The Many Dimensions of the Chief Justice's Triumphant Term

Among them: Religion got a place at the public table long reserved for secular society

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For once, the conventional wisdom was right: The Supreme Court term that ended last week was a triumph for Chief Justice John Roberts. But, as usual, the conventional wisdom skims the surface, focusing on the obvious: his steering of the court toward a center comfortably aligned with public opinion, and protecting it from an institutionally destructive alliance with a president who assumed the court would do his bidding.

I'm among those who celebrate these outcomes, and I don't in any way mean to diminish them. Rather, I want to suggest that the 2019-20 Supreme Court term looks even more consequential, for the country and the chief justice, when his triumph is seen in full, in its multiple dimensions.

To do that requires looking closely at the three religion cases decided at the end of the term.

In Espinoza v. Montana Department of Revenue, the court held that a state that offers a subsidy to private schools can't exclude religious schools from the benefit. In Our Lady of Guadalupe School v. Morrissey-Berru, the court ruled that the federal laws that protect workers from discrimination don't apply to the lay employees of religious schools who have a role in "educating and forming students in the faith." And in Little Sisters of the Poor v. Pennsylvania, the court excused employers, including corporations, with a "sincerely held" religious or "moral" objection to birth control from having to take even a modest arm's-length step that results in an employee receiving coverage for contraception, to which the Affordable Care Act entitles her.

Chief Justice Roberts wrote the majority opinion in only the first of these cases; he assigned the opinion in the second to Justice Samuel Alito and the third to Justice Clarence Thomas. While the first two involve the First Amendment's guarantee of the "free exercise" of religion, the third, concerning a rule put in place by the Trump administration, is not based on the Constitution but rather on administrative law and a federal statute.

But the decisions' commonalities are more important than their differences. All three elevate religion to a position of privilege, short-circuiting the statutory rights of employees or, in Montana's case, overriding an explicit state constitutional barrier against public financial aid to parochial schools. And all three go to the heart of John Roberts's project.

By "project" I don't mean something nefarious. To the contrary, it's not surprising that the ambitious and accomplished people who make it to the Supreme Court have some goal or goals in mind, some way they would like to move the law or, in the case of liberal justices in recent decades, to prevent it from moving in an unwanted direction. For Chief Justice Warren Burger, the project was rolling back the criminal procedure revolution over which his predecessor, Earl Warren, had presided. For Chief Justice William Rehnquist, an Arizonan who came to Washington in midlife, it was, among other things, elevating the role of the states in the federal system.

Federalism as such is not much of a motivator for his successor, Chief Justice Roberts, who has spent his entire career comfortably ensconced inside the Beltway. Nor does he, unlike Justice

Alito, appear driven to cut back on criminal defendants' rights at every opportunity. After 15 years of watching John Roberts as chief justice, I've identified two main projects.

One concerns race: getting the government out of the business of counting by race by rejecting both affirmative action that increases opportunity for racial minorities and federally policed guardrails to prevent the suppression of minority votes. His early years on the job reflected this deep commitment, first with the Parents Involved case in 2006, overturning efforts by two school districts to maintain integration through race-conscious school assignment measures, and, six years later, with Shelby County v. Holder, which cut the heart out of the Voting Rights Act of 1965.

The other project is religion: giving religion a place at the public table long reserved for secular society; removing barriers to religious expression in the public square; insisting on organized religion's entitlement to public benefits as a matter of equal treatment while at the same time according religion special treatment in the form of relief from the regulations that everyone else must live by. Benefits without burdens, equal treatment morphing into special treatment.

This term's trio of religion decisions carried the project into new territory. The chief justice's opinion in the Montana case, Espinoza, was particularly eyebrow raising, because when the case reached the court, there was no longer a tax credit program in place for any nonpublic school. That the program no longer existed for anyone would seem to make a claim of anti-religious discrimination implausible at best.

Not so, the chief justice wrote for the 5-to-4 majority. He said the program's cancellation "cannot be defended as a neutral policy decision" because it resulted from a decision of the Montana Supreme Court that the state Constitution's "no aid" provision meant that religious schools could not be included in the program. Because the state court said it couldn't effectively rewrite the statute, it invalidated the entire program. But Chief Justice Roberts found this application of the "no aid" provision to be itself a violation of the federal Free Exercise Clause, amounting to "discrimination against religious schools and the families whose children attend them."

Justice Sonia Sotomayor observed in dissent that "it appears that the court has declared that once Montana created a tax subsidy, it forfeited the right to eliminate it if doing so would harm religion." She continued, "This is a remarkable result, all the more so because the court strains to reach it."

There is a great deal to be said about each of these three cases, much more than this column can accommodate. I'll limit myself to one additional observation, about the Little Sisters of the Poor decision that upheld the complete opt out from the Affordable Care Act's contraception mandate that the Trump administration had offered employers with religious or undefined "moral" objections.

Anyone who hasn't dug at least part way into the weeds of this complex and long-running case (nine years and counting) is likely to have only a dim idea of what was actually at stake, with the confusion compounded by public opinion polls like the one I linked to in the first paragraph of this column. This poll, and others like it, offered a binary choice: "Employers should or should not be forced to cover contraceptives in their health insurance plans." More than 52 percent of respondents said they agreed with the Supreme Court's answer, described in the poll as "should not."

