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Recommended Citation

Richard A. Epstein, "Foreword: The Unfinished Business of the Supreme Court - An Introduction," 8 New York University Journal of Law and Liberty 137 (2013).

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SUPREME COURT REVIEW-PREVIEW

FOREWORD: THE UNFINISHED BUSINESS OF THE SUPREME COURT — AN INTRODUCTION

Richard A. Epstein*

It is a commonplace that the decisions of the United States Supreme Court often raise as many questions as they resolve. This is not to say that the level of indeterminacy in the law necessarily grows as one decision raises new issues for judicial resolution. In some case, the Supreme Court makes a large statement of great effect, so that the follow-on questions are of smaller scope than the one just resolved. But in some instances, the reverse can be true, such that a hint of things to come in one case presages major doctrinal developments that take place in the future. For these purposes, the exact direction of the vector is of less importance than awareness of the irreducible minimum of flux and uncertainty that comes when the Supreme Court tackles issues both large and small. For

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the purposes of this brief foreword, the trend is clear. The articles contained in this volume tend to look at big cases that have made major strides, leaving open smaller questions that are still of intense theoretical and practical interest. Such is true of the essays found here, which I shall review in brief detail.

I. INTERSTATE RECOGNITION OF SAME-SEX MARRIAGE AFTER *WINDSOR* — WILLIAM BAUDE

There is no dispute that the major story of the Supreme Court's October 2012-2013 term was same-sex marriage. As William Baude notes in his article, "Interstate Recognition of Same-Sex Marriage after *Windsor*," *United States v. Windsor*¹ did much to advance the cause of same sex-marriage when it held that the United States should follow the lead of the various states in deciding on whether to accept same-sex marriages. In a word, as New York goes, so goes the federal government. That stated deference to the states only reaches the status of a marriage within the state in which it is performed, and thus invalidates Section 3 of DOMA which defines marriage as a union of one man and one woman. But *Windsor* leaves open the status of Section 2 of the Act, which provides that no state is required to give recognition to same sex marriages in other states. As Baude notes, it is not clear that this provision really changes the law, which allows most states to reject those marriages performed elsewhere that offend their own public policies.

As Baude notes, *Windsor* can be read two ways on this point. First, it could be understood to firm up the principle of federal deference to state decisions on marriage matters, in which case Section 2 should survive. Or it could be held to project the view that there is a fundamental liberty interest in marriage that the Court is willing to protect, at which point the ability of state A to reject marriages

¹ 133 S. Ct. 2675, 2682 (2013).

performed in state B is far more precarious. Baude does not resolve this tension, but he does conclude that the recent decision in *Obergefell v. Kasich*² appears to go overboard on either view insofar as it requires Ohio to recognize a wedding in Maryland of two Ohio men who got married in Maryland without bothering to get off the airplane that took them there. Baude notes that there are real questions to be decided when a same sex couple relocates to a state that does not acknowledge same sex marriage when they were married, and did reside, in a state that did recognize such unions. The whole issue will disappear if same-sex marriage is found constitutionally required. But in this transitional state, Baude makes an impressive case for at least some limits on the forced interstate recognition of same-sex marriages.

II. THE *KIOBEL* DECISION: THE END OF AN ERA — FERNANDO R. TESÓN

Professor Teson's title is in perfect harmony with the overall theme of this brief introduction, for *Kiobel v. Dutch Petroleum*³ does seem to mark the end of an era in which the shortest statutes often gave rise to the most difficult controversies. That proposition is surely the case with the terse Alien Tort Statute of 1789, which confers on the federal courts jurisdiction to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁴ This statute poses two great questions. First, why should the United States exercise jurisdiction over wrongs involving two parties, neither of whom has any connection with the United States? And second, for those cases that do make it within our courts, whose law should be used to deal with these matters? These issues have bubbled about the federal courts since

² Order Granting Plaintiffs' Motion for a Temporary Restraining Order, *Obergefell v. Kasich*, No. 13-501 (S.D. Ohio July 22, 2013).

³ 133 S. Ct. 1659 (2013).

