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Title: The Robertson Center for Constitutional Law at the United States Supreme Court: A Look Back and a Look Ahead

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- Welcome and Introduction
    - Focus today on two Supreme Court cases in which the Robertson Center has been involved: *Fulton v. City of Philadelphia* and *Dobbs v. Jackson Women's Health*
    - *Fulton* was one of the most closely watched cases of last term, and *Dobbs* will be one of the most watched cases of next term
    - Robertson Center wrote amicus briefs with Hon. Ken Starr in both cases
- A Look Back: *Fulton v. City of Philadelphia*
    - Setting the stage – key facts:
        - Catholic Social Services has been doing foster care in Philadelphia for more than 200 years
        - Part of foster care involves home study certifications – the foster agency evaluates the prospective foster family and makes an evaluation as to whether it is suitable
        - City finds out through a newspaper article that if a same sex couple came to Catholic Social Services for a home study, CSS would refer that couple to one of more than 20 other agencies in city
        - Basically, CSS would tell the couple that CSS's religious beliefs did not endorse a same-sex family structure and that the couple would be better off going to another agency for the home study – including a handful that specialized in placing foster children with same-sex couples
        - Not surprisingly – given the alternatives – no same sex couple ever approached CSS and asked them to do a home study

- So, this is a case that started with no real conflict
- Nevertheless, City said CSS must promise ahead of time that it would certify a same sex couple if asked --- CSS refused to do that, and City then cut off CSS and foster parents already approved by CSS from future placements

- Lower Court Result
  - CSS lost in the district court and the Third Circuit.
  - Those courts applied *Employment Division v. Smith*, which held that the Free Exercise Clause does not entitle an entity like CSS from laws that are neutral and generally applicable
    - We'll come back to discuss this much more in a minute
- U.S. Supreme Court
  - CSS, represented by the Becket Fund, pressed two arguments at the U.S. Supreme Court
    - First, they said that the City's actions were unconstitutional under *Smith*. That is, even if Smith applied, the City's actions with respect CSS were not neutral or generally applicable
      - The City repeatedly changed the rules to keep CSS out
      - And, although City retained discretion to grant exceptions to its policies, dead set against granting one to CSS
    - Second – and here's why case got a lot of attention – what gave it "Blockbuster status" – CSS argued that *Smith* relied on an erroneous interpretation of the First Amendment and should be overruled.
- Becket Fund as lead merits counsel had a decision to make – where to focus. They understood correctly that – once you take on a case – you represent real people, not issues. And the clearest and cleanest path to victory was path 1 – the one that didn't require overruling Smith.
- So, they focused a lot of the argument there.
  - Easy to lose track of real lives affected by these cases.

- Becket reached out to the Robertson Center and asked us to file an amicus focused on the issue of overruling *Smith*.

- *Employment Division v. Smith*
  - Before we get to the opinion in *Fulton* want to pause for a minute on what made that case so highly watched – the prospect that it would overrule *Employment Division v Smith*.
    - What does *Employment Division v Smith* say:
      - First Amendment right to free exercise will not overcome a law that is neutral and generally applicable.
      - Makes free exercise right more like a nondiscrimination provision – can't target religion for disfavored treatment, but not really an affirmative right in same way that we think of other First Amendment rights – like speech or press or assembly
      - Make it more concrete – cert petition in *Ricks* case:
        - Religious beliefs against use of social security number. Government requires SS number for employment. Ricks refuses to give. This is law is neutral and generally applicable. No one is targeting Ricks or singling him out. Law applies to everyone. Probably didn't even know this was a religious belief when law was passed. But it burdens his beliefs. And would be pretty easy for gov't to obtain his SS in a variety of other ways. But Ricks doesn't get an exception – been out of work for 7 years.
      - Or take facts of *Smith*: Alfred Smith and Galen Black were dismissed from their jobs at a drug rehabilitation clinic for ingesting sacramental peyote. Because Smith and Black were dismissed for work-related misconduct, they were denied unemployment benefits. They said should have exemption, because they ingested the peyote as part of a Native American religious practice. Consider why they ingested the drugs.
        - But drug laws neutral and generally applicable. Court said no exception.

- *Policy Behind Smith*: Court worried that interpreting the Free Exercise Clause as anything more than a nondiscrimination provision would encourage people to seek, and required courts to grant, religious exemptions from "civic obligations of almost every conceivable kind." This, in turn, threatened to make functional government impossible and render "each conscience . . . a law unto itself." What is more, the *Smith* Court found it "horrible to contemplate that federal judges w[ould] regularly balance against the importance of general laws the significance of religious practice." So it left these judgment calls to be settled through the democratic process. And to judges, it provided a bright line.

