

Electronically Filed
Supreme Court
SCAP-22-0000429
31-OCT-2023
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Dkt. 76 OPC

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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CITY AND COUNTY OF HONOLULU and HONOLULU BOARD OF WATER SUPPLY,
Plaintiffs-Appellees,

vs.

SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM, LLC; EXXON
MOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY;
SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA,
INC.; BHP HAWAII, INC.; BP PLC; BP AMERICA, INC.; MARATHON
PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY;
PHILLIPS 66; and PHILLIPS 66 COMPANY,
Defendants-Appellants,

and

BHP GROUP LIMITED and BHP GROUP PLC,
Defendants-Appellees.

SCAP-22-0000429

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-22-0000429; 1CCV-20-0000380)

OCTOBER 31, 2023

CONCURRING OPINION BY EDDINS, J.

I agree with the Chief Justice's well-reasoned opinion.

Because the principles that govern personal jurisdiction arose after 1868, I write separately.

Enduring law is imperiled. Emerging law is stunted. A justice's personal values and ideas about the very old days suddenly control the lives of present and future generations. Recently, the Supreme Court erased a constitutional right. It recalled autonomy and empowered states to force birth "for one reason and one reason only: because the composition of this Court has changed." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2319-20 (2022) (Kagan, J., dissenting). The day before, the Court cherry-picked history to veto public safety legislation, disturb the tranquility of public places, and increase homicide. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022). The same week, it promoted a conjured idea hostile to judicial restraint - "major questions." When executive branch policy-making grazes disliked policy preferences, major questions "magically appear as get-out-of-text-free cards." West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

For now, International Shoe still fits. Defendants must have minimum contacts with the forum state such that exercising jurisdiction over them does not offend traditional notions of fair play and substantial justice. But the due process clause mentions neither fairness and justice, nor minimum contacts.

And those standards clash with how courts determined personal jurisdiction long ago. See Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (courts lack jurisdiction over defendants who are not physically present in the state or who have not consented to jurisdiction).

So when justices solicit cases to test their way against durable personal jurisdiction principles, a state occupying one of the world's most geographically isolated land masses pays attention. Ford Motor's concurrence announced "International Shoe's increasingly doubtful dichotomy." Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1039 (2021) (Gorsuch, J., concurring). It floated reviving the old tag rule to hale corporations into court, asking "future litigants and lower courts" to help determine how the Constitution's original meaning or history jostles personal jurisdiction law. Id.

Back in the day, parties played tag inside a state's boundaries. Once tagged, a party could be sued for anything, even things that happened outside the state. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 128 (2023). But if a party couldn't be tagged, they couldn't be personally sued.

Time-travelling to 1868 would unravel Hawai'i's long arm statute. Hawai'i Revised Statutes (HRS) § 634-35 (2016) reaches as far as the federal constitution allows. Yamashita v. LG Chem, Ltd., 152 Hawai'i 19, 21, 518 P.3d 1169, 1171 (2022). A

state registration statute preserves jurisdiction over national corporations. Mallory, 600 U.S. at 134. But what about other businesses, shell companies, and individuals that do not enter or remain in Hawai'i? See Shaffer v. Heitner, 433 U.S. 186, 200 (1977) ("The Pennoyer rules generally favored nonresident defendants by making them harder to sue").

Now, settled law easily unsettles. Some justices feel precedent is advisory. See Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring); Amy Coney Barrett, Precedent and Jurisprudential Disagreement, 91 Tex. L. Rev. 1711, 1728 (2013); Dobbs, 142 S. Ct. at 2265. Who knows what law may vanish? Or what text gets exiled next? See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466 (2017) (ghosting the Establishment Clause).

Before the Court's hubristic originalists arrived, everyone got it wrong. Well, mostly everyone. See Dred Scott v. Sandford, 60 U.S. 393, 405 (1857) (enslaving human beings and denying citizenship based on race because the Supreme Court must interpret the Constitution "according to its true intent and meaning when it was adopted"). All others, hall-of-fame jurists to 1Ls, held egregiously wrong-headed views. Only public meaning at inception counts. Traditional methods to interpret the Constitution are unacceptable. See, e.g., Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 492-93

(1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation").

A chosen interpretive theory cages the Constitution. Why originalism? To keep value judgments out of judging. To constrain judges.

Not that judges are always restrained. See, e.g., Shelby Cnty., Ala. v. Holder, 570 U.S. 529 (2013) (dismembering a cornerstone of American civil rights because a few judges made up a textually-unsupported rule that Alabama's equal sovereignty prevents the federal government from enforcing federal law - a law those judges felt worked too well).

Inconvenient originalism nurtures views that the Court operates as a political body. For instance, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), sidestepped text, history, and tradition to invalidate a major law on a question vital to democracy - limitless corporate money influencing elections. Corporations though have never been "members of 'We the People' by whom and for whom our Constitution was established." Id. at 466 (opinion of Stevens, J.). In 1791, corporations were rare, highly regulated creations of the states and not mentioned in the Constitution. Id. at 426-27.