⁴ 28 U.S.C. § 1350.

*Filartiga v. Pena Irala*⁵ allowed a suit to be brought in the United States on behalf of one Paraguayan man who had been murdered by a Paraguayan official.

Professor Tesón reviews the latest chapter in this difficult branch of law in his commentary on *Kiobel v. Dutch Petroleum*, in which the plaintiffs, residents of Nigeria, sued the Royal Dutch Petroleum Company in United States District Court for actions that were allegedly taken to support a repressive Nigerian government. Initially, the case injected the discordant element of how the ATS should handle the question of corporate liability when its text does nothing to identify who counts as a proper defendant in such cases. But in the end, a five-member majority clipped the wings of the ATS by concluding that the ATS does not reach acts beyond the US borders that occurred within the territorial limits of another sovereign state—allowing actions under the ATS for actions, such as those by pirates, in international waters. The four dissenters led by Justice Breyer concluded that actions could be brought for wrongs committed on the soil of other nations, but thought that this power should not be exercised in the instant case because the defendants were only accused of aiding and abetting, not of their own direct wrongs. In his short essay, Professor Tesón weaves together these various strands of law and concludes that under the ATS a proper claim must allege:

- A. Sufficiently precise and universally agreed upon rules of customary international law, and
- B. Events occurring in the United States or with a sufficiently strong contact with the United States.

He observes that the ATS no longer makes the United States the policeman of the world, only to conclude that the United States should in fact open its doors to victims of serious rights violations

⁵ *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980)

that occur outside our borders. In so doing, he notes that many libertarians do not respond to their cardinal sin, which is the need to control all forms of aggression, but instead revert to the isolationist element in libertarian thought. The reader will have to decide whether Professor Tesón's elegant essay has made out the case for a more muscular American jurisdictional response on what look suspiciously like natural law grounds. Some decisions may end an era; they do not end the underlying intellectual debate.

III. MARYLAND V. KING: THE SUPREME COURT FAILS THE FOURTH AMENDMENT TEST — BARRY FRIEDMAN

The Supreme Court's Fourth Amendment jurisprudence often involves simple fact patterns that give rise to sharp divisions of opinion that open up as many questions as they resolve. That is surely the case with *Maryland v. King*, where the Supreme Court held by a five to four vote that the police may collect DNA from people during the course of a routine arrest, and use the results of those tests to convict the arrested person of unrelated crimes committed some time before—in this instance a rape committed some six years earlier. Barry Friedman in his provocative essay argues that both sides to the fierce debate have got Fourth Amendment doctrine wrong. The passionate dissent of Justice Scalia, which insists that there be probable cause for any and all searches, clearly ignores the unquestioned right of both the federal and state governments to conduct regulatory searches at airports and road blocks—both to detain potential offenders and to deter crime before it is even attempted. But Friedman also chides Justice Kennedy in the majority for thinking that information collected in a non-regulatory “investigative” search can be used in any case apart from the one under investigation.

The question is indeed close. Justice Kennedy may have overstated his case when he insists that parties subject to arrest have a “reduced expectation of privacy.” But at the same time, it is far from clear whether a general procedure that does not single out some arrestees for treatment not given to others imposes such a great threat to civil liberties as to require the police to overlook a

serious crime because they have come across an unexpected windfall from a sensible general policy. Unlike Friedman, I think that this case is a close call. The clash over the relative importance of apprehending criminals or constraining government is part of a conversation that will surely continue in future cases.

IV. *SHELBY COUNTY AND THE VINDICATION OF MARTIN LUTHER KING'S DREAM—ILYA SHAPIRO*

In his essay on *Shelby County v. Holder*,⁶ Ilya Shapiro offers a stout defense of the Supreme Court's 5 to 4 decision striking down Section 4(b) of the Voting Rights Act, which requires that certain jurisdictions in the south and elsewhere follow a "preclearance" procedure before making any change, large or small, to their voting procedures. The reaction to the *Shelby County* decision from the American progressive wing is similar to the outcry sparked by *Citizens United* in 2010. The common feature is the near-violent overreaction to a decision that seems to be relatively uncontroversial as a matter of first principle, even though it gives rise to strong negative responses in an age when populism has made a strong comeback in some progressive quarters.

