5th Circuit Bar Association Appellate Advocacy Seminar—Supreme Court Panel

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2022 Term in Review

Nat'l Pork Producers Council v. Ross

California Proposition 12 – prohibiting the in-state sale of pork from pigs "confined in a cruel manner" – did not unconstitutionally burden interstate commerce.

A Dormant Commerce Clause conundrum: A regulation on *internal* sales but with huge *external* effects.

Unusual 5-4 line-up: Gorsuch (+Thomas, Sotomayor, Kagan, Barrett) v. Chief (+Alito, Kavanaugh, Jackson)

Nat'l Pork Producers (cont'd)

Majority: DCC is primarily about stopping states from discriminating against other states and protecting internal industry. This is not that.

--California has little internal pork industry. This is about protecting California's values, and we've always allowed internal sales bans.

--There is not an "almost per se rule" against laws with "extraterritorial effects" (absent discrimination).

What about "*Pike* balancing" route to showing DCC violation?

--*Pike* is about smoking out discrimination and instrumentalities of commerce

--Courts should exercise extreme caution in *Pike* balancing.

--Court has never applied *Pike* to invalidate law like the one here: No substantial burden on interstate commerce.

Nat'l Pork Producers (cont'd)

Various plurality sections of J. Gorsuch's opinion (joined by Thomas & Barrett) would go further to eliminate *Pike* balancing: courts can't balance moral harms to California with economic harms on producers

Chief concurrence/dissent: Agrees re no facial discrimination and no anti-extraterritoriality rule but thinks plaintiffs stated a plausible claim of substantial burden on interstate commerce under *Pike.*

--*Pike* is not as narrow as majority says.

--Prop. 12 would force marketwide, major consequences on pork industry, by revamping how pigs are raised. One state shouldn't have this power of national free market.

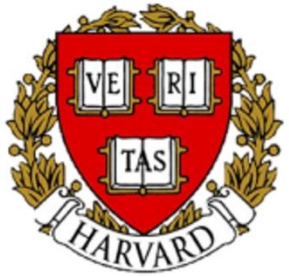
Increasing economic balkanization of red and blue states?

Students for Fair Admission cases

SFA v. Harvard / UNC: Decision

Majority Opinion (Roberts): Harvard's and UNC's admissions programs violate the Equal Protection Clause of the Fourteenth Amendment.

- Precedent permits race-based admissions programs only if they:
  - Comply with strict scrutiny;
  - Never use race as a stereotype or a negative; and
  - Have an endpoint.
- Harvard/UNC programs do not comply with strict scrutiny.
  - Asserted interests not susceptible to meaningful judicial review.
    - Unclear how to measure such goals as training future leaders, promoting robust exchange of ideas, developing new knowledge, preparing engaged citizens, etc.
  - Lack of connection between means and goals.
    - Racial categories imprecise (e.g., "Asian" and "Hispanic").
    - Racial categories underinclusive.



Additional theories of liability

- 42 U.S.C. § 1981 of the Civil Rights Act of 1866
- Title VII (intentional discrimination and disparate impact)
- Title IX (discrimination on the basis of sex)
- Section 1557 of the Affordable Care Act
- State anti-discrimination laws
  - CA Unruh Act
  - NY State and NYC Human Rights Law (*Pfizer*)
  - DC Human Rights Law (*Health Affairs*)

Who is at risk?

- All institutions and businesses – whether for-profit or non-profit – with any diversity program or mission

- Past practices may create risk even for entities that have adjusted their diversity program

Jones v. Hendrix

- 1948: 28 U.S.C. § 2255 became primary vehicle for a federal prisoner to challenge his conviction or sentence
- Jones was convicted of the federal felon-in-possession statute, appealed, and filed and lost a first § 2255 motion
- After all that, the Supreme Court rejected, in *United States v. Rehaif*, the statutory interpretation of the FIP statute under which Jones was convicted

Jones v. Hendrix (cont'd)

- Jones raised a "statutory innocence" claim under *Rehaif*, but claims like that do not meet the standards for successive § 2255 motions
- THE QUESTION: Could Jones raise his *Rehaif* claim under the residual habeas statute (28 U.S.C. § 2241) pursuant to the "savings clause" of § 2255, on the ground that the § 2255 remedy was "inadequate or ineffective" under these circumstances?

