Kuehl Remarks on SCOTUS
Making Waves 7/16/23

Ever since Goldwater lost in 1964, the right wing of the Republican party, which is now the entire party, has been establishing ever more conservative, reactionary and right wing think tanks to try and get federal courts to re-interpret the Constitution to erode existing protections and create greater importance and protection for religion (largely Christian, actually) and attacking democracy by moving away from actual Constitutional equality. At the same time the right wing activists have worked to take over the other branches, not just federal, but in states by capturing governorships, state legislators, local govts and school boards.

In their attempts to twist legal interpretation to suit their anti-democratic and anti-equality agenda, the major right wing think tanks have increasingly sought out plaintiffs and filed cases in friendly federal courts to get judges to distort, convolute and manipulate the law to serve that political and religious agenda. They have also specifically chosen cities in which to sue based on the presence of a particular judge so they could get a good initial opinion in a lower federal court, in a jurisdiction where the next court, the circuit court, was also likely to go along. Finally, now, they have captured the Supreme Court so they really want cases to end up there to in order to undermine established Constitutional rights and elevate their own supremacy over the entire nation.

The latest cases have been written about a lot so I'll be brief about them and talk a bit about what they are trying to set up for more destructive decisions down the line.

303 Creative LLC v Elenis, the wedding website case that was used to elevate religious beliefs over LGBTQ equality. There have been two major themes of discussion about this case. First of all, People ask why this case was even able to get a hearing in the lower courts. The US Constitution requires that American federal courts only hear a case when there is something that has happened causing a controversy needed to be solved by the court. In other words, the Founders wanted no speculative opinions. In the language of past courts, a case is "ripe" for adjudication when someone has been injured by an act of the government, including the passage of a law which is being applied to them, and, the party filing the case is the party who has been injured, the one who needs help with what they claim in an injurious law. This case was a real reach because it certainly was not in controversy yet, was not ripe. The plaintiff had not even established a business yet and there had been no real request that they design a site related to a gay marriage.

Alliance For Freedom is one of three very active right wing think tanks generating this and several other cases. They have worked over decades to get right wing courts to allow adjudication of cases that might speculatively offend some constitutional right, such as speech or religion, or both, even if no one has actually been injured yet. A similar case was brought in Arizona in 2019 and they got the result they wanted in the Arizona Supreme Court.

The think tanks wanted to make this successful result in Arizona the law for the whole country and did so with the wedding site case in the Supreme Court.

The Supreme Court said you still have to obey anti-discrimination laws if you run a business open to the public, but now there is a new exception. You can turn certain people away if, under the First Amendment, you are required to write or produce something from your own creativity that would require you to go against your religious beliefs. Make no mistake, this is just the first step for these think tanks and for the right wing.

Cases to come will try to expand the exception so that sincerely held beliefs, for instance, might provide an exception, the way a person's belief, not just religion, allowed many public employees to challenge the vaccine requirements during the pandemic.

The Court has also been wildly inconsistent. In this same court term, the Supreme Court upheld the government's ability to spy specifically on Muslims if it was a matter of national security. So the protection of religious beliefs in selective.

In the student loan case, Congress had actually spoken quite clearly in a prior law giving the executive branch the ability to waive (that is to forgive) or modify any student loan. The Court, in order to block the President's ability to do this without a new bill from a hostile Congress, didn't find that existing law clear enough, apparently, as they held Biden had to go back and get clearer permission from Congress, violating a long-standing rule that if statutory language is clear, there must be a constitutional violation, which here, there was not.

Also, and this is my own opinion, this court seems to want to direct the Democratic President to seek agreement from a hostile branch of government, like the Republican House of Representatives that, conveniently, will make sure the President is thwarted.

Finally, In the affirmative action case, the Supreme Court found that granting admission specifically using a person's race as a positive factor was not allowed. As we know, they did allow the colleges to ask people to talk about their experience even if it included being part of a disfavored race. The problem with this case, however, is deeper. Over decades, more progressive courts have established a way of evaluating policies, like college admission policies, so that, even if a policy, or a law of a city or state, doesn't use the language of race specifically, if it has a disparate impact on a protected group, it can violate the equality requirements of the Constitution. Universities developed affirmative action policies based on the way so-called "neutral" policies had an actual result of keeping people of color out. We saw this sort of ploy in early voting laws established after the Civil War.

The think tanks want to undermine the established doctrine of counting disparate impact as a form of discrimination. Now that looks to be in jeopardy. Now you will be unable to assess your own policies and make up for them by looking directly at the race of an applicant even if they have had a mathematical impact on minority admissions, you can only look at each application and apply so-called neutral principles which might take your experience as part of a disfavored group into consideration. It's subtle, but just the kind of incremental move the right wing is seeking.

So that's my take on these three cases and how they are being used to open the door for discrimination and preference for religion wider and wider. Thanx so much. I know you're wondering what we can do, so I'll turn it over to Torie to finish before we go to questions.