Supreme Court

Abortion

The Supreme Court term that ended in July was a significant one. It included important decisions on religious freedom and on abortion. Since the religious freedom decisions were numerous, I will begin by reviewing the Court's decision on abortion, which was a setback to the pro-life cause.

The case was June Medical v. Russo, decided June 29.[1] It involved a state law in Louisiana that required abortionists to have admitting privileges at a local hospital in case the woman undergoing the abortion needed emergency medical care. Many observers, including myself, expected the Supreme Court to uphold the state law. The only question seemed to be how significant would be the inroads made in the "abortion right" created by the Supreme Court in Roe v. Wade and Doe v. Bolton in 1973.[2] The reason for this optimism was twofold. First, there are some infirmities in current abortion law, and second, the Court contains five justices who are widely understood to reject the free-wheeling, or living constitution, analysis that produced and sustained *Roe* and *Doe*—Chief Justice John Roberts and Associate Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh.[3]

Several issues in abortion jurisprudence invited review and revision. First, why were *abortionists* bringing the case when it was allegedly *women* who were being harmed? Ordinarily, the law requires that the injured person sue on his or her own behalf. In the law, this is called *standing*. Nevertheless, in abortion-related cases, the Court has, over the years, failed to impose this ordinary requirement. It seemed likely—since the Court had requested briefing on this subject—that the Court would conform abortion litigation to the ordinary rules. Second, why were the abortionists challenging the law before it took effect? That is called a *pre-enforcement challenge*. It is not permitted by the courts in other areas of the law, though as with standing, it is routinely permitted by the Court with abortion.

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1. June Medica Services LLS v. Russo, 591 U.S. ___ (2020).
2. Roe v. Wade, 410 U.S. 113 (1973); and Doe v. Bolton, 410 U.S. 179 (1973).
3. Though the political terms *liberal* and *conservative* are often used, the actual distinction between living constitution and originalist–textualist jurisprudence is the fundamental divide on the Court. Roberts, who does reject the living constitution jurisprudence, still does not fall into the originalist jurisprudence; hence, he is often the deciding vote in close cases.

The Court seemed to reject such challenges in Gonzales v. Carhart in 2007.[4] However, a few years after *Gonzales*, the Court decided Whole Woman's Health v. Hellerstedt, which rejected *Gonzales*'s presumption of constitutionality regarding state abortion regulations passed through the normal legislative process.[5] The Court in *Hellerstedt* relied on the undue burden test created in the 1992 Supreme Court decision in Planned Parenthood v. Casey. The undue burden test asks, Does the "state regulation [have] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion?"[6] Using that test, the *Hellerstedt* Court struck down a Texas law that (like the one in Louisiana) required abortionists to have admitting privileges at a local hospital. In overturning the Texas law despite compliance with the normal legislative process (hearings, findings of fact, issuance of a legislative or committee report, voting, and so on), the Court ignored the presumption of constitutionality ordinarily employed by the courts in reviewing state laws.[7]

In fact, this is the inherent bias within the undue burden test: in effect, it presumes *against* the citizen-elected legislature and makes the unelected Court the fact finder. That keeps the Court, as Thomas noted, "the country's *ex officio* medical board with powers to disapprove medical and operative practices and standards throughout the United States."[8] Consequently, the third basis on which many hoped the Court would cut back on the abortion license was by revising or rejecting the undue burden test, thereby allowing the states to pass laws regulating abortion practice (as they do in other areas of life).[9]

Of course, even if the Court had addressed all three things—standing, pre-enforcement challenges, and undue burden—it would not have addressed the fundamental question of whether there is a right to abortion rooted in the Constitution, as the *Roe*, *Doe*, and *Casey* decisions claimed. It must be kept in mind that abortion is available at any time in the United States under these decisions. The cases that have arisen since *Casey* involve peripheral limits on that "right."[10]

This background explains the intensity with which pro-life Americans awaited the decision in *June Medical*. They were bitterly disappointed. The Court split five to four, striking down the Louisiana law. However, the majority of five was itself split four to one. Roberts concurred in the *result* (striking down the law) but not in the *reasoning* of the other four, or the plurality, in the majority, which consisted of the

