The past two terms of the Supreme Court have been among the most controversial in its history. The Court issued several opinions that, taken together, auger ill for pro-life Americans.

At the end of its 2015 term, the Court issued *Obergefell v. Hodges*.[1] In that opinion, the Court announced an implied right to same-sex marriage. A state must, the Court held, license a marriage between two people of the same sex as well as recognize such marriages that have been licensed and performed in other states.

There are many remarkable things about this holding, which I will review so as to help us understand two important Supreme Court decisions during its 2016 term. First, what is the origin of this right, which overrides contrary state law? Where is it found in the text of the Constitution? Since it is not in the express language of the text (the words "same-sex marriage" do not appear), it must be *implied* from existing text. Was it implied from the "liberty interest" in the Fourteenth Amendment—that no state may deprive a person of liberty without due process of law? This is the text the Court favors for implying new rights. For instance, in *Roe v. Wade*, the Court believed the right to abortion resided there.[2] In *Planned Parenthood v. Casey*, the decision that upheld *Roe*, the emphasis was squarely on "liberty," with the plurality of Justices issuing the famous "mystery" passage: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[3] An implied liberty right, relying on the mystery-of-life

1. 576 U.S. __ (2015).

2. 410 U.S. 113 (1973). The Court also mentioned the Ninth Amendment, but subsequent cases laid no weight on the Ninth Amendment.

3. 505 U.S. 833 (1992), page 851. The vote was 5 to 4 to uphold *Roe*. However, among the five, two voted to uphold *Roe* without refinement, while three, the "plurality," upheld *Roe* while refining, or changing, many of its essential elements. The Justices making up the plurality were Anthony Kennedy, Sandra Day O'Connor, and David Souter.

formulation in *Casey*, was the source when the Court struck down laws against homosexual conduct in *Lawrence v. Texas*.[4]

Most observers, then, were surprised that the Court stated that the implied right to same-sex marriage rested not *solely* on Fourteenth Amendment liberty but also on "equal protection," also found in the Fourteenth Amendment: no state may "deny any person within its jurisdiction the equal protection of the laws." The admixture of the two was powerful, if elusive, as the Court stated:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[5]

This was a rather novel approach to constitutional analysis. As Chief Justice John Roberts said in dissent, "The majority does not seriously engage with this claim [that the Equal Protection Clause requires States to recognize same-sex marriage]. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a 'synergy between' the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. … Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases."[6]

This novel approach was hardly all that was new or troubling about the *Obergefell* decision—and it is, in fact, an example of the fundamental problem with the Court's "abortion jurisprudence," as we will see below. For our purposes, I will note two other troubling points that are particularly relevant to the analysis of the Court's important decisions in 2016.

First, in *Obergefell* the Court embraced an understanding of the judicial role that is breath-taking. The Court asserted that the Founding Fathers intended for the Court to reveal the meaning of liberty—over the decades—as the Court perceived new insights into its meaning: "The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[7]

This arrogates unlimited power to the judiciary. In dissent, Justice Samuel Alito simply but poignantly stated, "If a bare majority of Justices [5 to 4] can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities [of the Supreme Court] will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. …

4. 539 U.S. 558 (2003).
5. *Obergefell v. Hodges*, opinion at 19.
6. Ibid., Chief Justice Roberts's dissent at 23.
7. Ibid., opinion at 11.

Today's decision shows that decades of attempts to restrain [the Supreme Court's] abuse of its authority have failed."[8] To state the obvious, where the power of the Court grows, the power of citizens and voters recedes.[9]

The second point is the implications for religious liberty and conscience protection. What are the consequences of *Obergefell* for those who, through sincere religious or moral conviction, oppose the "marriage right" created by the Court in this decision, much as pro-life Americans oppose the "abortion right" created by the Court in *Roe*? While the majority of five dismissed concerns about religious liberty,[10] the dissent was blunt: "The majority graciously suggests that religious believers may continue to 'advocate' and 'teach' their views of marriage. The First Amendment guarantees, however, the freedom to '*exercise'* religion. Ominously that is not a word the majority uses." It goes on to warn that, while conflicts are bound to arise in the future, "Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today."[11]

How then did these two issues so central to *Obergefell*—judicial imperialism and religious liberty—play out in the Supreme Court term that concluded in June 2016?

