



Dinsmore

Credits @more
2021

CONTINUING LEGAL EDUCATION SEMINAR

RBG → ACB:
Amy Coney Barrett's
Substitution for Ruth Bader Ginsburg



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&

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from the

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Examine Three Areas



∞ Free Exercise of Religion

∞ Separation of Powers

- Non-delegation Doctrine
- Removal power of POTUS

∞ Statutory Interpretation

My Disclaimers

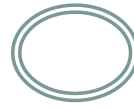


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- ❧ Some things to think about
 - NOT what to think about them
 - FWIW, **both** impressive & honorable

 - ❧ My predictions?

 - ❧ (Constitutional) law ≠ free from politics
 - Nor reducible to raw political preferences

Klarman's Model



Politics → Law ↓	Weak	Strong
Indeterminate	?	P
Determinate	L	?

Ruth Bader Ginsburg (1933-2020)



RBG



-
- Born March 1933, died September 2020
 - Supreme Court from 1993 to 2020
 - Mother died shortly before high school graduation
 - Cornell undergrad to Harvard Law
 - First woman on the editorial staff of the Harvard Law Review
 - Transferred to Columbia Law; graduated in 1959
 - Clerked for the SD New York judge Edmund Palmieri
 - Hired by Rutgers Law as assistant professor in 1963 (tenure 1969)

RBG, ii



- Began work in ACLU gender discrimination litigation in 1970
- First female tenured faculty at Columbia Law
- Argued 6 Supreme Court cases in 1970s (won 5)
 - *Frontiero v. Richardson*
- Appointed to the DC Court of Appeals in 1980 by Pres Carter
- 1993: NYU lecture: more limited approach in *Roe v. Wade*
 - would have reduced controversy instead of fueling it
- Nominated for SCOTUS by Clinton in 1993 to replace White
- Senate confirmation by vote of 96-3
- NEVER MISSED AN ORAL ARGUMENT

RBG: Interpretative Theory



- ❧ Eschewed overarching theory
- ❧ Pragmatic and incrementalist
 - Case specific / detail-oriented
 - Wary of bold judicial strokes
 - Moderate, in this sense
- ❧ EQUAL CITIZENSHIP STATUTE
- ❧ Great emphasis on collegiality

Amy Coney Barrett (1972-)



ACB



- Oldest of 8 children (now mother of 7)
- Rhodes College (Memphis) then Notre Dame Law School
 - ❖ *summa cum laude* in 1997
- Clerked first for DC Cir. Judge Laurence Silberman, then Scalia
- Barrett said of Scalia **“his judicial philosophy is mine too”**
- Worked for Miller, Cassidy in D.C.
 - ❖ *Bush v. Gore* litigation on behalf of Bush
- Returned to Notre Dame as professor of law in 2002
- Constitutional law & theory; statutory interpretation
- Member of Federalist Society
- Nominated to Seventh Circuit (2017), confirmed 55-43 vote
- Confirmed to SCOTUS by 52-48 vote

ACB: Interpretative Theory



☞ Highly theoretical

- Self-identified originalist & textualist

☞ Views the law as **fixed** at the time adopted

- guided by the words of a statute or the constitution
- instead of vague notions of purpose or intent

On ACB's Approach



“Like Justice Gorsuch and the late Justice Scalia, Judge Barrett is a textualist. Her scholarship stresses the importance of interpreting constitutional and statutory provisions consistently with the original public meaning of their text—the meaning that an ordinary member of the public would attach to their constituent words and phrases in context—and declining to depart from that public meaning when it’s clear.”

On ACB's Approach



“... Barrett favors a rule-like approach to ascertaining the meaning of text that generally eschews evidentiary sources that she deems unreliable but which intentionalist or purposivist judges might be more prepared to investigate.”

ACB: Interpretative Theory



❧ Highly theoretical

- Self-identified originalist & textualist

❧ Views the law as **fixed** at the time adopted

- guided by the words of a statute or the constitution
- instead of vague notions of purpose or intent

❧ Precise, detailed-oriented & restrained

- Judging as a craft

Examine Three Areas



∞ Free Exercise of Religion

∞ Separation of Powers

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- Removal power of POTUS

∞ Statutory Interpretation

The Free Exercise of Religion



The First Amendment



“Congress shall make **no law respecting an establishment of religion, or prohibiting the free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The Law



- ❧ Neutral and generally applicable laws that burden a religious practice are subject only to rational basis review.
 - Categorical Protection →→→ Anti-Discrimination
- ❧ *Smith's* unanswered question
 - What does it mean for a law to be non-discriminatory?
- ❧ Two Approaches
 - *Personnel Administrator v. Feeney*
 - “because of” vs. “in spite of”
 - “Most Favored Nation”
- ❧ The COVID-19 Dilemma
 - No religious hostility but interesting decision making . . .

COVID-19 SCOTUS Free Exercise Timeline May 2020 – February 2021



❧ *South Bay United Pentecostal Church v. Newsom*

- (May 29, 2020)
- 5-4 for the Government

❧ *Calvary Chapel v. Sisolak* (July 24, 2020)

❧ RBG →→→ ACB

❧ *Diocese of Brooklyn v. Cuomo* (Nov. 25, 2021)

- 5-4 for the Church

❧ *South Bay II* (Feb. 5, 2021)

- 6-3 for the Church

❧ *Change in FACTS or Change in DOCTRINE?*

Change in Doctrine



“[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.”

