Federalism & Separation of Powers

The Circuit Splits Are Out There—and the Court Should Resolve Them

*By Evan Bernick**

Note from the Editor:

This article argues that the U.S. Supreme Court should resolve a number of circuit splits in consequential cases. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the issues involved. To this end, we offer links below to briefs in opposition to certiorari in some of the past cases discussed by the author, and we invite responses from our audience. To join the debate, please e-mail us at info@fedsoc.org.

Related Links:

- Brief in Opposition to Petition for Writ of Certiorari, Kagan v. City of New Orleans, No. 14-585 (Jan 21. 2015): http://sblog.s3.amazonaws.com/wp-content/uploads/2015/01/Kagan-Brief-in-Opposition.pdf
- Brief in Opposition to Petition for Writ of Certiorari, Powers v. Harris, No. 04-716 (2004): http://www.ij.org/images/pdf_folder/economic_liberty/ok_caskets/Respondents-Brief-in-Opposition.pdf
- Brief in Opposition to Petition for Writ of Certiorari, Heffner v. Murphy, No. 14-53 (Aug. 18 2014): http://sblog.s3.amazonaws.com/wp-content/uploads/2014/09/14-53-Heffner-brief-in-opp.pdf

Under the circumstances, Chief Justice John Roberts appeared to be in excellent spirits. On June 29, 2012, the morning after he announced a badly fractured decision upholding the Affordable Care Act's individual mandate,[1] the Chief Justice gave a talk at the District of Columbia Circuit judicial conference in which he covered various Court-related topics and took questions from the audience.[2] When asked about the fact that the number of cases argued before the Supreme Court has continued to decline even as the number of petitions for writs of certiorari has increased, Roberts responded that the Court could hear "100 cases without any stress or strain, but the cases just aren't there." He also emphasized that circuit splits are far and away the most important consideration in deciding whether to grant cert petitions.

Three years later, the number of argued cases remains low in comparison with the Court's peak years. In the early 1980s, the Supreme Court decided more than 150 cases per year. In its 2014-2015 term, the Court decided 76, continuing a trend that has long been under observation.[3] In 2009, the Supreme Court advocacy clinic at Yale Law School held a conference to explore the recent docket shrinkage. Professors and practitioners advanced various theories, but as Adam Liptak of the *New York Times* reported, "there emerged nothing like a definitive answer."[4]

And yet, there are a number of glaring (and judicially acknowledged) circuit splits with wide-ranging effects that stand in need of resolution. If the Court is indeed capable of hearing these cases "without any stress or strain," we need to seek to understand why it has not done so. As indicated by the partial survey below, the cases *are* there, and the Court should hear them.[5]

The Court's own Rule 10 sets out the considerations governing review on certiorari. The rule instructs that among "the reasons the Court considers" in deciding whether to grant or deny certiorari are whether a lower court of last resort (a federal court of appeals or a state court of last resort) (1) "has entered a decision in conflict with" another such court on "an important federal question"; (2) "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power"; (3) "has decided an important question of federal law that has not been, but should be, settled by this Court"; or (4) "has decided an important federal question in a way that conflicts with relevant decisions of this Court."[6] There has been a great deal of research devoted to the question of which of these reasons is most influential, and the presence (or absence) of a circuit split has long been identified as a paramount consideration.[7] In this regard, the Chief Justice's focus on circuit splits was confirmatory rather than revelatory.

To hear Roberts tell it, the reason the Court's docket has shrunk so dramatically is not lack of capacity. His remarks suggest that the Court could and would hear more if it were presented with consequential circuit splits in need of resolution. Is it true that such splits "just aren't there"?

Earlier this year, the Institute for Justice sought review of a First Amendment challenge to a New Orleans law that made it illegal to give a paid tour of the city without first passing a history test and obtaining a license from the government. This law was upheld by the Fifth Circuit in *Kagan v. City of New Orleans*, which found that it did not restrict the tour guides' speech at all and thus applied the rational basis test rather than heightened scrutiny.[8] Subsequently, the D.C. Circuit in *Edwards v. District of Columbia* reached precisely the opposite conclusion about a nearly identical law and struck it down.[9] In *Edwards*, the court reasoned that a law which makes it illegal to speak about points of interest or the history of the city does, in fact, restrict speech and thus merits heightened scrutiny. In reaching this conclusion, Judge Janice Rogers Brown, writing for the panel, pointedly acknowledged and declined to follow *Kagan*.[10] The Fifth Circuit denied a petition for rehearing en banc following the decision in *Edwards*.