4. Gonzales v. Carhart, 550 U.S. 124 (2007).
5. Whole Woman's Health v. Hellerstedt, 579 U.S. ___ (2016).
6. Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833, 877 (1992). In *Casey* the Court referred to the abortion of a fetus before viability.
7. With any law—state or federal—a court ordinarily asks whether there is a rational basis for the law; that is, did the legislature, in enacting the law, consider the facts and policies involved? The proof that it did is ordinarily the holding of public hearings and so on.
8. *Gonzales*, 550 U.S. at 164, cited in *Hellerstedt*, 579 U.S., slip op. at 10 (Thomas, C., dissenting).
9. *License* is the right word because as discussed in the text, courts bend the rules in favor of abortion in ways that are inconsistent with the rules they apply in other areas of the law.
10. Even *Gonzales* was a narrow decision, only upholding the elimination of a single abortion procedure, partial-birth abortion.

four justices often denominated as *liberal*—Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Stephen Breyer. They engaged in an extensive balancing of harms and benefits that would, they believed, have resulted from the law, using the undue burden standard and relying on *Hellerstedt*.

Roberts's concurrence struck many as odd. For instance, he had been one of the dissenters in *Hellerstedt*, which had similar facts. Furthermore, if Roberts were going to write a separate concurrence, one would expect him to join the result favored by the four dissenters (often denominated as *conservative*)—Thomas, Alito, Gorsuch, and Kavanaugh. That would have upheld the Louisiana law, thereby subjecting abortion litigation to the ordinary rules I have outlined above, *even if* Roberts disagreed with their *reasoning*. In other words, why concur with the abortion liberals rather than the conservatives?

The answer might be found when one considers the basis on which Roberts dissented in *Hellerstedt*—the technical legal doctrine of *res judicata*. Likewise, in *June Medical*, Roberts based his concurrence on a technical legal doctrine, *stare decisis*. He found the statute involved in *June Medical* to be essentially the same as the one struck down by the Court in *Hellerstedt* and therefore controlled by the decision in that case.

Stare decisis means that a court gives deference to prior decisions on the same subject. It is not an ironclad rule, however. While it has more force when a court is interpreting a law (a legislative enactment), it has less force when the Court interprets a Constitutional provision.[11] Otherwise, Plessy v. Ferguson could not have been overruled by Brown v. Board of Education, which ended "separate but equal."[12]

Roberts's reliance on *stare decisis* to avoid upholding a peripheral regulation on abortion (that, additionally, straightforwardly benefits women) has caused many to wonder if Roberts is, in effect, indicating he would not ultimately vote to overturn *Roe*, because of *stare decisis*. While it is impossible to know for certain,[13] that very uncertainty would matter less were one of the four liberals replaced by another conservative justice, for thereafter, Roberts would no longer be the crucial swing vote.

The history of Supreme Court jurisprudence is one of shifting majorities and hence of quite unclear precedent. (For instance, *Hellerstedt* was decided by an eight-person, rather than a nine-person, Court following the death of Justice Antonin Scalia.) But as noted, the landmark cases are *Roe*, *Doe*, and *Casey*. Interestingly, Roberts rooted his understanding of undue burden in *Casey*, rejecting *Hellerstedt*

11. Because of the importance of the Constitution as America's fundamental law and source of law, it is essential that the Court interpret the Constitution *correctly*. By contrast, a legislative enactment can be easily amended, while the Constitution cannot be.
12. Plessy v. Ferguson, 163 U.S. 537 (1896); and Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
13. See, for instance, *June Medical*, 591 U.S., slip op. at 4 (Roberts, J., concurring), citing Ramos v. Louisiana, 590 U.S. ___, 20 (2020). "*Stare decisis* is not an 'inexorable command.' But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its adminstrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered."

as a departure from that standard. As a very cautious justice, Roberts, at least in the abortion area, decides cases narrowly. Since *Casey* did not provide for a balancing test, Roberts rejected it.

In sum, though Roberts's concurrence in *June Medical* was highly disappointing, it robs the decision of significant effect, essentially rendering it nonbinding as precedent and limiting it to its facts.

Religious Liberty

The Court decided four important decisions involving religious liberty. One of them has disturbing implications, but the other three taken together indicate that those implications are less likely than they first appear.

I will start with Bostock v. Clayton County, decided on June 15.[14] Gorsuch, writing for a six-vote majority,[15] held that Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex,[16] also prohibits discrimination because an employee is gay or transgender. In a painstaking analysis of the text, Gorsuch concluded that if the sex or gender of the employee is any part of the reason for the employer's action, then it is "because of sex" and therefore prohibited.[17] Gorsuch was unpersuaded by the argument that the legislative history of the text would show no legislator even *considered* that *sex* would cover homosexuality or gender identity, much less *intended* that it would prohibit such discrimination. Gorsuch maintained that the statutory text is clear and that discrimination based on homosexuality or gender identity is *necessarily* based, in part, on the sex of the employee.