There are two important cases to consider: *Whole Women's Health v. Hellerstedt* and *Stormans v. Wiesman*.[12] It is important to note that both decisions were issued at the very end of the Court's year—on June 27 and 28, respectively. It is well known among those who practice law before the Court, or who follow its operation closely, that the Court issues controversial opinions at the very end of each term, just before the Justices leave for the summer.[13]

Whole Women's concerned a Texas law (H.B. 2) regulating abortion practice in a variety of ways, including (1) requiring abortionists to have admitting privileges in a hospital within the vicinity of the abortion facility, and (2) subjecting abortion clinics to the same health and safety regulations as other walk-in surgical clinics. The "admitting privileges" and "clinic regulations" aspects of the law were challenged in federal district court, where they were invalidated. On appeal, the Fifth Circuit Court of Appeals reversed the district court. The Supreme Court, however, reversed the Fifth Circuit, and did so in a way that was, in many respects, a great setback to the pro-life cause.

To understand this, it is helpful to remember another Supreme Court case about abortion, the most recently decided before *Whole Women's*, to wit, *Gonzales v.*

8. Ibid., Justice Alito's dissent at 6–7.

9. "Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges." See ibid., Chief Justice Roberts's dissent at 25.

10. The matter is dealt with in one paragraph near the end of the thirty-page opinion; see ibid., opinion at 27.

11. Ibid., Chief Justice Roberts's dissent at 28, internal citation omitted.

12. *Whole Women's Health v. Hellerstedt,* 579 U.S. __ (June 27, 2016). *Stormans v. Wiesman*, no. 12-35221 (9th Cir. July 23, 2015); cert. denied, 579 U.S. __ (June 28, 2016).

13. For instance, the Court issued *Lawrence v. Texas* at the end of its 2003 term.

Carhart.[14] In that decision, which upheld the federal ban on partial-birth abortion, the Court, in an opinion written by Justice Anthony Kennedy, attempted to clarify issues related to the application of *Casey*. In particular, it was responding to the notion, exemplified by the Court's overturning of state-based bans on partial-birth abortion seven years earlier in *Stenberg v. Carhart*,[15] that legislatures were precluded from regulating abortion.

The *Gonzales* opinion held that laws regulating abortion should be given the same "presumption of constitutionality" that laws on other subjects were routinely given, and that, in the face of medical uncertainty or contested medical claims, the legislature could choose whichever view it found persuasive (as it does with other issues it considers). In light of these principles, and the horrific facts uncovered in the Kermit Gosnell case, which revealed the ugly consequences of an absence of effective regulation, the Texas legislature passed H.B. 2.[16]

Nonetheless, the Supreme Court invalidated the Texas law.[17] It is important to note that the case could have been decided on a mundane legal ground, *res judicata*, a judicial doctrine that says, in effect, that a plaintiff cannot bring the same case twice. Once a court has decided a case (and the appellate process has been exhausted), the plaintiff cannot come into court at a later date and make the same complaint. Two bites at the apple are not allowed.

Res judicata is an eminently sensible doctrine: it results in final resolution of the dispute, prevents (future) vexatious litigation, and conserves judicial resources. In Texas, a previous lawsuit had, in fact, raised the same issues as were raised in *Whole Women's*, and the plaintiffs (who complained that H.B. 2 would substantially limit the availability of abortion clinics) had lost in the Fifth Circuit.[18] Nonetheless, the majority in *Whole Women's* found a way around this fact by misapplication of *res judicata*.[19] Furthermore, the majority refused to "sever" the offending aspects of H.B. 2, instead enjoining the law statewide, despite the fact that this is what courts

14. 550 U.S. 124 (2007).

15. 530 U.S. 914 (2000).

16. See *Whole Women's*, Justice Alito's dissent at 26 and accompanying footnotes. As the reader will know, Gosnell was a Philadelphia abortionist who was convicted in 2013 of three counts of infanticide and the manslaughter of a patient.

17. It did so without overruling *Gonzales* directly. Justice Kennedy, the author of *Gonzales*, joined the majority in *Whole Women's*, which was written by Justice Stephen Breyer. One can only conclude that Justice Kennedy regards *Gonzales* as still valid. How to reconcile *Whole Women's* and *Gonzales* so as to craft laws that will survive in the Supreme Court is a significant challenge for pro-life legislators and strategists.

18. *Planned Parenthood of Greater Texas v. Abbott*, 951 F.Supp.2d 891 (W.D. Tex. 2013), affirmed in part and reversed in part, 748 F.3d 583 (5th Cir. 2014). There are various nuances of the *Whole Women's* decision that I do not have space to discuss, including the question of whether both the admitting privileges and the clinic regulation issues could be treated under the standards applied to facial, rather than as-applied, challenges.

