



Supreme Court Developments

The annual Supreme Court term began October 5. This term marks the tenth term for which John Roberts has served as chief justice. Roberts's tenure has proved somewhat controversial, given his decisions in several cases concerning aspects of the Affordable Care Act.¹ Thus, the question has arisen, particularly during the Republican presidential debates, as to what kind of justice should be appointed during the next presidential term (when as many as four vacancies might arise). This is a vital question, particularly when one remembers that the "right to abortion" was created virtually from thin air by the Supreme Court in *Roe v. Wade*.²

The people do not rule themselves when the Court is free to decide constitutional matters according to its own policy preferences. Public confidence in the Court continues to decline sharply.³ Thus, it is important that subsequent nominees be confirmed only if (1) they understand the limited role the Court is supposed to play under our Constitution, and (2) they will construe the Constitution according to its plain meaning. This issue alone makes the next presidential election one of the most important in our history.

¹ See, for instance, *King v. Burwell*, 576 US __ (2015)

² 410 US 113 (1973). The "right" found by the Court is, of course, not mentioned in the text of the Constitution. Instead, the Court found it to be implied from a "privacy right" that the Court had previously implied in *Griswold v. Connecticut*, 381 US 479 (1965).

³ Only 53 percent say they have trust in the Court. This is down from 76 percent in 2008. See Jeffrey M. Jones, "Trust in US Judicial Branch Sinks to New Low of 53%," *Gallup* poll, September 18, 2015, <http://www.gallup.com/>.

The Court's docket continually evolves as new cases come before it. At this point, we do not know what cases the Court will review this term, but it is nearly certain it will review cases involving the HHS mandate.

The mandate is the section of the Patient Protection and Affordable Care Act that requires most entities to cover contraceptives, abortifacients, and sterilization in their insurance plans. At least seven cases seeking review by the Court, including the case brought by the Little Sisters of the Poor, raise the question whether the "accommodation" offered by the HHS (Department of Health and Human Services) to religious organizations violates religious liberty rights. The religious institution in each case claims that complying with the terms of the accommodation makes the institution complicit in the underlying immoral act. (Compliance means that it provides notice to the government or to its insurer—or third-party administrator, if self-insured—of its objection to covering the services in its insurance.) Each organization claims that US law protects their right not to comply with the accommodation. If the Supreme Court ultimately decides the issue, there are at least three reasons to be concerned about the result.

The first reason is that there may be five members of the Court who think the accommodation is acceptable and, hence, that the Little Sisters and others must comply with it even if they believe it violates their religious beliefs to do so.

As recounted in my Winter 2014 column, the Supreme Court's decision in *Burwell v. Hobby Lobby Stores* introduced a twist in the ongoing litigation concerning the HHS mandate. One question in the *Hobby Lobby* case was whether closely held for-profit corporations (small businesses) had a right under the Religious Freedom Restoration Act to object to being forced to comply with the mandate.⁴ In a 5-to-4 opinion, the Supreme Court held that the closely held family businesses had a right to religious freedom under RFRA. Further, the Court found that, assuming the government had a compelling interest for the mandate, it nonetheless failed to meet its obligation to show that it was acting in the "least restrictive" way.⁵ As an example of a less restrictive alternative, the Court said the government could have extended the accommodation it granted to religious nonprofits to for-profit corporations as well.

Since the Supreme Court spoke well of the accommodation, the question arises, Did that mean the Court *approved* of the accommodation as an acceptable way for the government to respect the religious beliefs of for-profits—and, by implication, nonprofits, such as the Little Sisters of the Poor? The majority disclaimed any such intention, saying it was only deciding the precise issue before it (whether small businesses could be compelled to comply with the mandate if they had religious objections to it).⁶ However, while that may be the view of four of the five justices in the majority, one of them, Justice Anthony Kennedy, wrote a separate concurring opinion that can reasonably be read to suggest that he *does* find the accommodation, as it existed at the time of the *Hobby Lobby* decision, to be acceptable: "The means

⁴ *Burwell v. Hobby Lobby Stores*, 573 US ___ (2014), discussed in my Winter 2014 Washington Insider, pp. 612–615.

⁵ *Burwell v. Hobby Lobby*, 40.