Shapiro, like other defenders of the Court's decision (myself included),⁷ has no patience whatsoever for the voter bullying tactics that lasted through the mid-1960s and resulted in gross miscarriages of justice. But his argument is that those conditions are long past, that modern race relations represent a great triumph of American policy, and that the 2006 Congress's effort to act and write as if nothing much has changed in the past 50 years does a great disservice to those who have worked so hard to bring these changes

⁶ 133 S. Ct. 2612 (2013).

⁷ Richard A. Epstein, *The Mirage of Racism*, DEFINING IDEAS, THE HOOVER INSTITUTION (March 12, 2013), <http://www.hoover.org/publications/defining-ideas/article/142306>.

about, and casts an unjust eye of suspicion on public officials who have fully internalized the lessons on race that emerged from that earlier period. It turns race relations upside down. In 1965, Congress enacted a 5-year statute to control a rampant problem. The 2006 renewal is for 25 years when the initial outrageous behaviors that made the 1965 Voting Rights Act so critically important are nowhere to be found.

To be sure, there will always be disputes about voting requirements. But it goes beyond reason to think that the ID requirements that are imposed by some states should be taken as a sign of lingering discrimination when ID requirements have been sustained in the United States Supreme Court, are commonly required for admission into a bar and, for that matter, entrance into NYU Law School. As Shapiro points out, they are also commonplace in nations such as Canada, Germany, Holland, Switzerland and Sweden, which have no history of race discrimination. There is an eerie similarity between this case and *Schuetz* insofar as the modern complaint is that a refusal to impose additional judicial oversight over the political branches of government is justified by an appeal to principles of racial justice that are, alas, a reversal of many of the ideals of the earlier civil rights movement. Say what one will, the arguments of Justice Ruth Bader Ginsburg in her *Shelby County* dissent do not have any of the moral authority of the passionate dissent of first Justice John Marshall Harlan in urging a “color-blind” constitution in *Plessy v. Ferguson*.

V. NOEL CANNING V. NLRB: SHOULD THE COURTS POLICE THE RECESS APPOINTMENTS POWER — PETER M. SHANE

One of the most divisive cases of the current term, *Noel Canning v. NLRB*,⁸ raises a large number of questions associated with the ability of the President to make recess appointments. As drafted,

⁸ 705 F.3d 490 (D.C. Cir. 2013).

the Appointments Clause gives the President the power “to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”⁹ The limits of this Clause were tested over the presidential nomination of Sharon Block and Richard F. Griffin, Jr. for two of the three Democratic seats on the NLRB. Both names had been sent over to the Senate on December 15, 2011, one day before it was set to adjourn.¹⁰ On January 4, 2012, while the Senate was in pro forma session, President Obama made recess appointments for both members, which would last until December 31, 2013. The appointments were critical because without them the Board (and the Republican Terrence Flynn) of the NLRB could not have the three-member quorum required by the Supreme Court’s 2010 decision in *New Process Steel v. NLRB*.¹¹

A seesaw battle of much intensity has developed over whether these two appointments were valid. Peter Shane lays out with great care the various alternatives on this question and concludes that, given the tangle of issues on text, history and structure, the President’s will ought to prevail since he should take “the leading role in staffing the executive branch.”¹² In order to reach this conclusion, Shane thoughtfully critiques the arguments on the other side, most notably those made by Judge Sentelle in his opinion for the District of Columbia. Shane first argues that the phrase “that may happen during the Recess of the Senate” could be construed to allow for vacancies that open up when the Senate is still in session, but continue long enough so “as they happen to exist” during the relevant recess. I think on balance that this construction is forced, but it is consistent with the established practice from about the 1820’s,

⁹ U.S. CONST. art. II, § 2, ¶ 3.

¹⁰ Melanie Trotman, *Obama Makes Recess Appointments to NLRB*, WALL ST. J., January 4, 2012, <http://online.wsj.com/news/articles/SB10001424052970203513604577141411919152318>

¹¹ 130 S. Ct. 2635 (2010).