- Smith was written by Scalia, but very un-Scalia like opinion. Very little discussion of text, history, or original understanding of Free Exercise Clause; opinion reads like a judgment call based on policy.

    - Why did he do this? Hard to say, but Scalia likes rules, bright lines. Doesn't like standards, squishiness, multi-factor balancing tests.

- Underlying assumption of Scalia was that legislature would protect religious freedom – that it was a central American civic value. He says that clearly in the opinion.

- And that assumption proved true – response to *Smith* was fast and fierce. Huge movement by Congress to overturn it. Outrage from all quarters.

    - Religious Freedom and Restoration Act sponsored by young Congressman named Chuck Schumer introduced in House. Passed 97-3 in Senate. Signed by Clinton.

- Fast forward 30 years: That basic assumption no longer holds true. Civic value of religious freedom has been tarnished by culture wars. The *Smith* Court could have never foreseen the profound cultural changes ahead and the extent to which those changes would increase the possibility for conflict between generally applicable laws and religious exercise. *Smith*'s understanding of the Free Exercise Clause, which once primarily burdened those

with fringe religious views, increasingly burdens even those holding orthodox religious beliefs

- Many civil-rights advocates—who once championed religious liberty—now view religious liberty as a deeply contaminated, if not toxic, civil right. For example, the U.S. Commission on Civil Rights ("USCCR")—a commission that "play[s] a vital role in advancing civil rights"—issued a briefing report entitled *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*. In it, Chairman Martin Castro characterized "religious liberty" and "religious freedom" as "code words for discrimination, intolerance, racism, sexism," and other "form[s] of intolerance."
- Today, for first time in our history, politicians run on platforms opposing religious liberty.
- Moreover, by protecting "neutral" and "generally applicable" laws from judicial scrutiny, *Smith* provides little incentive for government actors to accommodate free exercise.
- And *Fulton* is a great illustration of this. No real conflict. No problem for same sex couples who wanted to foster. But Philadelphia politicians could score points by being tough on CSS. And Philadelphia felt emboldened by *Smith*—and what it claimed was its neutral and generally applicable policy—to refuse to accommodate CSS.

- Lots has changed since *Smith*:
  - Scalia's basic assumptions have been undercut:
    - Legislatures not solicitous of religious liberty. Neither are big-city government officials.
    - RFRA applies strict scrutiny anyways, so Courts have to engage in sort of balancing Scalia worried about, and it has basically been OK
    - At time Scalia wrote opinion, not much research original public meaning or intent of framers with respect to free exercise clause. *Smith* prompted extensive research and publication on that subject. So much more in known.

- And, if counting on free exercise to be protected by legislature—constant drumbeat to limit or repeal RFRA (think, Equality Act). And state-level RFRAs, which were once non-controversial are now lightening rods. Think Indiana or Georgia.

- Result and Opinions in *Fulton v. City of Philadelphia*
  - Remember, there were two basic questions in that case: (1) Was Philadelphia's policy neutral and generally applicable under *Smith*; and (2) should *Smith be overruled*
  - Result was very surprising to those watching closely – unanimous 9-0 opinion. I don't know of anyone who thought—going into the case—that Justice Sotomayor would side with religious liberty claims over LGBTQ claims
  - And the unanimity is very important. Belies this notion that if you side with CSS or value religious liberty it is, as noted by Chair of U.S. Commission on Civil Rights, just a code for bigotry
  - Not a single Justice defended Philadelphia's actions here.
  - Continues a trend where we see Justices more willing to value religious liberty claims relative to discrimination claims. That certainly was much less the case back when such claims were make closer in time to civil rights movement. Thinking about race discrimination and other forms of discrimination are decoupling.
  - Case widely reported as narrow victory, disappointing to advocates of religious liberty. But I think the importance of this case is being undervalued in this narrative.
  - Opinions in case:
    - *Roberts* wrote controlling opinion for six Justices (all except Thomas, Alito, Gorsuch).
      - Philadelphia loses under *Smith.*
      - If government has a system of considering particular reasons for conduct and can grant individual exemptions, then its not generally applicable, thus triggering strict scrutiny.
    - Barrett wrote a concurrence, joined by Kavanaugh and joined in part by Breyer (Breyer likes multi-factor balancing tests)

- Agrees with Roberts that Philadelphia's actions fail under *Smith*
- But indicates that she thinks *Smith* should be overruled. But don't have to do it here. And she isn't ready to do it because not sure what should replace it. Wary of replacing a one-size fits all rule of *Smith* with an equally categorical rule of strict scrutiny in all instances. Lots of facts and circumstances to work through.
- Historical record more silent than supportive. But strong reasons to overrule *Smith* based on text and structure.
    - By structure, Barrett means degree of protection for Free Exercise should be similar to that given to other enumerated First Amendment rights. Typically, you think of strict scrutiny attaching to those other First Amendment claims.

