The Third Branch:

The Supreme Court of the United States (SCOTUS) – Week 2

Nils Pedersen & Joyce Francis
Fall 2021, Jefferson County Library

1

Follow-up to Q's from Last Week

- **Admiralty Cases**
  - **Admiralty law** or **maritime law** governs nautical issues and private maritime disputes. Admiralty law consists of both domestic law on maritime activities, and private international law governing the relationships between private parties operating or using ocean-going ships.
  - Article III, Section 2 of the United States Constitution grants original jurisdiction to U.S. federal courts over admiralty/maritime matters; jurisdiction is not exclusive: most maritime cases can be heard in either state or federal courts.
  - Five types of cases can only be brought in federal court: limitation of shipowner's liability, vessel arrests in rem, property arrests quasi in rem, salvage cases, and petitory and possession actions. The common element is that the court is required to exercise jurisdiction over maritime property.

2

Textualism and Originalism

- **Textualism** is a formalist theory in which the interpretation of the law is primarily based on the ordinary meaning of the legal text, where no consideration is given to non-textual sources, such as intention of the law when passed, the problem it was intended to remedy, or significant questions regarding the justice or rectitude of the law.
- **Originalism** asserts that all statements in the constitution must be interpreted based on the original understanding "at the time it was adopted". This views the Constitution as stable from the time of enactment and that the meaning of its contents can be changed only by the steps set out in Article Five.
- **Originalism** stands in contrast to the concept of a 'Living Constitution,' which asserts that the Constitution should be interpreted based on the context of current times and political identities, even if different from the original interpretations of the document. Living constitutionalists sometimes argue that we cannot apply an original understanding of the Constitution because the document is too old and too cryptic.
- **Question:** If we were truly originalist, what would happen to the many cases decided under the 'equal protection' clause?

3

Examples

- Textualism: ***BOSTOCK v. CLAYTON COUNTY***
  - Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."
  - Gorsuch wrote the majority opinion finding that the firing of homosexual and transgender employees violated title VII based on the meaning of 'sex.' He went through a very textualist interpretation to arrive at this conclusion, to which Alito, Thomas and Kavanaugh dissented.
  - See also Gorsuch's opinion in McGirt v. Oklahoma

Living Constitution & Originalsim: Obergefell?

4

Fulton v. City of Philadelphia

Religious Freedom under the 1st Amendment

Facts of the case

- The City of Philadelphia contracts out the approval of foster care families to private organizations
- These organizations include Catholic Social Services (CSS) and other religious groups; CSS has been a contractor w/ the city for 50+ years
- In view of their religious beliefs, it is the policy of CSS to not consider unmarried couples or same sex couples for foster placement; there are many other contractors for the city that do not discriminate and could approve unmarried and same sex couples.
- This policy went without comment until it came to light in 2018 in a Philadelphia Inquirer article
- As a result of the article, the City suspends CSS's contract with the city.
- CSS and others sue the City for violating (amongst many other things) the free exercise clause of the first amendment of the U.S. Constitution.
- The City responds mainly by arguing that under the Supreme Court case precedent of ***Employment Division v. Smith*** the City is allowed to terminate CSS's contract

5

Fulton v City of Philadelphia (cont.)

The Rules of the Case

- The City's (amended) foster-care contract includes a non-discrimination clause that requires the contracting agency to serve prospective foster parents without regard to sexual orientation, clearly violated by CSS refusing to serve same sex couples
- The contract also includes a section that permits ***exceptions*** to this requirement at the 'sole discretion' of the Commissioner (the City).
- **Employment Division v. Smith** is a Supreme Court decision from 1990. The majority opinion was authored by Antonin Scalia and held that a state could deny unemployment benefits to a person fired for violating Oregon's ban on the use of peyote even though the use of the drug was part of a religious ritual. The Supreme Court established the precedent that a State can ban a religious practice ***if prohibiting the exercise of religion is not the object of the law (neutral) but merely the incidental effect of a generally applicable and otherwise valid provision.***

6

Fulton v City of Philadelphia (cont.)

District Court/Court of Appeals

- The District Court sides with Philadelphia (denying the grant of a preliminary injunction to CSS), concluding that the contractual non-discrimination requirement (and a Fair Practices Ordinance) was both neutral and generally applicable under ***Smith***. The Court of Appeals for the 3rd Circuit affirmed.