⁶ *Ibid.*, 44 note 40.

to reconcile [the religious freedom of employers with the compelling interest of the government] are at hand in the existing accommodation that the Government has designed, identified, and used for circumstances closely parallel to those presented here.”⁷ Given the ardent support for the mandate and the accommodation shown by the four justices who dissented in *Hobby Lobby*, Kennedy’s words may presage a fifth vote to force objectors to comply with the accommodation.

The second reason to be concerned that an eventual Supreme Court decision will require religious nonprofits to comply with the accommodation is that the overwhelming majority of appellate courts have said so.⁸ Following the decision in *Hobby Lobby*, the Supreme Court sent many cases back to the lower courts, telling them to reconsider decisions against nonprofits in light of its holding in *Hobby Lobby*. While many, including the author, thought this would lead the lower courts to reverse themselves and uphold the right of religious nonprofits not to accept the accommodation, most of those courts found to the contrary, that is, they held that the accommodation was an acceptable way for the government to comply with RFRA,⁹ and thus the nonprofit must do so (or shut down).

The third reason to be concerned is that the government may have found a way to “expand” the accommodation so as to garner the necessary votes on the Court (assuming Justice Kennedy was not already inclined to support it).

In an interim appeal in another case around the time of the *Hobby Lobby* decision, the Supreme Court indicated that HHS might be required to revise the terms of the accommodation to permit a religious objector to provide notice to the government rather than provide a “self-certification” form to the insurer, as the accommodation required.¹⁰ Sure enough, HHS subsequently revised the accommodation in this man-

⁷ *Ibid.*, Kennedy, J., concurring, 4.

⁸ However, not *all* lower courts so held. The Eighth Circuit, for instance, upheld the claims of the religious nonprofit. In doing so, it provided the “circuit split” (or disagreement among lower courts) that is often a good indicator that the Supreme Court will review the case. See *Sharpe Holdings v. HHS*, no. 14–1507 (8th Cir. Sept. 17, 2015).

⁹ See, for instance, *Little Sisters of the Poor v. Burwell*, no. 13–1540 (10th Cir. July 14, 2015). The Tenth Circuit concluded, “Plaintiffs do not ‘trigger’ or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and beneficiaries to coverage. Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity” (slip op. at 32). “Plaintiffs’ concern that others may believe they condone the Mandate is unfounded. Opting out sends the unambiguous message that they oppose the contraceptive coverage and refuse to provide it, and does not foreclose them from objecting both to contraception and the Mandate in the strongest possible terms” (66). HHS “has made opting out of the Mandate at least as easy as obtaining a parade permit, filing a simple tax form, or registering to vote—in other words, a routine, brief administrative task” (69). Subsequently, when the Tenth Circuit refused to reconsider this ruling, five of its judges took the highly unusual step of criticizing the refusal to reconsider, and confidently predicted the Little Sisters would be vindicated in the Supreme Court. *Little Sisters of the Poor v. Burwell*, no. 13–1540 (10th Cir. Sept. 3, 2015).

¹⁰ *Burwell v. Hobby Lobby*, 10 note 9.

ner.¹¹ Arguably, this attenuates further the nonprofit's participation in the immoral HHS mandate scheme. That may prove sufficient for the Court to uphold the accommodation.

A decision to uphold the accommodation will have grave consequences for religious organizations (such as schools and hospitals) of all stripes (Catholic, Protestant, Jewish, etc.), which may have to close if they cannot provide services without violating their religious beliefs, and for those they serve (the poor, the uneducated, the immigrant, the homeless, the abandoned, the indigent, the elderly) as well as for religious diversity (that is, fewer religious organizations active in the public square). Given the severity of the consequences, we may hope that when the Court takes these cases, it will hold that the religious entity has the right to decide, under RFRA and the First Amendment, whether complying with the accommodation violates its religious beliefs and, further, that the government has many available "less restrictive" means for distributing contraceptives (and abortifacients) that do not require the participation of religious entities.¹² As I have discussed in many prior Washington Insider columns, I am personally certain that the law, properly understood, protects religious institutions from being forced to comply with the mandate or to accept the accommodation,¹³ but only time will tell whether the Supreme Court will agree.¹⁴

¹¹ Coverage of Certain Preventive Services under the Affordable Care Act, 79 Fed. Reg. 51092 (Aug. 27, 2014).