The split over whether occupational speech is in fact speech entitled to meaningful constitutional protection affects, not only tour guides, but everyone who speaks for a living—from comedians to consultants to interior designers to therapists.[11] As we move from an industrial to an information economy, more and more and more Americans will earn their livings in occupations that consist primarily in speaking.[12] And yet, on February 23rd, the Supreme Court denied certiorari in *Kagan*, taking a pass on the question of whether the government can effectively deny them the ability to do so.

Yet another example: In *Powers v. Harris*, the Tenth Circuit concluded that a state could impose irrelevant credentialing requirements on casket retailers for the sole purpose of protecting state-licensed funeral directors from competition.[13] Thanks to the so-called[14] rational basis test, the Supreme Court and lower courts have generally turned a blind eye to blatant examples of protectionism. But the Court has always required a "fig leaf" of legitimacy—some assertion, however implausible, of a public-spirited end, like the protection of public health and safety.[15]

In *Powers*, however, the Tenth Circuit welcomed a wolf that came as a wolf, holding that economic protectionism—apart from even a disingenuous public goal—constituted a legitimate government interest.[16] In *Craigmiles v. Giles*, the Sixth Circuit reached the opposite conclusion, holding that economic protectionism, standing alone, is not a legitimate government interest.[17] More recently, in *St. Joseph Abbey v. Castille*, the Fifth Circuit followed *Craigmiles*, holding that mere economic protection of a particular industry is not a legitimate governmental purpose, but rather a "naked transfer of wealth."[18] This is another circuit split, and it touches on an issue of fundamental importance to ordinary Americans across the nation—whether their right to earn an honest living can be extinguished on the basis of a naked governmental preference for entrenched incumbents whose lobbying power they cannot match.[19] And, again, the Supreme Court took a pass.[20]

The circuits also remain divided over how to evaluate laws that burden interstate commerce. So long as the laws do not overtly discriminate between interstate and intrastate commerce, courts apply the test set forth in *Pike v. Bruce Church*, which asks whether the burden imposed on interstate commerce is "clearly excessive in relation to putative local benefits."[21] The test contains an inherent tension—together, the terms "clearly" and "excessive" imply an evidence-based, quantitative analysis, whereas the word "putative"[22] connotes supposition. The (predictable) result is that two directly conflicting lines of authority have emerged. The Second, Third, Eighth, and Tenth Circuits require proof that purported local benefits are both genuine and "credibly advanced."[23] By contrast, the First, Fifth, Ninth, and District of Columbia Circuits require only the assertion of a local benefit by the state, however incredible.[24] The Supreme Court made plain in *Kassel v. Consol. Freightways Corp*. that "(t)he incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack."[25] In *Kassel*, the Court concluded that, while the state law restricting the length of tractor trailers was designed to benefit Iowa residents, it burdened interstate traffic too much and was therefore unconstitutional; in reaching that conclusion, the Court carefully scrutinized the evidence in the record.[26] And yet no less than four circuits have held that a bare assertion is sufficient to establish a local benefit. In declining to grant certiorari on this question in *Brown v. Hovatter*, a case involving funeral home regulations, the Court missed an opportunity to resolve this simple but fundamental conflict between multiple circuits—one that threatens to balkanize the unified national market that the Commerce Clause is designed to protect.[27]

