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FEDERAL COURTS SECTION NEWSLETTER

July 2, 2019

2020 Annual Meeting Program

Federal Courts at the Border

In recent years growing dysfunction in the United States' immigration system has put pressure upon the federal courts to play a central role in lawmaking at the nation's border. Dysfunction within the administrative system of immigration adjudication, for example, has led to strain upon the Article III courts. Disputes about asylum and refugee policy, the Trump Administration's border wall, cross-border shootings, and the application of the Suspension Clause to undocumented immigrants have underscored the difficult role of federal courts at the border. The panel will consider three questions about that role. First, it will consider federal courts doctrines, such as doctrines of standing, implied rights of action, and statutory preclusion of judicial review, that bear upon the availability of judicial review at the border, asking whether and to what extent those doctrines create zones free from judicial oversight. Second, the panel will ask in what ways recent challenges to immigration law and policy have shaped the doctrines of federal courts law. Third, the panel will look to see what light disputes at the border may shed upon the design of—and practical constraints upon—the federal court system.

In the Supreme Court

Here are brief summaries of cases the Court decided in the October 2018 Term, followed by descriptions of cases awaiting review that appear to present Federal-Courts issues. Material new in this issue of the newsletter appears in blue type. There are hyperlinks to lower court decisions, mentioned cases, statutes, and argument transcripts.

Decided in the October 2018 Term

***Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019)**

The unanimous Court sided with the eight-to-three circuit majority in holding that the Title-VII exhaustion requirement is not jurisdictional. Although exhaustion is a mandatory rule, it does not go to the courts' subject-matter jurisdiction, so defendant's failure to raise it timely functioned as a waiver.

***California Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019)**

A five-to-four Court, split along "conservative" and "liberal" lines, overruled

Nevada v. Hall, 440 U.S. 410 (1979), which held that neither the Eleventh Amendment nor Article III nor the doctrine disallowing non-consensual suit against a sovereign in its own courts prevents a state's courts from hearing a case against another state.

The real news from this case may be the Justices' debate about the role and strength of *stare decisis*. The majority basically argued that the Court had erred in deciding *Hall* forty years earlier. Justice Breyer's dissent argued that the majority failed to demonstrate any of the typical bases for overruling long-standing precedent.

Hall appears not to fall within Chief Justice Rehnquist's majority opinion in *Payne v. Tennessee*, which explained that *stare decisis* is the most flexible when "[1] governing decisions are unworkable or badly reasoned, . . . particularly in constitutional cases, where correction through legislative action is practically impossible, . . . and [2] in cases involving procedural and evidentiary rules." With respect to the cases that *Payne* overruled, the Chief Justice noted that "for the reasons heretofore stated, [they] were wrongly decided," and "[3] were decided by the narrowest margins, [4] over spirited dissents challenging their basic underpinnings, [5] have been questioned by Members of this Court in later decisions; [6] have defied consistent application by the lower courts . . . and,." As Justice Breyer pointed out, *Hyatt* satisfied *all but six* of those criteria, and he articulated a *quo-vadis* concern.

***Knick v. Township of Scott*, 2019 WL 2552486 (U.S. Jun. 21, 2019)**

It is fortunate that *Knick* immediately follows *Hyatt* in this newsletter, for both cases' major doctrinal significance ultimately revolves around the continuing role of *stare decisis* in the Court's jurisprudence.

Knick overrules *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), which required property owners to exhaust state court remedies to ripen federal takings claims. The five-Justice majority's essential rationale was that *Williamson*, combined with 28 U.S.C. § 1738, created a "preclusion trap" that prevented takings plaintiffs from ever pursuing their claims in the federal court system. According to the majority, that justifies overruling *Williamson*. In the last section of the opinion, the Court at least paid lip service to some of the criteria typically examined in deciding whether to overrule. The reader may decide whether its recitation is persuasive.

Justice Kagan wrote what Chief Justice Rehnquist might have characterized as a "spirited dissent," though one might fairly characterize it as "angry." She did not find the majority's rationale at all persuasive, either on the construction of a takings claim or on *stare decisis*. She noted that *Knick* will have the effect of moving many compensation claims that state procedures and courts might have resolved into the federal courts. With respect to the *stare decisis*, Justice Kagan referred pointedly to Justice Breyer's dissent in *Hyatt*. "He concluded: 'Today's decision can only cause one to wonder which cases the Court will overrule next.' Well, that didn't take long. Now one may wonder yet again."

One of the unspoken assumptions of the Court's opinion seems to be that (at least) every takings claim is entitled to a federal forum. One could read the opinion more broadly still, to rest on the idea that every federal claim (or even every constitutional issue) is entitled to a federal forum. Yet that is manifestly not consistent with any number of the Court's decisions in other areas, from *Merrell Dow* and *Grable* with respect to federal-question jurisdiction, to the Court's various abstention doctrines, and to the political-question doctrine.

Knick is the second case in two months in which the two blocs of Justices have clashed over *stare decisis*. *Quo vadis* indeed.

***McDonough v. Smith*, 2019 WL 2527474 (U.S. Jun. 20, 2019)**

The six-Justice majority held, with the majority of circuits, that the statute of limitations for a § 1983 claim based on prosecutorial fabrication of false evidence begins to run upon favorable termination of the criminal proceedings, not at the earlier point when the defendant becomes aware of the fabrication and use of the evidence. The three dissenters would have dismissed the writ as improvidently granted because the petitioner failed sufficiently to identify the specific constitutional right infringed (which the majority took to be the Due Process Clause of the Fourteenth Amendment).