Tandon v. Newsom (per curiam)

Free Exercise Judicial Restraint



❧ *Fulton v. City of Philadelphia*

❧ “As a matter of text and structure, it is difficult to see why the Free Exercise Clause – lone among the First Amendment freedoms – offers nothing more than protection from discrimination.”

❧ “But I am skeptical about swapping Smith’s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court’s resolution of conflicts between generally applicable laws and other First Amendment rights – like speech and assembly – has been much more nuanced.”

❧ **“We need not wrestle with these questions in this case . . .”**

Lower Court Reliance on *Tandon*



✧ Mask Requirements

- *Resurrection School v. Hertel* (Siler, J., concurring in part and dissenting in part)
 - Mask requirements for religious schooling but not other contexts.

✧ Title VII

- *Bear Creek Bible Church v. EEOC*
- Antidiscrimination: requirements for employers with 15 or more employees (thus not for employers with fewer than 15)

Separation of Powers



Non-delegation Doctrine

&

POTUS's Power to Remove
(independent agencies)

Non-delegation Doctrine



Precipice of Change?



⌘ Gorsuch dissent in *Gundy v. United States* (2019)

○ Kagan (+ Ginsburg, Sotomayor)

○ Alito, (not yet ready)

○ Gorsuch "did not wait."

▪ Work on revival of NDD

○ Kavanaugh

• did not p

▪ ??????



ACB?

Scalia's *Mistretta* Dissent



- ✧ “But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, **it is not an element readily enforceable by the courts.**”
- ✧ “I fully agree with the Court’s rejection of petitioner’s contention that the doctrine of unconstitutional delegation of legislative authority has been violated because of the lack of intelligible, congressionally prescribed standards to guide the Commission.”

More On Scalia in *Mistretta*



- ✧ Upset that the Commission is not IN THE EXECUTIVE BRANCH
 - “because the Commission neither exercises any executive power on its own, nor is subject to the control of the President who does.”
 - Why NOT subject to control by POTUS???
 - Removable only for cause; effectively tenured
 - Case is “about the creation of a new Branch altogether,”
 - “a sort of junior varsity Congress.”

“Headless” Fourth Branch



POTUS's Power to Remove



(Executive) Officers of the United States

Removal after *Morrison*, ii



<u>Case</u>	<u>Office</u>	<u>Limit on P's Removal Power</u>	<u>Result</u>	<u>Why?</u>
Myers	OR Postmaster	Only w/ A & C of Senate	Unconst'l	Vesting/t.C. Cls.
Humphrey's	FTC Comm'ner	inefficiency/neglect/malfeasance	Const'l	≠ "purely exec."
Morrison v. Olson	Independent Counsel	Only for "good cause"	Const'l	Functional inquiry
Free Enterprise Fund	PCAOB	Double-layer of removal	Unconst'l	Functional Inquiry ????

Seila Law (2020)



ANOTHER 5-4 Ruling
What's it Mean???

Seila Law



CFPB

- Single Director
 - FIVE-year term
 - For-cause removal only
- Generates its own revenue
- Broad authority

Seila Law: Questions



- ✧ Just about the peculiar circumstances of CFPB???

 - Were they THAT peculiar?
 - Why, do you think, DID Congress create the CFPB this way???

- ✧ OR does the case signal a sea change in the law of removal???

 - CJ's summary of the law narrows *HE* & *Morrison* to vanishing pt

 - **What does it portend???**

Seila Law



- ❧ What, if anything, was different about the CFPB?
 - Should those differences have made it unconst'l?
 - Why did Congress structure the CFPB like it did?

- ❧ What are the implications of *Seila Law*?
 - For OTHER “independent administrative agencies”?
 - FTC, SEC, FEDERAL RESERVE, FCC, FEC, CPSC, etc.

“Headless” Fourth Branch



Statutory Interpretation



RBG on Statutory Interpretation



- ∞ Eclectic approach
- ∞ Sympathetic to Hart & Sach's Legal Process
 - Purposivist
- ∞ More specifically: Dueling Approaches
 - Language & Lenity canons > cong'l "intent"
 - Criminal statutes
 - Leg. History, Purpose, Agency deference
 - Administrative or Regulatory statutes

ACB on Statutory Interpretation



- Unapologetic Doctrinaire Textualist
- *Assorted Canards of Contemporary Legal Analysis*
 - Contra Purposivism
 - Congressional silence NOT acquiescence
 - Suspicious of dictionary abuse
 - Emphasis on text where meaning clear
 - ✦ Without regard to awkwardness of “fit”
- Hints from Seventh Circuit Cases

RBG → → ACB



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- ❧ Text > Legislative intent or purpose
 - ❧ Greater role for textual canons
 - Scalia & Garner's *Reading Law*
 - ❧ Suspicious of formal legislative history
 - ❧ Willingness to Revisit S.I. Precedents
 - ❧ Battle for the Soul of Textualism?
 - *Bostock* (2020)
 - ❧ Deference to Agency Interpretations?



Questions?



Comments?



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