Further, despite having heard over 150 rational basis cases since formalizing the test in *United States v. Carolene Products* in 1938, the Supreme Court has yet to decisively answer the question of whether a statute that is rational when passed can be challenged as irrational at a later date if circumstances change. In *Carolene Products*, the Court unambiguously stated that "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the Court that those facts have ceased to exist."[28] But the Supreme Court has not consistently affirmed that the rationality of the government's actions must be determined on the basis of presently existing facts in rational basis cases—indeed, it has implied that they do not. In *FCC v. Beach Communications*, for instance, the Court stated that "legislative choice is not subject to courtroom fact-finding" and that legislation should be upheld if any "conceivable state of facts" could justify it.[29] Lower courts are understandably confused—some circuits continue to follow the changed-circumstances doctrine articulated in *Carolene Products*,[30] while others look solely at whether the statute could be thought rational when it was passed.[31] If the rational basis test—the default rule in constitutional cases—is to be a meaningful test, the Court must clarify that facts matter in every constitutional case. Yet last year the Court declined to review *Heffner v. Murphy*, a decision in which the Third Circuit upheld archaic laws that force funeral directors to (among other things) spend tens of thousands of dollars building useless "preparation rooms" because those laws could have been thought rational in 1952.[32]

There are also several unresolved splits regarding the Second Amendment, including splits over whether the Second Amendment guarantees the right to carry a handgun outside the home;[33] whether states need to offer evidence in support of laws burdening the right to bear arms;[34] and whether consumers have standing to challenge federal restrictions on gun sales.[35] In *McDonald v. Chicago,* the Court affirmed that the Second Amendment protects a personal right to bear arms, and that that right is not a "second-class right," but is rather "among those fundamental rights necessary to our system of ordered liberty."[36] Law-abiding citizens seeking to exercise that right deserve better than this state of uncertainty.

There is also a fundamental disagreement over how carefully trial judges, acting in their capacity as "gatekeepers," should scrutinize expert testimony before admitting it. Federal

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Rule of Evidence 702 requires that judges determine both that the expert relied upon "reliable principles and methods" and that "the expert reliably applied the relevant principles and methods to the facts of the case." In *Daubert v. Merrell Dow Pharmaceuticals* (1993), the Supreme Court made plain that, as part of their gatekeeping function, judges must ensure that expert testimony "both rests on a reliable foundation and is relevant to the task at hand."[37] But the Seventh, Eighth, and Ninth Circuits have adopted the view that faults in an expert's methodology generally go to the weight of the expert's opinions, not their admissibility—thus delegating the gatekeeping function to the jury.[38] In contrast, the Second, Third, Sixth, and Tenth Circuits have adopted the bright-line rule that "any step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible, whether the step completely changes a reliable methodology or merely misstates that methodology."[39] This circuit split has resulted in the lack of any uniform rule when it comes to scrutinizing expert testimony in federal courts.

These are not obscure circuit splits of interest only to constitutional law aficionados. They leave the rights of millions hanging in the balance. Questions about whether naked wealth transfers merit more than a judicial rubber stamp or whether the price of pursuing a vocation is the abandonment of one's right to speak freely are pressing and fundamental, and certainly worthy of the attention of a Court that (to hear the Chief Justice tell it) could easily hear some thirty additional cases. While it is true that some issues benefit from percolating in the lower courts before the Supreme Court wades in, that is an insufficient explanation for the Supreme Court's refusal to resolve consequential issues that have long been ripe for review. After years of fruitless efforts to solve the mystery of docket decline, it is time to subject the Court's inaction to exacting scrutiny.

Endnotes

1 *See* Nat. Fedn. of Indep. Business v. Sebelius, 567 U.S. 1 (2012).

2 Del Quentin Wilber, *After the Health Care Ruling, Roberts Jokes But Declines to Talk About the Decision*, Washington Post (June 29, 2012), http://www.washingtonpost.com/local/crime/after-the-health-care-ruling-roberts-jokes-but-declines-to-talk-about-the-decision/2012/06/29/gJQAzOHfBW_story.html (last visited August 10, 2015).

3 *See* David R. Stras, The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation, 27 Const. Comment. 151 (2009); Margaret Meriwether Cordray & Richard Cordray, The Supreme Court's Plenary Docket, 58 Wash. & Lee L. Rev. 737 (2001); Arthur D. Hellman, The Shrunken Docket of the Rehnquist

Court, 1996 Sup. Ct. Rev. 403 (1996).