Supreme Court - *Arguments*

- CSS argued first that ***Smith*** should be overruled, i.e. they urged the court to adopt the position that even religiously neutral laws of general applicability would still be subject to some exception where the law impinges on the free exercise of religion.
- Second, they argued that even under ***Smith,*** where the state has in place a system of individual exemptions from the non-discrimination rule, it may not refuse to extend that system of exemptions to cases of 'religious hardship' without a compelling reason.
- Philadelphia essentially argued ***Smith,*** asserting that the non-discrimination requirement was neutral and generally applicable. They also expressed concern if the court were to find otherwise about the case's applicability to the rest of the City's contracts beyond foster care.

7

Fulton v City of Philadelphia (cont.)

Supreme Court - *Decision*

- The Supreme Court decision **reversed** the 3rd Circuit and found that the refusal of Philadelphia to to contract with CSS unless they agreed to certify same-sex couples violated the free exercise clause of the 1st Amendment.
- The problem for the city was the mechanism for individualized exemptions. While "Smith held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and generally applicable…A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions… Where such a system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason." The inclusion of a mechanism for entirely discretionary exceptions renders the non-discrimination provision not generally applicable.

8

Fulton v City of Philadelphia (cont.)

- This case was a unanimous decision written by the Chief Justice.
- Alito wrote a concurring opinion joined by Thomas and Gorsuch that hinted that they might have completely overturned ***Smith.***
- This case was expected/hoped by some to be a major step forward for the Free Exercise movement, but instead marked a small step, apparently entirely consistent with ***Smith***. Some disappointment on both 'sides.'
- https://www.acslaw.org/video/the-2020-2021-supreme-court-review/

  50:15 → 57:02

9

Texas v. California

Is Third Time the Charm for the ACA?

Intro: https://www.youtube.com/watch?v=Efo2sQYyKMA 55:12 → 57:28

Facts of the case

- The Affordable Care Act (ACA), aka Obamacare, includes an individual mandate for Americans to buy health insurance or face a monetary penalty.
- The mandate was previously challenged at the Supreme Court as unconstitutional in ***NFIB v. Sebelius***. The court upheld the ACA based, not on Congress' power to regulate interstate commerce, but rather on its taxing power, considering the individual mandate to be a tax.
- In 2017, the individual mandate was lowered to be zero by an amendment to the act, effectively nullifying the penalty.
- Texas and over a dozen other states, along with two individuals, sued federal officials for a declaration that the Act's minimum essential coverage provision (26 USC s.5000A(a)) is unconstitutional without the penalty, that this part of the act is not severable from the remainder of the Act, and thus the entire act is unconstitutional and should be enjoined.

10

Texas v. California (cont.)

Rules of the Case

- For parties to have a cause of action considered by a court, they must have sufficient 'standing' in the cause of action. Standing generally means sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Harm generally means specific injury/money damages. Standing is a preliminary consideration, because without it your case won't be heard.
- Severability is a doctrine that basically says that if one provision of a law is found unconstitutional, the remainder of the law should be upheld if possible.

11

Texas v. California (cont.)

District Court/Court of Appeals

- The District Court found that the individual plaintiffs had standing, and that s. 5000A(a) of the Act is unconstitutional and not severable from the rest of the act.
- The Fifth Circuit Court of Appeals agreed as to standing and the unconstitutionality of s. 5000A(a), but not with the severability analysis.
- California and other states intervened (hence TX v. CA) because the administration was not interested in defending the act.

Supreme Court

- The Court first looks at the standing issue, because if the parties don't have standing, the case is over.
- In short, the individual plaintiffs do not have standing. The injury they allege is that they are forced to buy insurance, but because the penalty is zero, there is no injury, no enforcement mechanism. To have standing, they have to allege 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' Unenforceable statutory language is not enough.
- Similarly, the states fail to show that the 'pocketbook injuries' are traceable to the Government's allegedly unlawful conduct.

12

Texas v. California (cont.)

