Supreme Court Showdowns on Religious Freedom and on Abortion

The first months of the Biden administration revealed a determined effort to roll back many existing protections for religious liberty as well as to reverse limitations on abortion (and its funding). These efforts continue to unfold but remain unfinished. As they develop, we will return to them in subsequent columns.

However, the most significant developments on both religious liberty and abortion are taking place in the Supreme Court. These can best be understood within the context of two cases: Fulton v. Philadelphia, which was decided in June 2021, and Dobbs v. Jackson's Women's Health Organization, which is likely to be decided in June 2022. The *Dobbs* decision will likely be announced in the spring because the Court's longstanding practice has been to announce the most controversial decision during the last week of its term. True to form, the Court announced its decision in *Fulton* during the last week of its last term.

Fulton involved the City of Philadelphia's foster care services. Catholic Social Services of Philadelphia (CSS) has undertaken for centuries to help the needy children of Philadelphia. Since taking over the certification and management of all such services forty years ago, the city regularly enters into contracts with private foster care agencies to place children. Those agencies must certify that the families chosen meet state law requirements. The city maintained that its contractual nondiscrimination requirements necessitated that each private agency certify same-sex married couples as appropriate. CSS disagreed. The agency holds the religious belief that marriage is a sacred bond between a man and a woman. Hence, it could not in good conscience place children with same-sex married couples. Other private agencies

freely placed children with such couples. Nonetheless, the city insisted that CSS do so. Litigation ensued. CSS claimed the city's actions violated the First Amendment.[1]

The Supreme Court agreed … in a highly unusual nine-to-zero opinion. The Court is very often split, particularly on social issues; yet all the justices agreed that the city's actions were unconstitutional. That, on its face, is a big win for religious freedom even in the context of hotly debated social issues. The question for us is, How should we understand the decision, by looking at the forest or at the trees? Is the most significant aspect the holding itself (the forest view), or is the manner of reasoning—and the split among the justices on that reasoning—what is truly significant (the tree view)?

Many (but by no means all) informed observers expected the Court to use the occasion to strike down a prior case, Employment Division v. Smith (1990). *Smith* changed the rules for deciding cases where the plaintiff claimed an infringement by government of its religious freedom rights under the First Amendment. Prior to *Smith*, the test (Sherbert test) was whether the government had a compelling interest (i.e., a very important reason) and was pursuing it in the least restrictive manner (i.e., the law was narrowly tailored to the compelling interest).[2] *Smith* replaced that test with one that asked whether the rule was neutral (e.g., not targeted at religion) and generally applicable (e.g., affected everyone, religious or not).[3] The majority of the justices (Chief Justice John Roberts and Justices Sonia Sotomayor, Elena Kagan, Amy Coney Barrett, Stephen Breyer, and Brett Kavanaugh) applied the *Smith* test; the other three (Justices Samuel Alito, Neil Gorsuch, and Clarence Thomas) would have reversed *Smith* and applied the Sherbert test.

Roberts et al. reasoned that the contractual nondiscrimination requirements were not generally applicable, since they permitted individualized exemptions. If a law does that, it must, said Roberts et al., grant exemptions to religious objectors … unless it can satisfy strict scrutiny in the failure to do so. We might call this "second level" strict scrutiny. It does not apply to the initial question regarding government action (rather, *Smith* applies to that), but it does apply *if* the government grants exemptions.[4] The city could not survive strict scrutiny in its failure to grant an exemption to CSS. ("CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else."[5])

However, Alito et al. disagreed and would have overruled *Smith*, using an originalist methodology to examine the meaning of the First Amendment: "Even

1. "Congress shall make *no law respecting an establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (emphasis added).
2. Sherbert v. Verner, 374 U.S. 398 (1963). This test is called "strict scrutiny."
3. Subsequent federal law—the Religious Freedom Restoration Act—as interpreted by the courts, protected religious freedom against federal law but not state law.
4. Fulton v Philadelphia, 593 U.S. ___, 3 (2021). "The question is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying such an exemption to CSS."
5. *Fulton*, 593 U.S. at 15.

if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection [because it would survive *Smith*'s requirement that it not target religion]. This severe holding is ripe for reexamination. . . . The ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*. It certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted."[6]

According to Alito et al., the requirements of *stare decisis* did not prevent the overruling of *Smith*: "In assessing whether to overrule a past decision that appears to be incorrect, we have considered a variety of factors, and four of those weigh strongly against *Smith*: its reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down. No relevant factor, including reliance, weighs in *Smith*'s favor."[7]

Thus, to sum up, Alito et al. disagree with Roberts et al. as to whether a change in the standard of review (to *Sherbert* from *Smith*) is necessary to properly protect the Constitutional guarantee of freedom of religious exercise.[8] That is important, but perhaps more important is the disagreement between Alito et al. and two of the six other justices, Barrett and Kavanaugh.

Alito et al. addressed the conflict that often occurs between same-sex couples and religious freedom:

> CSS's policy has only one effect: It expresses the idea that same-sex couples should not be foster parents because only a man and a woman should marry. Many people find this idea not only objectionable but hurtful. Nevertheless, protecting against this form of harassment is not an interest that can justify the abridgement of First Amendment rights.
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> We have covered this ground repeatedly in free speech cases. . . . Suppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game. While CSS's ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs. In *Obergefell v. Hodges*, the majority made a commitment. It refused to equate traditional beliefs about marriage, which it termed "decent and honorable" (672), with racism, which is neither. And it promised that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned" (679).[9]

6. *Fulton*, 593 U.S., slip op. at 1, 25 (Alito, J., concurring). This is highly significant, as will be clear when we consider a fissure among the five conservative justices in a few paragraphs.
7. *Fulton*, 593 U.S., slip op. at 53 (Alito, J., concurring).
8. Despite some fears that after the decision, the city would simply stop granting exemptions and thus force CSS to comply with placing children with same-sex couples, the city did eventually grant an exemption to CSS.
9. *Fulton*, 593 U.S., slip op. at 74–75 (Alito, J., concurring).

