief quotes from the affidavit of Mark Dayton saying, Yep, auditing counties is a core function of the Auditor. Which is such a strange move. You're like creating your own authority. You don't often see affidavits to the state supreme court on legal issues, so that came up a little bit in the argument.

Otto Counsel: And the governor specifically and expressly said, the only reason I'm signing this is because I want to avoid a state shutdown. And he's been very clear both contemporaneously and since then that the provision regarding the State Auditor is objectionable to him both as a former State Auditor and as governor, he thinks that it's unconstitutional.

Chief Justice: Why is that relevant?

Alison Key: So I think that goes to your point, that it may not be relevant what a former governor slash former State Auditor---which apparently is a common path to the governor is through the State Auditor's office; Rebecca Otto again, trying to complete the cycle---but I think part of Otto's argument here is that it has been shaped by current history. So having voices from current iterations of the Atate auditor's office saying this is how we've always done things can be relevant in some way. But I agree that Chief Justice Gildea's questioning, kind of harsh.

Mark Thomson: Fair enough.

Alison Key: Let's move on. So the second bulk of the argument here, in addition to the fact that Rebecca Otto argues that this legislation violates her core functions impermissibly, is that Rebecca Otto also argues that this entire appropriations bill that came about through the convoluted conference committee process that we had discussed earlier, violates the constitutional Single Subject Clause. It's article

four, section 17, is the single subject clauses and it says, "no law shall embrace more than one subject, which shall be expressed in its title." That is the entire section 17, and it was first interpreted in a Minnesota Supreme Court case in 1891 a case that's still cited today. It's called Johnson v Harrison. And the crux of that case is that what it meant to be a single subject is that all provisions in the legislation needed to be considered "germane" to that single subject. Johnson always said that the subject can be as broad as possible, but all provisions in that legislation have to be "germane." So that is what Johnson gave us. Fast-forward to 1989 because we use Johnson v Harrison for a long time and still do, in a case called Blanch, the court further expanded its germaneness test of the constitutional single subject clause to say that a common thread which ran through various sections of the provision at issue shared a "mere filament." But they upheld the law as not violating the Single Subject Clause. So now we're in a situation where we have the constitutional section 17, Single Subject Clause, that has to follow a "germaneness" test, and the "germaneness" test has been further interpreted in Blanche in 1989 to mean a "mere filament" of similarity runs through all the provisions.

Mark Thomson: So here's some of the things that are in this bill. We've obviously got the provision pertaining to State Auditor duties. You've also got appropriations for state departments and agencies, various state government finances, topics like railroad condemnations, and regulation of cosmetology. So, if the state is going to win here, a mere filament is indeed what they're going to need to rely on. This is explicitly an omnibus bill was explicitly put together in a haste at the end of the session. And so I think there's a decent argument that there's no way this could be construed as a single subject. And in fact that's how Otto frames it.

Otto Counsel: Simply put, if the 2015 omnibus bill is deemed to comport with section 17 of article four, then this clause is left with virtually no meaning.

Mark Thomson: I like that.

Alison Key: I like that too. So I mean, I don't think it's possible to necessarily disagree with Otto's counsel there, that the way that laws are passed these days---and Otto's brief does go through the fact that fewer bills are passed per session and more crap is stuffed into these fewer number of bills suggesting that this is just how legislation works these days---it's hard to disagree that that's not within the spirit of the Single Subject Clause, but does it pass the "mere filament" test? And here's one other problem I think Otto runs into is she doesn't clearly challenge that the private audit provisions don't have a mere filament in common with the subject of the rest of the legislation. She argues that the process in general is bad and it's not clear to me that that's specific enough of a challenge to get her where she needs to be.

Mark Thomson: Yeah. That may be the case. And I think it's several of the justices, despite kind of the absurd facts here, appeared to side with the very lenient interpretation of the Single Subject Clause that the court has historically gone with, including Justice Hudson.