¹² Shane, *infra* at 202.

which raises a tension, difficult to resolve, between the text as drafted and the text as traditionally construed.

Shane next notes that there is an extensive debate over whether the only recesses that count are those that take place between Congressional sessions, or those that take place within sessions. On balance, I think that the words "next session" point to the former of these readings, because otherwise an intersession appointment would last only until the end of the same session.

Both of these issues could be resolved in favor of the NLRB, and it will still lose the case if the Court holds that any appointment made while the Senate is in pro forma session does not occur during a recess. As Shane carefully notes, pro forma sessions are recent devices, started by the Democrats in 2007 after they took over the Senate during the Presidency of George W. Bush. President Bush refused to make appointments during that period of time, so that whatever nascent custom arises on this issue cuts against the appointment. Since the Senate has passed legislation during these pro forma sessions, and has control over its own proceedings,¹³ my view is that this narrow ground points in favor of the President. Shane makes a strong case for the opposite position, noting first that the political dimension of the issue counsels against let the Court intervene in this area and that, as noted earlier, the President should be in charge of executive appointments.

There are several responses here, the worth of which is yet to be determined. First, it is wrong to call this a political dispute since questions of constitutional text, structure and practice raise issues of the type that the Supreme Court often resolves. Second, I think that the President still retains the tactical advantage even if these recess appointments are limited, because only he can name a nominee and that nominee can only be blocked by a majority of the Senate, which is not easy to do. And third, the dangers of tactical behavior are, as ever, bilateral. In this instance, the President's decision to submit

¹³ U.S. CONST. Art. I, § 5, cl. 2 ("Each House may determine the Rules of its Own Proceedings. . .").

the two Democratic names late in the cycle, when the Republican name had been sent up much earlier, is a form of strategic behavior that can pay handsome dividends if the President can make a recess appointment before the Senate has adequate time to consider his nominee. And it is in my view always dangerous, and perhaps even unconstitutional, for the President to make a recess appointment of a nominee whom the Senate has rejected. The question here is surely close and worthy of close attention. Shane's excellent article is a measured and constructive contribution to a much needed debate.

VI. *SCHUETTE V. COALITION TO DEFEND AFFIRMATIVE ACTION AND THE FAILED ATTEMPT TO SQUARE A CIRCLE* — DAVID BERNSTEIN

David Bernstein's contribution to this issue, *Schuette v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle* addresses yet another piece of unfinished business, this time on the socially contentious issue of affirmative action. As did both *Grutter v. Bollinger*¹⁴ and *Gratz v. University of Michigan*¹⁵ in 2003, Schuette tackles the vexed status of affirmative action programs in Michigan—with a twist. In the aftermath of decisions that gave limited sway for affirmative action, the voters of Michigan, under the Michigan Civil Rights Initiative, Proposal 2, voted to ban affirmative action by state entities, not only in universities but elsewhere, by a 58 to 42 margin. As Bernstein notes, the case came to the Supreme Court after Proposal 2 was struck down by an 8 to 7 vote in the Sixth Circuit, with all 8 democratic appointments voting to strike down the law and all seven republican appointments voting to sustain it.

The title of Bernstein's paper gives little doubt as to where he stands, and I must say that I agree with him in thinking that the

¹⁴ 539 U.S. 306 (2003).

¹⁵ 539 U.S. 244 (2003).

decision should be, and will be, struck down by the Supreme Court.¹⁶ What is impressive about Bernstein is his relentless demolition of the arguments of the Sixth Circuit majority, which in his view reflect many obsolete assumptions about race relations that rest in part on a systematic underestimation of the influence of African Americans on local politics, and on the dubious assumption that affirmative action policies are simply a black and white matter, without taking into account the position of Asian Americans, Hispanic Americans and Native Americans. Nor, it should be added, is the modern jurisprudence tied to any of the traditional indicators of economic disadvantage. Given the current state of play, it is quite doubtful that anything that Bernstein says about this issue will put an end to the debate. But it is worth noting that it would be exceedingly odd if the Supreme Court struck down a statute that uses democratic processes to embed in the Constitution a colorblind ideal. For those who are interested in seeing how these two strands are effectively woven together, I recommend a close read of Judge Jeffrey Sutton's dissent in *Schuette*¹⁷, which may yet be the basis of the Supreme Court's (possibly unanimous) reversal of the Sixth Circuit decision.