¹² There are other ways in which religious institutions might be freed from any obligation to comply with the accommodation. For instance, in *March for Life v. Burwell*, a federal court held that the organization March for Life was denied the "equal protection of the laws" (as guaranteed under the Fourteenth Amendment to the Constitution) by the accommodation. *March for Life v. Burwell*, no. 14-cv-1149 (RJL) (D.D.C. Aug. 31, 2015). "What HHS claims to be protecting is religious beliefs, when it *actually* is protecting a moral philosophy about the sanctity of human life. HHS may be correct that this objection is common among religiously affiliated employers. Where HHS erred, however, is in assuming that this trait is unique to such organizations. It is not" (slip op. at 15). "By singling out a specific trait for accommodation [i.e., moral opposition to abortifacient contraceptives], and then excising from its protection an organization with that precise trait, it sweeps in arbitrary and irrational strokes that simply cannot be countenanced, even under the most deferential of lenses" (17).

¹³ The government does not have a compelling reason for the mandate (contraception is widely available) nor has it followed the least restrictive means (it could give contraceptives away for free). The burden it is placing on religious institutions is substantial (the fines are enormous). Further, religious institutions cannot be forced to follow an accommodation that makes them complicit in the underlying immoral acts. It is not up to the government to judge whether they are complicit; it is the institutions themselves whom the law recognizes as having the right to make this judgment. In sum, what the mandate or accommodation does is force religious institutions to participate in an immoral—and unconstitutional—scheme.

¹⁴ It is by no means certain that Justice Kennedy will vote for the accommodation and against the Little Sisters (and the others). He has voted in other cases in a way that suggests he will supply the fifth vote to form a majority that upholds their religious liberties claims. See my Washington Insider from Winter 2014, pp. 614–615, and the discussion of the interim orders in *Little Sisters of the Poor v. Burwell* and in *Wheaton College v. Burwell*.

As noted, it is impossible to predict what other life-related cases will arise during this term and be selected for review.¹⁵ Nonetheless, of particular interest from a pro-life perspective, petitions are currently pending that involve whether certain state regulations are constitutional. The regulations in question (a) require abortion clinics to meet the ordinary safety standards that apply to other ambulatory surgical centers or (b) require abortionists to have admitting privileges at a local hospital (in case the woman suffers serious complications from the abortion), or both. The cases are from Mississippi and Texas.¹⁶ The first, *Jackson Women's Health*, resulted in a bizarre holding that rejected the admitting privileges requirement in Mississippi under the theory that a state is obligated to ensure the presence of an abortion facility within its borders—and fly-in abortionists might not be able to get admitting privileges in local hospitals. The second case, *Whole Woman's Health*, upheld Texas regulations on both issues.¹⁷

At any rate, if the Court reviews either or both cases, it will have the opportunity to consider what standards bind states when it comes to regulating abortion. In its most recent abortion-related decision,¹⁸ the Court indicated that legislatures can act concerning abortion as they do with other issues, that is, they may pass laws that have a rational basis¹⁹ (rationally related to a legitimate government purpose²⁰). However, in addition, and unlike with other laws, the law must not have an improper “effect.” It is unclear what this latter requirement means. The Court has spoken of not placing a “substantial obstacle” or “undue burden” in the way of a woman seeking an abortion. But what constitutes a “substantial obstacle” or an “undue burden”? The Court has sometimes spoken of whether a “substantial fraction” of situations in which a woman seeks an abortion are affected. It is very important for a legislature that is seeking to pass a law that meets constitutional requirements (and to avoid the costs

¹⁵ The Court will be reviewing several cases concerning the death penalty, but none of these cases is a direct challenge to the constitutionality of the death penalty.

¹⁶ *Currier v. Jackson Women's Health Organization*, docket no. 14–997 (5th Cir.), and *Whole Woman's Health v. Lakey*, docket no. 14A365 (5th Cir.).

¹⁷ The requirement that abortion facilities meet ordinary standards for ambulatory surgical centers was challenged “facially,” that is, the claim was that the regulation was unconstitutional in every instance. The second requirement, the admitting privileges requirement, had been subjected to a “facial” challenge in a prior case and had been upheld. In the instant case, it was being challenged “as applied” to certain abortion facilities.