- The injury alleged by the states relates to costs for running state operated medical insurance programs, but these costs don't come from either actual or possible enforcement of s. 5000A(a).
- So, the case is reversed and remanded for action consistent with the decision. Breyer wrote the opinion and was joined by Roberts, Thomas, Sotomayor, Kagan, Kavanaugh and Barrett. Thomas concurred, while Alito and Gorsuch dissented.
- Legal experts opine that as the decision is based on lack of standing, it will be difficult for any other party to challenge the ACA further. Law professor Steve Vladeck said that by avoiding the constitutional question of the individual mandate and instead deciding on standing, the Supreme Court "made it much harder for anyone to get that issue into the courts going forward. In essence, they sucked the oxygen out of the ACA's continuing constitutional fire."
- If you see what the court did here, it's kind of clever in its own way. So, for a party to have standing, there has to be some injury to that party. E.g., the mandate forces you to buy health insurance or else pay a penalty. But by making the penalty zero, no one is injured if they don't buy health insurance, If the mandate is not zero, as it was previously, then there would be standing, but then the mandate is also constitutional under the previous decision holding that it's a proper exercise of Congress' power to tax. Catch 22.

13

The Alien Tort Statute (ATS)

- **1789** – Enacted by Congress to state, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only (not criminal), committed in violation of the law of nations or a treaty of the United States (particularly assault against ambassadors, piracy, and violations of safe passage).
- From **1789→1980**, only two courts based jurisdiction on the ATS.
- **1980** – A Paraguayan woman in New York located, in New York, the Paraguayan doctor who had tortured her brother to death and brought suit against him under the ATS. The 2nd Circuit Court upheld the claim, stating that a resident alien could sue another resident alien in U.S. courts for international law violations outside the U.S. Despite victory, the doctor returned to Paraguay without consequence.
- Thus was born an era of international human rights litigation in U.S. courts.

14

2013 (23 years later) *Kiobel v. Royal Dutch Petroleum*

- **Nigerian nationals** filed suit under the ATS, alleging that they and/or their relatives were killed, tortured, unlawfully detained, deprived of their property, and forced into exile by the Nigerian government AND that RDP & other U.S. agents had been complicit in these actions.
- **2nd Circuit** ruled that ATS could be used against individuals but not corporations, because under international law, corporations can't be made defendents.
- **SCOTUS** Unanimous Decision for RDP – Without addressing question of corporate liability, Chief Justice Roberts wrote that, under the ATS, there is a presumption AGAINST extraterritorial application of U.S. law (thereby avoiding clashes between U.S. and other countries' laws), UNLESS the claims "touch and concern" the U.S. with "sufficient force."

15

June 2021 – *Nestle/Cargill v Doe*

- **Plaintiffs were former enslaved children** forced to work on cocoa farms in the Ivory Coast for up to 14 hours per day without pay.
- Plaintiffs claimed that **Nestle & Cargill, U.S. corporations** that effectively control cocoa production in the Ivory Coast, were aware of the abuse yet continued to provide financial support and technical farming aid to farmers using forced child labor.
- **9th Circuit ruled for the plaintiffs**, as the prohibition against slavery is "universal law."
- View **Pratik Shah**, Partner at Akin Gump and panelist at American Constitution Society (ACS) review of SCOTUS OT 2020.

https://www.acslaw.org/video/the-2020-2021-supreme-court-review/, 105:50→113:00

16

June 2021 – *Nestle/Cargill v Doe (cont.)*

- **Questions:**
  - *May an aiding and abetting claim against a domestic corporation brought under the ATS overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the U.S. and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that general corporate activity?*
  - *Does the judiciary have the authority under ATS to impose liability on domestic corporations?* (2018 in *Jesner v Arab Bank*, SCOTUS found that foreign corporations could not be sued under the ATS)
    - In *Kiobel (2013)*, the 2nd Circuit had said NO.
    - In this case, the 9th Circuit had said YES, as the prohibition against slavery is "universal law."

17

June 2021 – *Nestle/Cargill v Doe (cont.)*

- **8:1 Decision for Nestle/Cargill –** Opinion authored by Thomas found that the corporate conduct (training, fertilizer, tools, and cash to farmers) was mere "corporate presence," so not a violation of international law. Lots of concurrence with dissenting opinions:
  - Thomas, joined by Gorsuch and Kavanaugh, further argued that only Congress can create a new cause of action (child slavery here) beyond original three -- violence against ambassadors, piracy, and violation of safe passage.
  - Sotomoyor , joined by Kagan & Breyer, countered that limiting ATS torts to these three contravenes previous cases as well as the text and history of ATS.
  - Solo Dissenter Alito (with Gorsuch concurring) argued that if a particular claim may be brought under ATS against a U.S. citizen, a similar ATS claim may be brought against a domestic corporation.