Corporations had *privileges*, not rights. Id. at 427. They did not enjoy the same free speech protections as people. Id. at 428-29, 466 ("corporations have no consciences, no beliefs, no feelings, no thoughts, no desires"). And they certainly were not spending silver coins to sway elections.

Whose history are we talking about anyway? The powerful. The few white men who made laws and shaped lives during the mostly racist and misogynistic very old days. Originalism revives their value judgments. To constrain the value judgments of contemporary judges!

What about today's need-to-be-constrained judges? They need to be historians. Figuring out the way things were to govern the way things are. Excavating 18th and 19th century experiences to control 21st century life. How? Relying on partisan amicus briefs, borrowing history books and dictionaries, searching online, using artificial intelligence? As one judge put it: "[T]he standard articulated in Bruen expects us to play historian in the name of constitutional adjudication." United States v. Bullock, ___ F. Supp. 3d ___, 2023 WL 4232309, at *4-*5 (S.D. Miss. 2023) (Reeves, J.) ("[A]n overwhelming majority of historians reject the Supreme Court's most fundamental Second Amendment holding - its 2008 conclusion that the Amendment protects an individual right to bear arms,

rather than a collective, Militia-based right") (both quotes cleaned up).

I fear the Court self-inflicts harm, loses public confidence, and exposes itself to real criticisms about its legitimacy.

Inconvenient originalism may just save International Shoe. Playing tag exposes nationwide corporations to easy forum-shopping by plaintiffs. "[C]orporations might lose special protections." Ford Motor, 141 S. Ct. at 1039 n.5 (Gorsuch, J., concurring). They might get sued for any claim, in any state, even though they have no connection to that state. Mallory, 600 U.S. at 128. And states may enact the broadest possible jurisdiction consent statutes to compete with each other. See id. at 130.

Sharper minds than mine deep dive and debate the tugs between originalism and other interpretative modalities. I'm just a state judge who respects and admires the federal constitution's open-textured, freedom-and-liberty-inspired language.

Sure, a constitutional provision's public meaning at ratification may matter centuries or decades later. See United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Yogi, 101 Hawai'i 46, 53, 62 P.3d 189, 196 (2002) ("[i]n construing a constitutional provision, the court can also look to [the] understanding of

voters who ratified the constitutional provision"). But to the Hawai'i Supreme Court, it's not decisive, or the *only* way to interpret a constitution.

In Hawai'i, the Aloha Spirit inspires constitutional interpretation. When this court exercises "power on behalf of the people and in fulfillment of [our] responsibilities, obligations, and service to the people" we "may contemplate and reside with the life force and give consideration to the 'Aloha Spirit.'" HRS § 5-7.5(b) (2009).

Hawai'i's people define the Aloha Spirit as:

"Aloha Spirit" is the coordination of mind and heart within each person. It brings each person to the self. Each person must think and emote good feelings to others. In the contemplation and presence of the life force, "Aloha", the following unuhi laulā loa may be used:

"Akahai", meaning kindness to be expressed with tenderness;

"Lōkahi", meaning unity, to be expressed with harmony;

"Olu'olu", meaning agreeable, to be expressed with pleasantness;

"Ha'aha'a", meaning humility, to be expressed with modesty;

"Ahonui", meaning patience, to be expressed with perseverance.

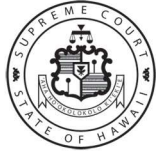
These are traits of character that express the charm, warmth and sincerity of Hawai'i's people. It was the working philosophy of native Hawaiians and was presented as a gift to the people of Hawai'i. "Aloha" is more than a word of greeting or farewell or a salutation. "Aloha" means mutual regard and affection and extends warmth in caring with no obligation in return. "Aloha" is the essence of relationships in which each person is important to every other person for collective existence. "Aloha" means to hear what is not said, to see what cannot be seen and to know the unknowable.

HRS § 5-7.5(a).

Ku'ia ka hele a ka na'au ha'aha'a (hesitant walks the humble hearted). Mary Kawena Pukui, 'Ōlelo No'eau: Hawaiian Proverbs & Poetical Sayings 201 (1983). A humble person walks carefully so they will not hurt others. Id.

The United States Supreme Court could use a little Aloha.

/s/ Todd W. Eddins



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Title: City and County of Honolulu and Honolulu Board of Water Supply, Petitioners/Plaintiffs-Appellees, vs. Sunoco LP, Aloha Petroleum, Ltd., Aloha Petroleum LLC, Exxon Mobil Corp., Royal Dutch Shell Oil Company, Shell Oil Products Company LLC, Chevron Corp., Chevron USA, Inc., BHP Hawaii Inc., BP PLC, PB America, Inc., Marathon Petroleum Corp., Conocophillips, Conocophillips Company, Phillips 66, Phillips 66 Company, Defendants-Appellants, and BHP Group Limited and BHP Group PLC, Respondents/Defendants-Appellees.

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