***Parker Drilling Management Services, Ltd. v. Newton*, 139 S.Ct. 1881 (2019)**

The Outer Continental Shelf Lands Act requires that all law applicable to the outer continental shelf be federal law. The unanimous Court ruled that although state law may be applicable through adoption as federal common law for issues that federal law does not touch, extant federal law on the relevant point precludes adoption of contrary state law.

***Rucho v. Common Cause* and *Lamone v. Benisek*, 2019 WL 2619470 (U.S. Jun. 27, 2019)**

The political-question doctrine took on new life in a predictable-bloc split. Gerrymandering, at least as to political affiliation and partisan gain and entrenchment, even if there is a constitutional injury-in-fact, it is now beyond the reach of the federal courts. Both major parties appear now to be at liberty to seek as much partisan advantage as they can. The majority did make clear that gerrymandering for racial discrimination and (possibly) other constitutionally proscribed goals is still justiciable. Professor Hasen points out that one may anticipate state legislatures using the partisan-advantage rationale as a cloak for redistricting actually resting on other goals. Richard L. Hasen, *The Gerrymandering Decision Drags the Supreme Court Further Into the Mud*, N.Y. TIMES, Jun. 27, 2019 (available at https://www.nytimes.com/2019/06/27/opinion/gerrymandering-rucho-supreme-court.html?searchResultPosition=1 (last visited Jun. 29, 2019).

Justice Kagan's dissent argued not only that judicially manageable standards were possible but also that they existed and that both lower courts had discovered and applied them through the use of sophisticated technology capable of generating thousands of possible districting configurations using the very criteria that individual states employ except for partisan advantage. From this, the dissent argued it is possible to generate what one might call (but the dissent did not) a bell curve of possible electoral results based on those state-selected criteria and to see how far from the bulk of the curve a particular redistricting plan departed. To be sure, the dissent did not maintain that the process was free of judicial judgment, but argued that the required judgment would be no more difficult to exercise responsibly than other less-than-precise legal criteria such as reasonableness and substantiality.

In one way, majority and dissent approached the case in divergent ways reminiscent of the differences between on-its-face and as-applied constitutional challenges. The majority looked at the problem of adjudicating partisan-gerrymandering cases *in toto* and, concluding that it could not articulate reasonably precise judicial standards, threw up its hands and ruled the entire area out of bounds. It did not ask whether the methods the district courts used in *these* cases offered such standards.

The dissent, on the other hand, implicitly took the position that these cases did not require the Court to articulate generalized standards for all future gerrymander-

ing cases, but rather required only that the Court consider the specific processes that both district courts used in deciding whether "this much was too much."

The majority, for its part, punted the problem to the states and the state courts to address under state constitutions and statutes. Having concluded that there were no possible articulable judicial standards, the majority effectively said that nothing prevents the states from refusing their legislatures the power to seek partisan advantage through redistricting. And the fact that many state constitutions and the United States Constitution have many rights and much language in common does not mean, as we have seen particularly in the criminal procedure area, that the overlapping provisions mean the same thing on the state and federal levels, so it is possible that state courts may come up with the articulable standards that the *Rucho* majority said do not exist under the federal Constitution.

***Thacker v. TVA*, 139 S.Ct. 1435 (2019)**

The sovereign immunity waiver in the Tennessee Valley Authority Act contains no express or implied exception for tort suits involving discretionary functions.

***Virginla House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945 (2019)**

A sharply split Court ruled that the Virginia House of Delegates lacks standing to appear as a party in an action challenging redistricting as racially discriminatory. After the plaintiffs prevailed in the District Court, Virginia, through its Attorney-General, announced that it would not appeal. The Virginia House did, but a five-to-four majority held that the House lacked standing to appeal in its own right or to represent the state. Intervenors must demonstrate standing of their own if the primary party does not challenge a decision.

Granted Certiorari

***Gray v. Wilkie*, No. 17-1679 (Decision below: 875 F.3d 1102))**

"[Does] the Federal Circuit ha[ve] jurisdiction under 38 U.S.C. § 502 to review an interpretive rule reflecting VA's definitive interpretation of its own regulation, even if VA chooses to promulgate that rule through its adjudication manual[?]"

The Court was originally to hear argument on February 25, 2019, but removed the case from the argument calendar and suspended the briefing schedule pending further order.

Comments, Questions, Submissions

Celestine McConville (Chapman) and Don Doernberg (McGeorge) prepared this newsletter. If you would like to contribute to a newsletter, contact Gillian Metzger, Chair of the Section for 2020, at Columbia Law School, (212) 854-2667, gmetzg1@law.columbia.edu, Seth Davis, Chair-Elect of the Section for 2020, at Boalt Hall, (949) 824-3761, sethdavis@berkeley.edu, Celestine McConville, Chapman Law School, (714) 628-2592, mcconvil@chapman.edu, Don Doernberg, McGeorge Law School, (530) 274-1228, DLD@law.pace.edu, or so that your name can be placed in nomination at the 2020 meeting in Washington. Please make the contact as quickly as reasonably possible.