¹⁸ *Gonzales v. Carhart*, 550 US 124 (2007), upholding the constitutionality of the federal Partial-Birth Abortion Ban.

¹⁹ This is important, because if abortion were protected by the strict-scrutiny standard, it is unlikely its regulation by states would survive. (The test, which, as noted, applies to the HHS mandate, requires that government have a compelling reason and pursue its ends in the “least restrictive” manner.)

²⁰ Since abortion is a legal right, the state legislature may not intend to prohibit all abortions. Another way of understanding this is that the legislature must have some true basis for action, other than its opposition to abortion. For instance, with admitting privileges, the court would ask, is there a reason other than banning abortion to have such a requirement?

of needless litigation) to know the answer to these questions. Perhaps the pending cases will provide the occasion when the Court clarifies these matters.²¹

Congressional Developments

The release by the Center for Medical Progress of a series of videos of secretly recorded conversations with various employees and associates of Planned Parenthood, in which they discussed possible trafficking in the body parts of aborted babies,²² sparked four congressional investigations. One committee in the Senate (Judiciary) and three in the House (Energy and Commerce, Judiciary, and Oversight and Government Reform) have announced investigations, and have held, or plan to hold, hearings. Furthermore, the House has voted to set up a select committee as a subcommittee of Energy and Commerce, with its own staff and budget, to investigate the allegations of trafficking in fetal body parts and other issues that concern Planned Parenthood.

The committees are investigating, among other things, whether Planned Parenthood violated existing law. Americans United for Life sent a twenty-eight-page letter to Senator Chuck Grassley (R-Iowa), who chairs the Senate Judiciary Committee, on August 27, documenting material in the videos that raise questions about possible violations of (1) the Partial-Birth Abortion Ban Act, (2) the Born-Alive Infants Protection Act, and (3) federal laws against conspiracy, in addition to (4) federal law that, when fetal tissue is provided for research, (a) requires informed consent, (b) prohibits payment (as opposed to recovery of costs), and (c) prohibits altering the abortion procedure to obtain particular body parts.²³

On September 18, the House voted to pass H.R. 3134/S. 1881, a bill to prohibit federal funding of Planned Parenthood. On September 29, the House passed H.R. 3495, the Women's Public Health and Safety Act, which would permit states to exclude abortion providers from Medicaid.²⁴ Both bills now go to the Senate for consideration.

Regarding pro-life bills unrelated to Planned Parenthood, the House passed H.R. 3504, the Born-Alive Abortion Survivors Protection Act, on September 18.

²¹ The foregoing discussion is based on the holding in *Gonzales v. Carhart*, and that decision was 5 to 4. The four dissenters would have made the regulation of abortion subject to strict scrutiny and will seek to do so in future cases. Thus, the stakes are high if the Court does review these cases.

²² The videos, transcripts, and documents are available on the Center for Medical Progress website at <http://www.centerformedicalprogress.org/>.

²³ For a complete discussion, see Americans United for Life, "Planned Parenthood Employees and Contractors Raise Probable Cause for Systemic Violations of Federal Criminal Laws and Unethical Behavior," August 2015, <http://www.aul.org/wp-content/uploads/2015/08/PP-CMP-Videos-Backgrounder-AUL.pdf>.

²⁴ Several states, including Alabama and Louisiana, did not feel it necessary to wait for congressional action and excluded Planned Parenthood from Medicaid funding. Prior efforts to do that by some states, such as Indiana and Arizona, were overturned by the courts, which held that current federal law as written does not allow the states to do this. See *Planned Parenthood v. Indiana*, 699 F.3d 962 (7th Cir. 2012), and *Planned Parenthood v. Beltrach*, 727 F.3d 960 (9th Cir. 2013).

This bill adds criminal penalties to the existing Born-Alive Infants Protection Act; it, too, goes now to the Senate for consideration. However, the Senate failed to pass H. R. 36/S. 1553, the Pain-Capable Unborn Child Protection Act (also known as the “abortion ban after twenty weeks”), which had passed the House. Senate rules require sixty votes to end debate (“cloture”) and bring the bill to the floor for a vote on the merits, but the vote was 54 to 42.

International Developments

Two important international developments have widespread implications.