4 Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, New York Times, (September 28, 2009), http://www.nytimes.com/2009/09/29/us/29bar.html?_r=0 (last visited April 5, 2015).

5 To help focus attention on this seeming anomaly, the Institute for Justice's Center for Judicial Engagement is planning to hold a conference at which professors and practitioners will identify and discuss the existence of circuit splits that have been presented to the Court, but that it has refused to resolve.

6 Sup. Ct. R. 10.

7 *See* Gregory A. Caldiera & John R. Wright, The Discuss List: Agenda Building in the Supreme Court, 24 Law & Soc'y Rev. 807 (1990) (finding that the existence of an actual conflict between the lower courts or between the lower Court and a Supreme Court precedent is a potent determinant of whether the Court grants certiorari).

8 753 F.3d 560 (5th Cir. 2014).

9 755 F.3d 996 (D.C. Cir. 2014).

10 Id. at 1009 n.15 ("We are of course aware of the Fifth Circuit's contrary conclusion… We decline to follow that decision, however, because the opinion either did not discuss, or gave cursory treatment to, significant legal issues.").

11 The Third Circuit and the Ninth Circuit have also taken differing approaches in cases involving sexual orientation change efforts (SOCE) performed by licensed counselors. This "talk therapy" consists largely in speech. But in Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013), the Ninth Circuit applied rational basis review to a law which prohibited counselors from engaging in SOCE with clients under 18, reasoning that the ban regulates only "conduct," not speech. In King v. Governor of the State of New Jersey, 767 F.3d 216 (3d Cir. 2014), the Third Circuit considered a similar ban and expressly disagreed with the Ninth Circuit's analysis. Following the Supreme Court's lead in Holder v. Humanitarian Law Project, 561 U.S. 1 (2010), the Third Circuit in King rejected the proposition that verbal communications are transformed from speech into "conduct" when they are used to deliver professional services, applying intermediate scrutiny rather than the rational basis test. The Third Circuit went on to uphold the ban, finding that it directly advanced the important government interest of preventing harm to minors.

12 *See generally* Alvin Toffler, The Third Wave (1980).

13 *See* Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004).

14 *See generally* Clark Neily, No Such Thing: Litigating Under the Rational Basis Test, 1 N.Y.U. J.L. & Liberty 898 (2005) (describing the history and present state of the rational basis test and contending that it is not a meaningful "test" at all).

15 The Court has upheld laws barring people who are not licensed optometrists or opthalmologists from replacing broken lenses; denying pilotage licenses to anyone who is not a friend or relative of an incumbent pilot; and banning all pushcart vendors from a popular tourist location except those who had been there for more than eight years. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); Kotch v. Board of River Port Pilot Comm'rs for Port of New Orleans, 330 U.S. 552 (1947); New Orleans v. Dukes, 427 U.S. 297 (1976). In all of these cases, the Court took the government's profession of public-spirited ends at face value.

16 *See* Powers, 379 F.3d at 1220 (holding that "protecting or favoring one particular intrastate industry… is a legitimate state interest").

17 *See* Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).

18 *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013).

19 *See generally* Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1985) (discussing how many of the most important clauses of the Constitution focus on a single underlying evil: "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.").

20 This split has since deepened. In April 2015, the Second Circuit Court of Appeals upheld a patently anticompetitive restriction on non-dentist teeth-whiteners in Connecticut. Writing for himself and another judge on the panel, Judge Guido Calabresi claimed that a "simple preference for dentists over teeth-whiteners" would constitute a legitimate state interest, even if the challenged rule did not—and was not designed to—promote public health. *See* Sensational Smiles v. Mullen, No. 14–1381–CV, 2015 WL 4385295 (2nd Cir. April 15, 2015).

21 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

22 *See* Bryan A. Garner, A Dictionary of Modern Legal Usage 721 (2d ed. 1995) (defining putative as "supposed, believed, reputed").

23 Southhold v. E. Hampton, 477 F.3d 38 (2d Cir. 2007); Lebanon Farms Disposal, Inc. v. County of Lebanon, 538 F.3d 241 (3d Cir. 2008); R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731 (8th Cir. 2002); Blue Circle Cement, Inc. v. Saunders, 27 F.3d 1499 (10th Cir. 1994).