The decision was highly controversial. After all, Gorsuch had been nominated and confirmed to the Court recently because he is a textualist committed to intellectually rigorous analysis of the text at issue. To many it seemed his decision in *Bostock* was the very opposite of that—that, in fact, he shoehorned into *sex* concepts that the statute (from 1964) simply could not have been meant to cover.

Many leaders of religiously affiliated institutions (churches, schools, hospitals, and so on) as well as businesses are severely worried about what this means for them, since their religions view such conduct as sinful and hence as quite relevant for hiring or firing. For instance, the president of the United States Conference of Catholic Bishops, Archbishop Jose Gomez, stated, "I am deeply concerned that the U.S. Supreme Court has effectively redefined the legal meaning of 'sex' in our nation's civil rights law. This is an injustice that will have implications in many areas of life."[18]

Gorsuch himself addressed this at the end of his opinion. Given the seriousness of this issue, it is worth quoting at length:

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14. Bostock v. Clayton County, 590 U.S. ___ (2020).
15. The majority consisted of Gorsuch, Roberts, Ginsburg, Breyer, Sotomayor, and Kagan. Alito, Thomas, and Kavanaugh dissented.
16. 42 USC §2000e-2(a)(1). The act prohibits employment discrimination based on "race, color, religion, sex, or national origin."
17. See *Bostock*, 590 U.S. at 12.
18. US Conference of Catholic Bishops, "President of U.S. Bishops' Conferences Issues Statement on Supreme Court Decision on Legal Definition of 'Sex' in Civil Rights Law," news release, June 15, 2020, https://www.usccb.org/news/2020/president-us-bishops-conference-issues-statement-supreme-court-decision-legal-definition.

> [Some] fear that [our decision] … may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. … [But such worries] are nothing new. … As a result of its deliberations in adopting [Title VII], Congress included an express statutory exception for religious organizations. This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFFA). … Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in certain cases. … [But these] are questions for future cases.[19]

In sum, it seems Gorsuch does not intend his opinion to mark a substantial infringement on religious liberty. His votes in the other important religious freedom cases this term confirm that.

In Espinoza v. Montana, the Court considered whether a state could refuse aid to a religious school while making it available to other kinds of schools.[20] In a five-to-four opinion, which broke along the familiar conservative and liberal lines and which was written by Roberts (and joined by Gorsuch), the Court held it could not.[21] The state argued such aid was prohibited by a state constitutional amendment. Historically, such amendments were adopted in thirty states, in part to deny aid to Catholic schools.[22] Hence, the decision in the case would appear to render all of these state constitutional amendments void when applied in similar factual circumstances.

In another important case this term, Our Lady of Guadalupe School v. Morrissey-Berru, the Court, in a seven-to-two decision written by Alito, held that

19. *Bostock*, 590 U.S. at 32, citing Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 464 U.S. 171, 188 (2012).
20. Espinoza v. Montana Department of Revenue, 591 U.S. ___ (2020).
21. Thomas, Alito, Gorsuch, and Kavanaugh joined Roberts, while Ginsburg, Breyer, Kagan, and Sotomayor dissented. Gorsuch joined Thomas in a concurrence questioning the jurisprudence of the Court in establishment cases, that is, cases concerning the First Amendment's prohibition of an establishment of religion. Though I cannot go into details in this article, the jurisprudence of the Court regarding establishment is indeed in need of reform. Furthermore, Gorsuch wrote a separate concurrence to emphasize the central importance of religious freedom to our Constitutional scheme of government: "Often, governments lack effective ways to control what lies in a person's heart or mind. But they can bring to bear enormous power over what people say and do. The right to *be* religious without the right to *do* religious things would hardly amount to a right at all. … A right [such as religious freedom] meant to protect minorities instead could become a cudgel to ensure conformity. … Even today … people of faith are made to choose between receiving the protection of the State and living lives true to their religious convictions." *Espinoza*, 591 U.S., slip op at 6 (Gorsuch, N., concurring), emphasis original.
22. *Espinoza*, 591 U.S., slip op. (Alito, S., concurring).

the First Amendment permits a religious institution to hire and fire an employee without interference from the state.[23] The case applied the familiar ministerial exception expansively, rejecting a narrow interpretation of prior cases that would have required that certain rigid criteria be satisfied. Instead, the Court said what mattered was whether the employee performed "vital religious duties" such as educating students in the faith of the school and guiding them in living that faith.[24] The decision has obvious implications regarding the power of religious institutions even after the *Bostock* decision.