19. Justice Alito's dissent provides a thorough discussion of this point, but I note briefly that if there are changed facts, a new complaint could be made. While the majority said this was the case (some abortion clinics had closed since H.B. 2 was passed), Alito pointed out

ordinarily do when a law contains language indicating that the legislature intended that offending portions be severed and, hence, the rest of the law preserved.[20]

Justice Alito subjected the majority to scorching criticism on the misapplication of *res judicata* and "severability" in his dissent.[21] The bending, if not breaking, of ordinary rules when they touch on abortion—so as to retain the widest possible "abortion right"—has long been a problem of the Supreme Court.[22] As Justice Clarence Thomas said in his *Whole Women's* dissent, "Today's [majority] decision perpetuates the Court's habit of applying different rules to different constitutional rights—especially the putative right to abortion."[23] Justice Alito noted, "The Court's wholesale refusal to engage in the required severability analysis here revives the antagonistic canon of construction under which in cases involving abortion, a permissible reading of a statute is to be avoided at all costs."[24]

As Justice Thomas and Justice Alito show, the majority in *Whole Women's* did not apply the standard of review from *Casey*, which should be the governing precedent and which would have permitted H.B. 2 to survive. *Casey* introduced an "intermediate scrutiny" test (did the law create an undue burden?) to replace the "strict scrutiny" test that some courts felt was mandated by *Roe*. This is a significant difference, because laws examined by courts under a strict scrutiny test almost never survive.

As the dissents showed, however, the majority in *Whole Women's* so transformed the *Casey* test as to make it the equivalent of the strict scrutiny:

> Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways. First, today's decision requires courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." Second, today's opinion tells the courts that, when the law's justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves. Finally, even if a law imposes

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that the material fact, that some abortion clinics would close, was known at the time the Abbott case was decided.

20. "When the Texas legislature passed H.B. 2, it left no doubt about its intent on the question of severability. It included a provision mandating the greatest degree of severability possible." *Whole Women's*, Justice Alito's dissent at 38.

21. See *Whole Women's*, Justice Alito's dissent at 40: "[The majority's] main argument is that it need not honor the severability provision because doing so would be too burdensome. … This is a remarkable argument. Under the Supremacy Clause, federal courts may strike down state laws that violate the Constitution or conflict with federal statutes, but in exercising this power, federal courts must take great care. … Federal courts have no authority to carpet-bomb state laws, knocking out provisions that are perfectly consistent with federal law, just because it would be too much bother to separate them from unconstitutional provisions" (citations omitted). See also Alito dissent at 43: "When we decide cases on particularly controversial issues, we should take special care to apply settled procedural rules in a neutral manner. The Court has not done that here."

22. See, for example, *Stenberg v. Carhart*, Justice Scalia's dissent at 954–955.

23. *Whole Women's*, Justice Thomas's dissent at 1.

24. Ibid., Justice Alito's dissent at 42, internal quotation marks omitted.

> no "substantial obstacle" to women's access to abortion, the law now must have more than a "reasonable relation to … a legitimate state interest." These precepts are nowhere to be found in *Casey* or its successors, and transform the undue-burden test to something much more akin to strict scrutiny.[25]

The effect of this evisceration of the *Casey* standard is to transfer power from legislatures to courts on the issue of abortion. (How can a legislature determine what law to pass if it cannot know in advance the standard by which the constitutionality of that law will be judged?) Such a radical move, effectively changing the standard of review to the equivalent of strict scrutiny, seems in line with the hubris shown by the majority in *Obergefell* about judicial activism, for it shall be the Court, not the legislature, that will forever superintend the abortion issue.

Of course, not all the Justices shared this inflated notion of the judicial role. Chief Justice Roberts and Justices Thomas and Alito dissented.

Justice Alito also wrote the dissent from the denial of review in the *Stormans* case, and that dissent brings us to the second point I noted above, religious liberty.

Religious liberty arose in the *Stormans* case in the context of the rights of pharmacists. A state law required pharmacists to fill prescriptions for abortifacients. The state law was upheld by the Ninth Circuit, and the Supreme Court declined to review the case. In a highly unusual move, several justices dissented from the denial of review. Justice Alito wrote the dissent for himself, Justice Thomas and Chief Justice Roberts.

The very first words of that dissent capture the essential point, which should trouble all who support religious liberty: "This case is an ominous sign."