Jones v. Hendrix (cont'd)

HELD: NO; § 2255(e)'s "savings clause" does not allow a prisoner asserting an intervening change in interpretation of a criminal statute to circumvent the restrictions on second or successive § 2255 motions by filing a habeas petition under 28 U.S.C. § 2241. (6-3, per J. Thomas)

- JJ. Sotomayor, Kagan, and Jackson dissented

Bittner v. United States

A “violation” under the Bank Secrecy Act is the failure to file an annual Report of Foreign Bank and Financial Accounts (no matter the number of foreign accounts); the Court rejected the government’s argument that there is a separate violation for each individual account that was not properly reported.

Mallory v. Norfolk Southern Railway

- Mallory worked for NSR; after he left NSR, he moved to Virginia and subsequently sued NSR in Pennsylvania state court, alleging exposure to carcinogens in Ohio and Virginia
- NSR disputed that Pennsylvania had personal jurisdiction over NSR; BUT Pennsylvania requires out-of-state companies who register to do business in the state to agree to appear to appear in Pa. courts on “any cause of action” against them

Mallory v. Norfolk Southern Railway (cont'd)

THE QUESTION: Did Pennsylvania's exercise of personal jurisdiction over NSR in Mallory's suit violate due process?

- The Pennsylvania Supreme Court said YES; it held that older SCOTUS precedents about the exercise of personal jurisdiction by this type of consent had been superseded by the later line of personal-jurisdiction cases beginning with *International Shoe Co. v. Washington* (1945)

Mallory v. Norfolk Southern Railway (cont'd)

HELD: NO; the Due Process Clause of the 14th Amendment does not prohibit a state from requiring a corporation to consent to personal jurisdiction to do business in the state.

- SCOTUS's decision in *Pennsylvania Fire Ins. Co.* (1917) – holding that laws like Pennsylvania's in this case comport with due process – is still good law
- Cases like *International Shoe* are distinguishable because they don't deal with jurisdiction by consent

Mallory v. Norfolk Southern Railway (cont'd)

5-4 decision with an unusual line-up of Justices:

- Majority/plurality decision authored by J. Gorsuch was joined in whole by JJ. Thomas, Sotomayor, and Jackson, and in part by J. Alito
- J. Alito concurred, agreeing with due-process holding but suggesting that NSR might have a good attack on the Pennsylvania law under the Dormant Commerce Clause
- Dissent by J. Barrett & joined by C.J. Roberts and JJ. Kagan and Kavanaugh: agreed with Pa. Sup. Ct. that *Pennsylvania Fire* was effectively abrogated under reasoning of *International Shoe* and its progeny

United States ex rel Polansky v. Executive Health Resources, Inc.

The government had authority to dismiss False Claims Act suit after intervening in that suit, even though it had initially declined to proceed with the action.

United States et al. v. Texas et al. (June 23, 2023)

Whether Texas and Louisiana have standing to sue the Secretary of Homeland Security over a Biden administration change to immigration-enforcement guidelines that prioritize arrest and removal of non-citizen suspected terrorists and dangerous criminals.

Held: No standing. 8-1

Kavanaugh, J.: A citizen "lacks standing to contest the policies of the prosecuting when he himself is neither prosecuted not threatened with prosecution."

The States claimed costs associated with having to detain non-citizens who are in state prison and should be arrested by the federal government upon release and to provide services to those subject to final removal orders who should be detained for 90 days after the removal order becomes final. The district court agreed and vacated the Secretary's new guidelines. The Fifth Circuit refused a stay requested by the U.S.. The Court agreed to review before the Fifth Circuit ruled.

"The States have no cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies."

"When the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power . . . and this does not infringe upon interests that courts are often called upon to protect."

"The Executive must balance many factors when devising arrest and prosecution policies."

United States et al. v. Texas et al. (June 23, 2023) (cont'd)

Gorsuch, J. concurring with Thomas and Barrett, JJ.