The first concerns the United Nations Human Rights Committee, which is charged with aiding nations in understanding and complying with the most important, and widely ratified, human rights treaty, the International Covenant on Civil and Political Rights (ICCPR). (The United States is a party to the ICCPR.)

The Human Rights Committee announced that it is considering adopting a “general comment” regarding article 6. This is highly significant, because section 1 of article 6 of the ICCPR states, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” On several occasions, such as its recent review of Ireland’s compliance with the ICCPR,²⁵ the committee has indicated it believes abortion is required to be permitted under article 6 in certain situations.

In this context, the Human Rights Committee invited comments from members of civil society on what form its proposed general comment should take, noting that it might consider, among other things, abortion, euthanasia, and the destruction of embryos. In response, the committee was inundated with comments urging it not to suggest that abortion was permitted (or even required) under article 6.²⁶ In response, it extended the deadline so that more pro-abortion organizations could comment. The committee held a “general discussion” at which members of civil society could present their views in July.²⁷

Given the ongoing effort to promote abortion through international “norms,” a declaration from the Human Rights Committee that a provision protecting the life of *every human being* actually requires the legalization of abortion (at least in some circumstances) would be most unfortunate—perhaps even devastating—as it would be cited by pro-abortion lawyers and activists as evidence of an international consensus in favor of “abortion rights.” Perhaps worse, it would undermine the clear meaning of article 6–1, that is, that every human being is guaranteed the right to life.

²⁵ See “Human Rights Committee Considers Report of Ireland,” UN Office of the High Commissioner for Human Rights, July 15, 2014, <http://www.ohchr.org/>.

²⁶ All the written comments may be viewed at the committee’s web site, at <http://www.ohchr.org/>. AUL, for instance, submitted a comment drawing together research reports that show the damage to women’s health caused by abortion, also available at <http://www.aul.org/>.

²⁷ “General Discussion on the Preparation for a General Comment on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights,” UN Office of the High Commissioner for Human Rights, July 14, 2015, <http://www.ohchr.org/>.

The new comment has not yet been issued.

The second important development was the adoption of the Sustainable Development Goals at the United Nations on September 25.²⁸ These goals apply to every country in the world and replace the expiring Millennium Development Goals. The goals apply for the next fifteen years and are intended to guide development (and eradicate poverty) throughout the world. Unfortunately, they include two “targets” that are problematic from a pro-life perspective.

Target 3.7 seeks to “ensure universal access to sexual and reproductive health-care services,” while target 5.6 aims to “ensure universal access to sexual and reproductive health and reproductive rights.” While the plain sense of this language does not include abortion, language like this has been used by pro-abortion forces to promote “abortion rights” since the International Conference on Population and Development in Cairo in 1994. While technically (legally) the adoption of these targets does not obligate nations to liberalize abortion laws, the rich, pro-abortion nations will certainly use these targets to pressure smaller, poorer, developing countries to do just that, as the Catholic bishops of Africa pointed out forcefully:

It can no longer be denied that under the euphemism of “sexual and reproductive health and rights,” such programs are plainly imposed as a condition for development assistance. . . . The agents of the civilization of death are using ambivalent language, seducing decision-makers and entire populations, in order to make them partners in the pursuit of their ideological objectives. . . . We, African pastors, note today with profound sadness that the post-2015 agenda for global development, in its present state of elaboration, continues in the direction set at the Cairo and Beijing conferences and that, twenty years after these conferences, the partnerships that have been established have become a powerful political and financial force.²⁹

The next stage in this struggle will come in the Spring when the United Nations considers what “indicators” nations must satisfy (such as “universal access to reproductive services”) to meet the targets. Pro-life nations will be fighting for unambiguous language that makes it clear that no nation is legally obligated to liberalize abortion laws.

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²⁸ UN General Assembly, Seventieth Session, *Transforming Our World: The 2030 Agenda for Sustainable Development* (A/70/L.1), September 18, 2015, <https://sustainabledevelopment.un.org/>.

²⁹ See paragraphs 5, 6, and 13 of the Common Declaration of the Bishops of Africa and Madagascar (Accra, Ghana), June 11, 2015, available at <http://aleteia.org/common-declaration-of-the-bishops-of-africa-and-madagascar/>.