> At issue are Washington State regulations that are likely to make a pharmacist unemployable if he or she objects on religious grounds to dispensing certain prescription medications. There are strong reasons to doubt whether the regulations were adopted for—or that they actually serve—any legitimate purpose. And there is much evidence that the impetus for the adoption of the regulations was hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State. Yet the Ninth Circuit held that the regulations do not violate the First Amendment, and this Court does not deem the case worthy of our time. If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.[26]

Since the law or regulation at issue was state based, rather than federal, the governing standard is not, as it is in the HHS mandate litigation, the Religious Freedom Restoration Act, which applies to federal law; rather, it is the First Amendment, which provides that government shall make no law abridging the free exercise of religion.[27] In the case of *Employment Division v. Smith*,[28] the Supreme Court interpreted that provision

25. Ibid., Justice Thomas's dissent at 6, internal citations omitted.

26. *Stormans*, Justice Alito's dissent at 1.

27. The First Amendment applies to federal as well as state law. RFRA adds an additional layer of protection regarding only federal law, however.

28. 494 U.S. 872 (1990).

to mean that free exercise does not relieve an individual of the obligation to comply with a law that applies equally to everyone—that is, in Supreme Court parlance, a law that is "neutral and of general applicability." But the law in Washington arguably was *not* such a law; there was evidence that it was passed in order to deny religious liberty to pharmacists, that it targeted the "free exercise" rights of pharmacists. If so, it was not "neutral" and would then be invalid under the First Amendment.

Yet, and this is what troubled the dissent, the other members of the Court did not even think the case merited their review. It could be that, *after review*, the Court would have decided that the law was actually neutral. But if it did not review the case, the outcome was certain: the Washington regulation would become the law and pharmacists would be forced to comply or go out of business. In a nation that so favored the free exercise of religion that it protected it in the very first amendment to the Constitution, such indifference by the Court is deeply troubling.

What triggers review of a case by the Court? It requires four votes of the Justices to do so. Given that the current court comprises eight members and three dissented, none of the other five—Elena Kagan, Sonia Sotomayor, Stephen Breyer, Ruth Bader Ginsburg, and Anthony Kennedy—voted to review the case. When one considers that the same five justices made up the majority in *Obergefell* and that a central remaining issue after that case was whether religious liberty would be respected, one can clearly see why the dissent in *Stormans* found the failure to review the case "ominous" for the future of religious liberty in America.

Of course, one member of the Court when *Obergefell* was decided in 2015 was no longer on the Court when *Whole Women's* and *Stormans* were decided in 2016: Antonin Scalia, who passed away in the interim. The vacancy caused by his death is why the Court is currently composed of eight rather than nine justices. Every reader will know there has been an intense effort by President Obama to fill that seat with a judge from the District of Columbia Court of Appeals, Merrick Garland, and that Senate Republicans have refused to consider voting on this, taking the position that, since the vacancy occurred during the presidential election season, it is the job of whoever is elected president to fill the seat.

While we will know very soon who the next president will be, it may be worth briefly reflecting on the consequences of the election for the Supreme Court. Donald Trump has announced a list from which he will chose the replacement, a list broadly supported by those who want justices who practice judicial restraint. Hillary Clinton has not announced her list but is expected to choose someone like current Justice Sonia Sotomayor.[29] Pro-life readers should recall that Sotomayor was in the majority in *Obergefell* and *Whole Women's* and did not vote to review *Stormans*. Though there is much uncertainty in all this, it is clear that the composition of the Supreme Court will play a major role in future decisions on life and conscience/religious liberty issues. Will Scalia's replacement have a judicial activist view of his or her role? Will that person believe the Court, not the people through their legislatures, should regulate abortion? Will that person believe in a broad or narrow view of religious

29. Cristian Farias, "Hillary Clinton Has a Vision for the Supreme Court, and It Looks Like Sonia Sotomayor," *Huffington Post*, October 10, 2016, http://www.huffingtonpost.com/.

liberty? The consequences will be momentous. For instance, the litigation over the HHS contraceptive mandate is not over. It was simply returned to the lower courts to see if it could be resolved between the parties. It is likely to arise again, and the new Justice sitting in what was Scalia's seat will probably cast the deciding vote as to whether religious organizations must comply with the mandate or go out of business because of devastating fines.[30]

It is perhaps worth noting that nothing in the Constitution requires that there be nine justices. The Constitution is silent on the number of justices. Thus, if Republicans continue to control the Senate, they could block *all* nominees of a pro-abortion President who do not have a philosophy of judicial restraint. In practice, however, that would require greater party discipline and resolve than has been demonstrated in the past. And even if that happened and the Court were to remain at eight members, pro-life Americans have been disappointed in decisions of this eight-person Supreme Court in *Whole Women's* and *Stormans*, as discussed, and there would appear to be no grounds to expect otherwise in future cases.

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30. The next president may nominate more than one Justice. After all, two other members of the Court—Justices Ruth Bader Ginsburg and Anthony Kennedy—are over eighty years old.