"The problem here is redressability."

The "vacatur order does nothing to address the States' injuries."

The states' attempt to get the Court to order" an injunction barring implementation and enforcement of the Guidelines " would leave officials with their prosecutorial discretion intact.

"Universal injunctions continue to intrude on powers reserved for the elected branches. . . . They continue to encourage parties to engage in forum shopping and circumvent rules governing class-wide relief."

Barrett, J. joined by Gorsuch, J.

"I see little reason to seize on [a] bonus discussion of whether a 'private citizen' has a 'judicially cognizable interest in the prosecution or nonprosecution of another' to establish a broad rule of Article III standing."

Alito, J. dissenting:

In future cases, Presidential power may be extended even further . . . a possibility bolstered by the Court's refusal to reject the Government's broader argument" that the only constitutional limit on the President's power to disobey a law is "Congress's power to employ the weapons of inter-branch warfare – withholding funds, impeachment, removal etc."

Moore v. Harper

The “independent state legislature” theory/doctrine

- NC Supreme Court throws out state legislative maps for partisan gerrymandering in violation of “free and fair elections” clause of *state* constitution, then reverses course after election.
- Does this violate *U.S.* Constitution, which assigns redistricting to the “legislature” of the state?
- No, says 6-3 majority: Chief (+Kavanaugh, Kagan, Sotomayor, Jackson).
  - One of several cases this Term where Chief and Kavanaugh joined liberals.

Moore v. Harper (cont'd)

- Case not moot despite NC course reversal.
- State does not violate "legislature" mandate of US Constitution by subjective legislative action to normal judicial review under state constitution (undisputed)
  - State constitutions create state legislatures; not purely federal power
  - Precedents re gubernatorial veto, referenda, constitutional ballot initiatives
- But state courts usurp "legislative" power if they exceed judicial role in applying state constitutions in this area. *See Bush v. Gore.*
  - And U.S. Supreme Court will review this question.
- Mostly eliminates consternation about how ISL would affect presidential elections
- Dissent Thomas (+Alito & Gorsuch): Case is moot (+doubts majority on merits)

Student Loan Forgiveness – *Biden v. Nebraska* (June 30, 2023)

Six States, including Nebraska, challenged the Secretary of Education's plan to discharge balances for those with incomes under $125,000 in 2020 and 2021 because of COVID hardships.

Does the Secretary of Education have authority to establish a student loan forgiveness program that will cancel about $430b and affect nearly all borrowers (with ?

Held: No. 6-3. Roberts, C.J.

"The question here is not whether something should be done; it is who has the authority to do it."

"The Court has reason to hesitate before concluding that Congress meant to confer such authority" in light of the unprecedented scope and impact of the plan.

Missouri had standing because of a non-profit, state government entity help some of the debt. "If at least one plaintiff has standing the suit may proceed."

Student Loan Forgiveness – *Biden v. Nebraska* (June 30, 2023) (cont'd)

Barrett, J. concurs. The "major questions doctrine" supports the holding and requires the Secretary to point to "clear congressional authorization"

"I take seriously the charge that the doctrine is inconsistent with textualism."

Dissent: Kagan, J.

"When [textualism would frustrate broader goals, special canons like 'the major questions doctrine' magically appear as get-out-of-text-free cards."

"Federal courts do not possess a roving commission to publicly opinion on every legal question."

The Missouri non-profit is a separate legal entity that has financial independence – had the capacity and ability to sue on its own.

Of note: Former President Trump ordered Secretary DeVoss to suspend payments on loans because of the pandemic.

303 Creative LLC v. Elenis: Background

Issue: Whether a public accommodation law that compels an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

Essentially a replay of *Masterpiece Cakeshop.*

Facts: Lorie Smith wants to expand her website-design business, 303 Creative, to include services for couples seeking custom wedding websites. According to the facts stipulated to by the parties:

Smith will work with all people regardless of sexual orientation or other protected characteristics;

Smith will not produce content that contradicts her view of "biblical truth," regardless of who orders it;

Smith sincerely believes that marriage must be between a man and a woman; and

Smith's websites are "original, customized" creations that express her message celebrating her view of marriage.