24 Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294 (1st Cir. 2005); All State Ins. Co. v. Abbott, 495 F.3d 151 (5th Cir. 2007); Spoklie v. Mont., 411 F.3d 1051 (9th Cir. 2005); Electrolert Corp. v. Barry, 737 F.2d 110 (D.C. Cir. 1984).

25 Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670 (1981) (plurality opinion).

26 Id. at 672.

27 Brown v. Hovatter, 561 F.3d 357 (4th Cir. 2009), *cert. denied* 130 S. Ct. 741 (2009).

28 United States v. Carolene Products, 304 U.S. 144, 152 (1938). *See also* Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 210 (1934) (holding that where a statute is challenged under the rational basis test, the validity of that statute is "properly the subject of evidence and of findings").

29 508 U.S. at 315. *See also* Heller v. Doe, 509 U.S. 312, 320-1 (1993) (stating that rational basis does not require "foundation in the record").

30 *See* Long v. Robinson, 316 F. Supp. 22, 27-28 (D. Md. 1970), *aff 'd*,436 F.2d 1116 (4th Cir. 1971); Seaboard Air Line R.R. Co. v. City of West Palm Beach, 373 F.2d 328 (5th Cir. 1967); United States v. Moore, 644 F.3d 553 (7th Cir. 2011); Dias v. City & Cnty. of Denver, 567 F.3d 1169 (10th Cir. 2009).

31 *See* United States v. Then, 56 F.3d 464 (2d Cir. 1995); Burlington N. R.R. Co. v. Dep't of Pub. Serv. Regulation, 763 F.2d 1106 (9th Cir. 1985).

32 Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014), *cert. denied* 135 S.Ct. 220 (2014).

33 The Second, Fourth, Fifth, and Seventh Circuits have held or assumed that the Second Amendment encompasses the right to carry handguns outside the home for self-defense. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 93 (2d Cir. 2012); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013); Nat'l Rifle Ass'n of Am., Inc. v. McCraw, 719 F.3d 338 (5th Cir. 2013); Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012). The Third Circuit has refused to recognize this right. Drake v. Filko, 724 F.3d 426 (3d Cir. 2013), *cert. denied* 134 S.Ct. 2134 (2014).

34 The First, Second, Fourth, Seventh, and District of Columbia Circuits require evidence. United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011); Kachalsky v. Cnty. of Westchester, 701 F.3d 81 (2d Cir. 2012); United States v. Chester, 628 F.3d 673 (4th Cir. 2010); Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011); [DC Cir. cite]. While the Fifth, Ninth, and Tenth Circuits have not explicitly held that the government may only meet its burden with actual evidence, their decisions leave little doubt that at least some supportive evidence is expected. Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185 (5th Cir. 2012); United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013); United States v. Reese, 627 F.3d 792 (10th Cir. 2010). The Third Circuit does not require evidence. Drake, 724 F.3d. at 438.

35 The Fifth and District of Columbia Circuits have held that consumers do have standing. NRA of Am. v. BATFE, 700 F.3d 185 (5th Cir. 2012); Dearth v. Holder, 641 F.3d 499 (D.C. Cir. 2011). The Fourth Circuit has held that they do not. Lane v. Holder, 703 F.3d 668 (4th Cir. 2012), *cert. denied* 134 S.Ct. 1273 (2014).

36 McDonald v. City of Chicago, 561 U.S. 742, 780, 778 (2010).

37 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993).

38 Manpower, Inc. v. Ins. Co. of Penn., 732 F.3d 796 (7th Cir. 2013); Johnson v. Mead Johnson & Co., 754 F.3d 557 (8th Cir. 2014); SQM N. Am. Corp. v. City of Pomona, 750 F.3d 1036 (9th Cir. 2014).

39 Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 265-270 (2d Cir. 2002); In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994); Tamraz v. Lincoln Electric Co., 620 F.3d 665, 670 (6th Cir. 2010); Attorney General of Oklahoma v. Tyson Foods, Inc., 565 F.3d 769 (10th Cir. 2009).