J. Hudson: I tend to agree with you, this has the look of a garbage bill. But my question to you though is it seems to me you're pushing a big rock up a steep hill because when you look at the great weight of the authority out there, we have been quite lax and quite deferential to what we just kind of say, well, that's the process. That's how it works. And I guess I'm trying to, in order to rule in your favor on this issue, I think you've got to convince, at least me and maybe the rest of my colleagues too, that this case is somehow very unique or---that's a redundant---but it's unique. It's different. It's worse than all the others.

Otto Counsel: It is for, for a couple of reasons. Number one, the way in which his past is clearly a garbage bill passed in an objectionable way.

Mark Thomson: A garbage bill passed in an objectionable way. A review of your 2015 legislative session, Minnesotans.

Alison Key: Don't pass garbage bills, Minnesota legislature. And I think Justice Hudson has a good point there and I think she does accurately describe the law. Johnson all the way back in 1891 does say that the subject of the bill can be as broad as you want. And the counties definitely make the argument that this is a broad subject, and they're not hiding that it's a broad subject. It's all "government operations" is what they say the subject this bill is. So why can't the idea of permitting counties to hire private firms to audit their books, be within the broad subject, admittedly, of "government operations"?

Mark Thomson: Right and Justice McKeig goes down that road with the counties' counsel.

J. McKeig: Counsel, I have a question related to the single subject. If we agree with your argument, can you think of a bill that would fall under the broad category of government operation?

County Counsel: Well, it's a pretty broad category. And I've thought about that and I think you could make an argument that any specific bill, narrowly phrased or broadly phrased, is going to in some way relate to state government.

Alison Key: Not a good argument that there is no limiting principle in your rule.

Mark Thomson: He later comes up with a couple. But I thought it was pretty stunning that she puts him in this dicey position and he basically comes back and says, nah I'm good, government operations is everything.

Alison Key: Yeah. Very interesting strategy and I think what Justice McKeig is getting at is the broader point that he concedes, that anything can pass this "mere filament" test of "germaneness" when my subject is as broad as I want to. So I think a lot of people are starting to ask, maybe some justices on the court, is the "mere filament" test appropriate or if this test allows this ridiculous process of appropriations to go through, is that causing problems and do we need to change our test?

Mark Thomson: Yeah and I appreciated Justice McKeig, newest justice on the court and perhaps the one that seemed least kind of cowed by this long history of precedent, and she was standing up for kind of common sense at certain points like this:

J. McKeig: But counsel, isn't the purpose of the Single Subject Clause so that there's a transparency as to the legislative process? And when you look at the whole-page title, how is your average Minnesotan to know what is included in that bill?

Alison Key: And I think Justice McKeig is pretty proud of the fact---and she said so publicly---that she always remembers who she's representing when she's up there and I think her question directly went to, how are common Minnesotans supposed to be able to follow our processes and understand who is representing them and what they're doing, if we let this continue?

Mark Thomson: Yeah. So a little resistance put up on the Single Subject Clause. That said, I'm personally not optimistic about Otto winning this portion of the argument. The precedent is completely daunting.

Alison Key: I think that there may be an appetite to change this test. I am actually more convinced that this test is completely unworkable and I think the Justices may be as well after hearing cases that they've heard recently, particularly the Line Item Veto case. Because one of the arguments that the ACLU makes in the amicus brief it filed is that this process renders any govern[or] veto power completely obsolete. If all of these provisions are wrapped up in appropriations bills as here, the choice that the governor has is, I have to pass this bill or shut down the government. The governor can only line item veto appropriations, which this provision was not. It was not an appropriations provision, it was a substantive provision about how the government operates. So there was no way Governor Dayton could've vetoed this. And I think that argument kind of wrapped up in a separation of powers principle is pretty compelling to me. And so it sounds like there's some appetite to reconsider this test and reconsider what its permitting the legislature to do. So I'm a little more optimistic than you.

Mark Thomson: Maybe so. So I think that wraps up our inaugural episode of The ComMN Law. Thanks, as always, to Joy, our communications director. You should to thecommlaw.com, our website. There you can check out Minnesota's only, we think, calendar of free CLE opportunities. That will be updated going forward. You can also get in touch with us at The ComMN Law on Facebook, twitter, or through the website.

Alison Key: Excellent. Have a nice one, Commners.