Fearing that Colorado would apply its public accommodations law to compel her to create websites celebrating gay marriages as well, Smith brought a pre-enforcement challenge.

303 Creative LLC v. Elenis: Decision

- **Holding:** The First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees.
  - Majority: Gorsuch (writing), Roberts, Thomas, Alito, Kavanaugh, and Barrett.
  - Dissenting: Sotomayor, Kagan, and Jackson.
- **Key question:** As applied to Smith, is Colorado's public accommodations law regulating speech or mere conduct?
  - If speech → case controlled by *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995).
  - If conduct → case controlled by *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR),* 547 U.S. 47 (2006).
- **Majority opinion:**
  - Conclusions that websites are "pure speech" and are Smith's speech flow directly from stipulations.
  - Colorado thus seeks to compel Smith to engage in speech she does not wish to provide.
  - Under *Hurley* and similar cases, public accommodations laws are not a valid basis to compel speech.
- **Dissent:** Colorado targeted the act of discrimination, which is conduct. Public accommodations laws have been repeatedly held not to violate free speech rights, and any burden on speech is incidental and thus permissible under *FAIR*.

Counterman v. Colorado

- From 2014 to 2016, D Counterman sent C.W. (a woman he had never met) hundreds of messages on Facebook, some of which envisaged violent harm coming to her
- D was prosecuted under a Colorado law barring repeated communications likely to cause, and which did cause, serious emotional distress
- The Colorado courts rejected D's contention that, because his communications were not "true threats," the First Amendment barred his conviction

Counterman v. Colorado

- In rejecting D's First Amendment claim, the Colorado courts applied an ***objective*** standard, namely: that a reasonable person would consider the messages threatening
- D argued that the State had to show not only that the messages were objectively threatening, but also that he was ***subjectively*** aware of their threatening character

Counterman v. Colorado

- HELD: D is correct that the First Amendment requires also a subjective understanding of the threatening nature of the messages; but that requirement is satisfied by a recklessness *mens rea*, and actual knowledge on the part of the D is not required:
- "The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another."
- Majority opinion by J. Kagan, and joined by C.J. Roberts and JJ. Alito, Kavanaugh, and Jackson; J. Sotomayor, joined by J. Gorsuch, concurred in part and concurred in the judgment
- JJ. Thomas and Barrett filed dissents

Groff v. DeJoy

Title VII: Religious discrimination is different:

--employer must “reasonably accommodate” religious beliefs or practices unless doing so would impose “undue hardship on the conduct of the business”

Gerald Groff: “the faithful carrier”

TWA v. Hardison (1977): “undue hardship” means anything “more than a de minimis cost” to employer

--Lower courts: overtime, CBAs, disgruntled co-workers

Groff v. DeJoy (cont'd)

Groff's petition: Should *Hardison*'s de minimis test be overruled?

Unanimous Court per Alito: "Clarifies" that de minimis is not the test under a proper reading of *Hardison*.

Test is whether accommodation would impose "substantial increased costs/burdens" in relation to the overall context of the business

--consistent with plain language of statute

--consistent with some language in *Hardison*

--so no need to address stare decisis

Courts can't stop analysis with co-worker effects; must show substantial effect on conduct of *the business*

Allen v. Milligan, (June 8, 2023)

Whether Alabama's 2020 redistricting map, based upon older maps and producing only one district in which black voters constituted a majority, violates Section 2 of the Voting Rights Act."

Held 5-4: The district court properly determined that plaintiffs demonstrated a reasonable likelihood of success on their claim that the map violates Section 2.

Roberts, C.J.:

The long-running debate between whether the VRA prohibits only discriminatory intent or also prohibits discriminatory effect was resolved by Senator Dole's compromise in 1982. Effects count, but there is no right to proportionality (or quotas).

The Court upheld *Gingles* – a 40-year old precedent instructing that the Section 2 guards against "a certain electoral law, practice, or structure [that] interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters."

What constitutes a "community of interest" cannot be justified by preserving political power.