▪ Alito wrote concurrence joined by Gorsuch and Thomas

- *Smith* is bad law and should be overruled.
- (So, if you are counting, that's at least five, maybe 6 or 7, Justices agreeing *Smith* is wrong.)
- He lays out case against Smith from originalist perspective – largely developed by McConnel in wake of Smith.
- Also goes through a textual analysis
- Says should be replaced with strict scrutiny.
- If don't fix this now, issue will recur.
- This is must-read if interested in religious liberty. Could do several hours just on this.

▪ Gorsuch wrote concurrence joined by Thomas and Alito

- Says should just get on with business of overruling *Smith*. Criticizes moves Roberts made in interpreting relevant rules applied by Philadelphia to avoid having to overrule *Smith*.

- Impact of *Fulton*

- Underappreciated importance.
- 9-0. Religious liberty not partisan or code word for bigotry or result of Trump judges. All 9 Justices agree on importance and effect.
    - Not a single Justice took up the pen to defend *Smith* or Philadelphia. Very significant.
- Roberts: Particularized exemptions will trigger strict scrutiny. And when assessing compelling government interests, question is not about discrimination generally but whether there is compelling interest in excluding CSS from foster care system. Interest in eliminating discrimination generally is "weighty" but something short of compelling.
- Defense of this case surrounded notion that CSS was contracting with Philadelphia in government program administered by it. That defense lost. If that view had prevailed, would have entrenched notion that government has a significantly freer hand to disregard religious liberty when administering government programs.
    - That's significant given growth of administrative state and government largess. First Amendment doesn't shrink when government grows.
- I submit that maybe we are better off that *Smith* was not overruled. Think about current state of play:
    - Groups like CSS can use *Smith* offensively against state action. If that action is not neutral or generally applicable—and Court will take a pretty close look—then the state is toast. So, *Smith* still a potent offensive weapon for religious claimant.
    - But defensive value of *Smith* to state actor like Philadelphia is close to zero. Majority, maybe supermajority, of Court reject *Smith*. Won't suffice to simply say law is neutral and generally applicable and thus constitutional. Lower courts can read the opinions and will understand this. And if try to hide behind *Smith*, case will go to Supreme Court and state will lose.
        - I disagree with Alito in this respect: His most quoted line in concurrence was that this opinion might as well be written on vanishing paper sold at magic shops. That all Philadelphia will need to do modify program to eliminate exemptions. But that's only if *Smith* still controls. If Philadelphia does this, case might come back to Supreme

Court. And do it all over again (point made in Gorsuch concurrence).

- So, *Smith* not formally overruled. But as a practical matter, its continued viability is probably more useful for religious claimants than for state. And its only a matter of time before overruled. That will happen as Court gets more comfortable with what comes next.

- *Dobbs v. Jackson Women's Health*
  - Briefly move from last term's expected blockbuster to the expected blockbuster of next term – *Dobbs v. Jackson Women's Health*
  - As in *Fulton*, the Robertson Center co-wrote amicus with Hon. Ken Starr.
  - Question there is whether Mississippi's ban on abortions after 15 weeks is constitutional
  - As a practical matter, a ruling in favor of Mississippi would run afoul of what's been characterized as "core holding" of *Roe v. Wade* prohibiting state bans of pre-viability abortions.
  - Robertson Center's Brief discussed three main issues:
    - Federalism
    - Substantive Due Process
    - Stare Decisis
  - Predictions: Lots of court watchers expect Court to uphold Mississippi law.
    - *Fulton* reinforces idea that, with the Roberts court, expect the unexpected. And expect them to go small if they can.
    - But will be harder to get to narrow holding here. Ruling for Mississippi will necessarily require taking a big bite out of *Roe* and *Casey*
    - Discussion of dilemma for formalist/originalist judges who want to stop short of complete reversal
- Concluding Remarks and Q&A