18

1965 - The Voting Rights Act (VRA)

- Designed to enforce the voting rights guaranteed by the 14th and 15th Amendments, the Act sought to secure the right to vote for minorities throughout the country, especially in the South.
- Considered "one of the most far-reaching pieces of civil rights legislation in U.S. history."
- Included general provisions for all states and special provisions for states that had a history of voter discrimination.
- Special provision states had to receive pre-clearance from the Justice Department before implementing new voting laws.

19

2013 - *Shelby County v. Holder*

- **Justice Roberts** authored the 5-4 majority opinion, effectively gutting the special provisions of the VRA, arguing that "*the conditions that originally justified these measures no longer characterize voting*" in states and cities with a history of discrimination against Black voters.
- Roberts further opined that those jurisdictions could now be trusted to pass new voting regulations and create new congressional districts without fear of discrimination.
- **Justice Ginsburg** (joined by other 3 liberals in dissent) argued that taking away voting rights protections because Black voters were now in large numbers was akin to "*throwing away your umbrella in a shower because you are no longer getting wet.*"

20

July 2021 – *Brnovich v. DNC*

- **Democratic National Committee (DNC)** argued that two of Arizona's newer voting laws violated the remaining Section 2 (general provision) of the VRA, because they adversely and disparately affected Arizona's Native, Hispanic, and African American citizens:
  - Discarding any ballot filed out of precinct
  - Criminalizing the collection and delivery of another person's early voting ballot
- District found for Arizona, our 9th Circuit found for DNC, and Arizona (via AG Mark Brnovich) appealed to SCOTUS

https://www.acslaw.org/video/the-2020-2021-supreme-court-review/, 5:53→16:40 then questions→21:40, Speaker Debo Adegbile, Partner with WilmerHale

21

July 2021 – *Brnovich v. DNC (cont.)*

- **6:3 Decision for Brnovich** – Ruling split along partisan lines.
  - **Majority opinion authored by Alito** was narrowly decided on the facts of this case and offered no tests to govern all VRA Section 2 challenges. Neither provision imposes burdens on voters that exceed the "usual burdens of voting," and any racial disparity in burdens is "small in absolute terms."
  - **Minority opinion by Kagan** argued that the majority's decision narrowly reads the language of Section 2 of the VRA in a way that undermines its essential purpose to guarantee that members of every racial group have equal voting opportunities.

22

Where the public stands

	Discarding entire ballots from voters who voted outside of their precinct **is unlawful.**	Discarding entire ballots from voters who voted outside of their precinct **is lawful.**
All	51%	49%
Democrats	67%	33%
Independents	44%	56%
Republicans	35%	65%

	Voters **should be able** to rely on another person to collect and drop off ballots.	States **can forbid** voters from relying on another person to collect and drop off ballots.
All	50%	50%
Democrats	70%	30%
Independents	46%	54%
Republicans	27%	73%

Source: SCOTUSPoll, https://www.nytimes.com/interactive/2021/06/01/us/major-supreme-court-cases-2021.html

23

Preview of Week 3 Cases

- ***Americans for Prosperity v. Bonta***
  - **Question –** Does the policy of the California attorney general's office requiring charities to disclose the names and addresses of their major donors violate the 1st Amendment of the U.S. Constitution?
- ***Jones v. Mississippi***
  - **Question -** Does the 8th Amendment require a sentencing authority to find that a juvenile is permanently incorrigible before it may impose a sentence of life without the possibility of parole?
- ***Roman Catholic Diocese of Brooklyn v. Cuomo***
  - **Question –** Are religious entities entitled to a preliminary injunction from COVID-19 restrictions on the basis of showing that their 1st Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest?

24

Preview of Week 3 Cases (cont.)

- ***Mahanoy Area School District v. B.L.***
  - **Question –** Does the 1st Amendment prohibit public school officials from regulating off-campus student speech?
- ***National Collegiate Athletic Association v. Alston***
  - **Question -** Does the NCAA's prohibition on compensation for college athletes violate federal antitrust law?

25