"The heart of this case is not about the law as it exists. It is about Alabama's attempt to remake our Section 2 jurisprudence anew."

Allen v. Milligan, (June 8, 2023) (cont'd)

Only three Justices joined section III B 1 of the C.J.'s opinion. Kavanaugh, J. did not. III B 1 concerned whether the plaintiffs' maps were tainted by "racial predominance" and the C.J. wrote that they were not. This is the principal point of the dissent.

Kavanaugh, J., concurring: "The stare decisis standard for this Court to overrule a statutory precedent [*Gingles*], as distinct form a constitutional precedent, is comparatively strict."

To the extent that it exists or even could exist, "the authority to conduct race-based redistricting cannot extend indefinitely into the future."

Thomas, J., dissenting with Gorsuch, Barrett and Alito (partial), JJ.

The language of Section 2 affects voting and the right to vote, not redistricting.

"federal court's are not equipped to apportion political power as a matter of fairness."

"The constitution abhors classifications based upon race." (quoting his opinion from *Grutter*)

Alito, J. with Gorsuch, J. dissenting:

The majority "misunderstands what it means for a district to be reasonably configured."

The district court "failed to consider whether the plaintiffs' had shown that that their illustrative districts were created without giving race a predominant role."

The Upcoming 2023 Term

Chevron Doctrine

Loper Bright Ents. v. Raimondo (22-451)

QP: Whether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

Constitutionality of CFPB's funding

CFPB v. Community Financial Svc. Ass'n (22-448)

QP: Whether the Fifth Circuit erred in holding that the statute providing funding to the Consumer Financial Protection Bureau (CFPB), 12 U.S.C. § 5497, violates the Appropriations Clause, U.S. Const. Art. I,§ 9, Cl. 7.

CFPB (cont'd)

Appropriations Clause: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"

CFPB funding statute: "Each year . . . the [Federal Reserve] Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law" subject to percentage cap of FR expenses

CFPB (cont'd)

Government's argument: Text and history

- Many other agencies with formula-based, ongoing funding: Federal Reserve, Social Security, Medicare/Medicaid

Respondent's Argument: Purpose of Appropriations Clause is requiring annual congressional oversight of funding.

- Distinguishes historical examples because CFPB *delegates* authority to agency to determine how much it needs in perpetuity (subject to cap) to *enforce* the law (i.e., a core executive function).

Constitutionality of SEC proceedings

SEC v. Jarkesy (22-859)

QPs:

1. Whether statutory provisions that empower the SEC to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment.
2. Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine.
3. Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.

SEC (cont'd)

Brings together longstanding concerns about agencies as lawmaker, prosecutor, judge, and appellate court in the same case.

Seventh Amendment question turns on whether agency would be adjudicating "public rights" or whether this is more like a private fraud action for damages.

Removal-protection question applies *Free Enterprise Fund's* holding that "double for-cause" removal attenuates presidential control required by Article II.

> --Government tries to distinguish *FEF* by noting that here the ALJs are adjudicators and thus not exercising core executive power.

On non-delegation, government argues SEC is not exercising legislative power.

Second Amendment

United States v. Rahimi (22-915)

QP: Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.

Second Amendment

- Last Term, in *NYSPA v. Bruen*, SCOTUS rejected the interests-balancing approach that the lower courts had adopted for the Second Amendment, and instead mandated an approach that looked only to the text of the Second Amendment, history, and tradition
- Following *Bruen*, the Fifth Circuit invalidated Rahimi's conviction under § 922(g)(8) as violative of the Second Amendment
- The government petitioned for cert., and SCOTUS granted cert.
- *Rahimi* is viewed as a litmus test about how protective SCOTUS is going to be of Second Amendment rights, and what types of gun regulations it will find acceptable

Armed Career Criminal Act

Brown v. United States (22-6389) c/w *Jackson v. United States* (22-6640)

QP: Whether the "serious drug offense" definition in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules that were in effect at (1) the time of the commission of the federal firearm offense, (2) the time of federal sentencing on the federal firearm offense, or (3) the time of the prior state drug offense.

Bankruptcy

Harrington v. Purdue Pharma, L.P. (23-124)

QP: Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.