But that wasn't the choice. Nobody was forcing employers with religious objections to cover contraception. Following the Supreme Court's decision in the Hobby Lobby case in 2014, the Obama administration offered religious employers an accommodation under which all they had to

do was inform their insurance carrier that they objected to covering contraception. The insurer would then eliminate the coverage from the policy and assume the obligation of providing the coverage directly to the female employees, with no involvement by the employer.

Ah, but the doctrine of complicity: Along with other religious organizations, the Little Sisters, an order of nuns who hire lay employees for the nursing homes they run, objected that this accommodation was insufficient to protect them from complicity in their employees' sin of using birth control.

Litigation resumed, and the whole question was left hanging as President Barack Obama left office. The Trump administration promptly replaced the offered accommodation with a complete exemption, expanding the category of eligible employers and extending the exemption to "moral" objectors. (The court upheld the undefined moral opt-out without analysis, as if "religious" and "moral" are synonyms.)

It seems to me that the religion cases represent a triumph for Chief Justice Roberts on a different, deeper level than do the cases that left many liberals cheering at the end of the term. Consider three of the most prominent of those cases: the decisions that brought L.G.B.T.Q. individuals into the category of employees protected against workplace discrimination under Title VII of the Civil Rights Act of 1964; that blocked President Trump from ending the DACA program that enables young undocumented immigrants, the Dreamers, to work legally and protects them from deportation; and that struck down a Louisiana law aimed at driving abortion clinics out of business. Chief Justice Roberts wrote the majority opinions in the last two of those cases and joined Justice Neil Gorsuch's majority opinion in the first.

While hailing each of those decisions, I think it's still possible to take a cleareyed look at them and to put each in a category that I call "yes, but."

Yes, employers now can't fire someone for being gay or transgender, but we have yet to see the carve-outs that the religious right will demand and to which the court may well accede in subsequent cases. Yes, the president can't end the DACA program in such a clumsy way, but the decision offers a road map for how to do it better. Yes, the Louisiana law replicated a Texas statute that the court had already rejected, but the Chief Justice Roberts was careful to leave the door open to continued attacks on the right to abortion.

The religion decisions, by contrast, consist of cases that I would call "yes, and." While the other decisions went no further than necessary to achieve their result, the religion cases went considerably further than they needed to, each one taking and running with one of the court's recent applicable precedents.

For example, the Montana schools decision built on a three-year-old opinion by Chief Justice Roberts in Trinity Lutheran Church v. Comer, holding that Missouri could not exclude a church-run preschool from eligibility to apply for a state grant to resurface its playground. The church's exclusion, under a provision of the Missouri Constitution, imposed "a penalty on the free exercise of religion," the chief justice wrote then. In a footnote, he added that the court was addressing only "express discrimination based on religious identity with respect to playground resurfacing." It didn't take long for the no-discrimination doctrine of Trinity Lutheran to migrate to the heartland of church-state controversy in America, public financing of religious education.

The Our Lady of Guadalupe School case, which stripped anti-discrimination protection from elementary teachers at two Catholic schools, also built on an earlier opinion by Chief Justice Roberts in which the court first endorsed a judicial doctrine called the ministerial exception (as in exception from federal civil rights laws.) In the earlier case, Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., the teacher who claimed discrimination, while not an ordained minister, had received extensive religious training and served in what the Lutheran church deemed a “called” capacity.

By contrast, the two elementary schoolteachers in the new case were ordinary classroom teachers with minimal training who taught the required religion classes out of a workbook. The court extended the ministerial exception to them and, by implication, to all parochial school teachers and perhaps other school employees as well. (One of the teachers was fired after she requested time off to be treated for breast cancer; she died while her Americans With Disabilities Act case was pending.)

In her dissenting opinion, Justice Sotomayor objected that in contrast to the detailed analysis in the Hosanna-Tabor case, the court this time “all but abandons judicial review” and “has just traded legal analysis for a rubber stamp.”

The Little Sisters decision represents a blatant bait-and-switch. Six years ago, when the 5-to-4 majority in the Hobby Lobby case held that the Religious Freedom Restoration Act required the Obama administration to offer an accommodation for religious employers that did not want to pay for insurance coverage for contraceptives, Justice Alito’s opinion for the court was reassuring about the consequences. The effect “would be precisely zero,” he said, adding that female employees of the objecting companies “would still be entitled to all F.D.A.-approved contraceptives without cost-sharing.”

Of course, that assurance became the basis for the religious employers’ resistance to the accommodation on the ground of complicity. In any event, no such reassurance was forthcoming this time. In her dissenting opinion last week, Justice Ruth Bader Ginsburg observed that 580,000 women work for employers eligible for the exemption.

“Of cardinal significance,” she wrote, “the exemption contains no alternative mechanism to ensure affected women’s continued access to contraceptive coverage.” The government, Justice Ginsburg said, “may not benefit religious adherents at the expense of the rights of third parties.”

Put that in the past tense. Label it the Roberts project and call it a triumph.

In June 2006, as his first term was nearing an end, I ran into Chief Justice Roberts at the court. There aren’t many questions a person can appropriately ask a Supreme Court justice, so I went with the obvious: “What are your summer plans?”

He had a pile of biographies of chief justices that he planned to read, he said. And then with a wry smile he added, “You know, most of them were failures.”

John Roberts doesn’t have to worry.

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