VII. BOND V. UNITED STATES: CAN A TREATY INCREASE CONGRESS'S LEGISLATIVE POWER? – NICHOLAS QUINN ROSENKRANZ, ILYA SHAPIRO, JOHN C. EASTMAN, & ANTHONY T. CASO

One area in which there is a vast amount of unfinished business concerns the scope of the Treaty Power. It is well understood that

¹⁶ Richard A. Epstein, *Schuette v. Coalition to Defend Affirmative Action: The Intellectual Confusion That Surrounds Affirmative Action Today*, SCOTUSBLOG (Sep. 9, 2013, 2:25 PM), <http://www.scotusblog.com/2013/09/schuette-v-coalition-to-defend-affirmative-action-the-intellectual-confusion-that-surrounds-affirmative-action-today/>.

¹⁷ *Coal. to Defend Affirmative Action v. Regents of the Univ. of Michigan*, 701 F.3d 466 (6th Cir. 2012).

the Treaty Power permits the President to enter into treaties with foreign nations with the concurrence of two-thirds of the Senators present.¹⁸ It is also clear that the powers granted to Congress are enumerated, and thus subject to external limit. The question raised in *Bond* is thus: "Can the President increase Congress's legislative power by entering into a treaty?" The answer to that question found in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW¹⁹ is that there are virtually no limits to what the President, with Senate concurrence when needed, can achieve.

That position is now up for grabs in *Bond*. The supposed extent of the treaty power is revealed on the facts of *Bond*, which involved an effort of the accused to murder her husband by stealing toxic chemicals from her employer. Her actions violated many state laws, including theft and attempted murder. Nonetheless *Bond* was indicted under a federal statute, 18 U.S.C. § 229, which was enacted pursuant to the Chemical Weapons Convention to which the United States was a signatory. The constitutional authority for that proposition rests on this single unexplained sentence from Justice Holmes in *Missouri v. Holland*: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."²⁰

The Rosenkranz brief offers a devastating deconstruction of that proposition, and should command the strong support of originalists, textualists, structuralists, functionalists—indeed of any person who thinks of constitutional law as something other than international politics under another name. Can it really be the case that the President can, via a treaty with some banana republic, expand or, as

¹⁸ U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

¹⁹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. c (1987).

²⁰ *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

our authors point out, contract the power of Congress to act? The Constitution was designed to prevent the President and Congress from circumventing basic constitutional provisions by strategic behavior, and just that would happen here if the use of the Treaty power were allowed to give Congress (or at least one House of Congress) an alternative way to work, or to avoid the procedures for constitutional Amendment found in Article V. The Treaty power made perfect sense when treaties were confined to their traditional functions of ending wars, establishing boundaries, recognizing nations, opening embassies and forging alliances. But some profound limitation on that power is necessary to make sure that it does not allow Congress and the President to displace the ordinary principles of state law in dealing with routine criminal offenses. *Bond* is without question a constitutional case for the ages. Rosenkranz makes a powerful case for the rejection of Holmes' ill-considered dicta in *Holland*.

CONCLUSION

The cases discussed in this issue all raise profound constitutional policy concerns that raise the perennial question of the extent and use of government power in a wide variety of social areas. In dealing with these areas, the justices do not write on a blank slate, but must contend with the growth of Supreme Court doctrine, some of which is sound, but much of which is not. The open business before the Court is how to bring order to the unruly materials before it and take on the unfinished business of crafting a body of jurisprudence that deals with the difficult issues of this, and indeed any, age. The short pieces in this collection offer a useful roadmap as to some steps that can be taken to advance us in a sound and sensible direction.