Finally, it should be noted that Gorsuch has insisted on the importance of religious freedom in many other contexts. For instance, he filed a written dissent when the Court refused to review a case questioning the validity of state restrictions on religious freedom during the COVID-19 pandemic. The filing of such a written dissent when the Court declines review is unusual and indicates that the justice who writes it feels strongly about the issue. In this case, Nevada permitted movie theaters to reopen but prohibited churches from doing so. Gorsuch stated, "This is a simple case. . . . The First Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."[25]

In sum, when these cases are considered in total, it seems fair to say that while none of his critics would agree with his reasoning, Gorsuch himself does not see or intend *Bostock* to mark a serious infringement of religious freedom. And there would appear to be at least three other members of the Court who agree (Alito, Thomas, Kavanaugh).

As Gorsuch's dissent indicates, however, one area in which the Supreme Court has not proven to be a friend of religious liberty concerns the pandemic. In several cases, it has declined to relieve churches of the burden placed on them by local government. The Court has been highly deferential to governmental authority.[26] Meanwhile, the US Attorney General noted, "the First Amendment and federal statutory authority prohibit discrimination against religious institutions and religious believers. … If a state or local ordinance crosses the line from appropriate exercise of authority to stop the spread of COVID-19 into an overbearing infringement of constitutional and statutory protections, the Department of Justice may have an obligation to address that overreach in federal court."[27] This issue will not go away until the pandemic does.

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23. Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ___ (2020). Ginsburg and Sotomayor dissented.
24. *Our Lady of Guadalupe*, 591 U.S. at 21.
25. Calvary Chapel Dayton Valley v. Sisolak, 591 U.S. ___ (2020).
26. See, for example, Robert Barnes, "Supreme Court, in Rare Late-Night Ruling, Says California May Enforce Certain Restrictions on Religious Gatherings," *Washington Post*, May 30, 2020, https://www.washingtonpost.com/politics/courts_law/supreme-court-considers-churches-demands-that-states-lift-pandemic-restrictions/2020/05/29/af07b918-a1b2-11ea-81bb-c2f70f01034b_story.html.
27. William P. Barr, Memorandum for the Assistant Attorney General for Civil Rights and All United States Attorneys (April 27, 2020), 1.

One other Supreme Court decision from the last term should be mentioned. It is Little Sisters of the Poor v. Pennsylvania.[28] There the Court reversed and remanded a lower court's nationwide injunction that prevented the federal government from revising the Obama administration's contraceptive mandate. When Donald Trump was elected president, his administration moved to revise the mandate to protect these religious objectors. Pennsylvania alleged that the revocation of the mandate violated the requirements of the Administrative Procedures Act. The Court held that the Trump administration had the statutory authority to act as it did, but the justices remanded the issue to the lower courts to determine if the administration had complied with the APA. The decision, written by Thomas, commanded a seven-to-two majority.[29]

Readers will recall that the contraceptive mandate was resisted by many religious organizations because they viewed it as requiring them to violate their religious beliefs.[30] Rather amazingly, the Court has never definitely applied the RFRA to the issue; instead, it remanded the litigation to the lower courts to find a resolution that respected the religious freedom of employers. Though this was thought by many to mark the end of litigation on this issue, it did not. The significance of the case for religious freedom is that the Court noted that the RFRA, which protects religious freedom absent a compelling and narrowly tailored reason on behalf of the government, is relevant to the mandate.[31] Perhaps that will resolve the issue once and for all, but given the long litigation history of this issue, that is not certain.

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28. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. ___ (2020).
29. Two of the seven—Breyer and Kagan—doubted the Trump administration could meet the requirement of disinterested rulemaking required by the Administrative Procedures Act. Ginsburg and Sotomayor again dissented.
30. For the history and extent of the mandate, as well as various objections to it, readers may refer to my column over the past several years.
31. Recall that in his opinion in *Bostock*, Gorsuch noted that the RFRA "is a kind of super statute, displacing the normal operation of other federal laws" in favor of religious freedom.