The justices' concern was that in this ongoing conflict, it is important to have a standard that clearly privileges religious freedom (per the Constitution's First Amendment). Obviously, they failed to convince any other justices. Two that might have been thought to agree with them (since both claim to be originalists) are Kavanaugh and Barrett. Yet they filed a concurring opinion explaining their reasons for not voting with Alito et al. to overturn *Smith*. Here is what they said: "In my view, the textual and structural arguments against *Smith* are more compelling [than those in favor of it]. … Yet what should replace *Smith*? … There would be a number of issues to work through if *Smith* were overruled. … We need not wrestle with these questions in this case, though, because the same standard applies regardless whether *Smith* stays or goes."[10]

This seemingly bland statement, nonetheless, shocked many Supreme Court watchers. In essence, Barrett and Kavanaugh are saying that they will not overrule *Smith*, because they do not know what to replace *Smith* with. But as originalists, they are committed to applying what the text says (requires). Thus, if a judicial rule does not accord with the Constitution, it should be overruled. The only test for the standard that replaces it should be (for an originalist) whether it accords with the text. All the issues do not need to be resolved at the time of the decision, but they can be in the future. Yet two supposedly stalwart originalists decided not to do that, for the kind of reasons (workability, etc.) that non-originalists always employ in deciding cases.[11]

This issue—the two-three split among the conservatives—would not seem to be overly important when religious liberty is the issue. (All nine justices agree that strict scrutiny should apply when the question is whether religious organizations should be included in exemptions.) However, it may be highly relevant to what is undoubtedly the most significant case of the current term, that is, *Dobbs*. To explain that requires a deep dive into *Dobbs*.

A Mississippi law passed in 2018 prohibits abortion when the probable gestational age is greater than fifteen weeks, "except in a medical emergency or in the case of a severe fetal abnormality."[12] The question is whether this state law survives under the Court's abortion jurisprudence. Since that implicates the possibility of revising that jurisprudence, the case has sparked extraordinary interest—more than eighty organizations filed briefs in favor of the law, and more than forty organizations filed briefs against it.

To understand why this case is so important, it must first be recalled what the standards are for abortion in America. First, in 1973 Roe v. Wade established a constitutional right to abortion under a privacy right implied (not written) in the

10. *Fulton*, 593 U.S., slip op. at 1–2 (Barret, J., concurring). Barret wrote the concurrence, which Kavanaugh joined in its entirety. Breyer joined most of it, though not the crucial first paragraph where Barrett noted that the balance of the argument favored overturning *Smith*.
11. *Fulton*, 593 U.S., slip op. at 10–11 (Gorsuch, J., concurring). In a biting shot at them, Gorsuch, joined by Alito and Thomas in another concurring opinion, noted, "Smith committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow."
12. Gestational Age Act, Miss. H.B. 1510 (2018), §1(4)(a).

Constitution. The exercise of this right was subject to a trimester system, where the "interest of potential life" is relevant only in the third trimester and where any restrictions that conflict with the health of the woman are invalid. On the same day, in Doe v. Bolton, the Court held that health included anything that the woman found to be important, subject only to ratification by a single doctor, the abortionist (who obviously has a conflict of interest, since he benefits only if an abortion is performed).

Nineteen years later in Planned Parenthood v. Casey, a plurality of three judges revised the standard, making the right to abortion a liberty interest protected by the Fourteenth Amendment and making viability (the point at which the child could survive outside the womb) of crucial importance. (Seemingly no abortions would be permitted before viability.)[13]

Dobbs calls this directly into question, since viability is usually assumed to be around twenty-two weeks, while Mississippi bans all abortions after fifteen weeks.[14] The amicus brief I signed onto (from international law and foreign legal scholars) pointed out that nearly every country in the world, unlike America, severely restricts (or effectively prohibits) abortion at twelve weeks—thus, America would not be out of step with the rest of the world if the Court upheld Mississippi's fifteen-week ban. Other amicus briefs pointed out that abortion becomes much more dangerous for women around the fifteenth week. (As we saw above, concern for women's health has always been an important consideration in abortion jurisprudence.)[15]

Obviously, no one knows how the Court will rule. Some believe it will overturn *Casey*,[16] some believe it will overturn *Roe* as well,[17] and some believe it will go even further and hold that the Fourteenth Amendment actually protects the unborn from abortion.[18] Anticipation is so intense that I fear anything less than the overturning of *Roe* will be viewed as a loss and cause pro-life Americans to lose faith in confirming judges committed to applying the Constitution.

To the contrary, any win in *Dobbs* would be a huge pro-life win. Currently abortions can be performed at any time for any reason. If abortions can be prohibited at fifteen weeks, every pro-life state in the Union will pass similar laws. This will save many lives. And it will mark the first significant pro-life win in the Supreme

13. Although five justices are necessary to form a majority, five justices did support upholding *Roe*, while four would have overruled it. But the five split between two that would have upheld *Roe* with no changes, while the plurality would change it as noted above.
14. Three questions were presented to the Court for review: (1) to clarify the standard for review in abortion cases, (2) to address whether third parties (e.g., abortionists) can bring a case on behalf of women (or whether an affected woman needs to do so), and (3) to determine whether all pre-viability prohibitions are unconstitutional. The Court chose to take only the third question.
15. This argument also counters the assertion in *Casey* that women rely on abortion in order to be full citizens.
16. It would be relatively easy to overturn *Casey*, since the three-justice plurality based on viability did not then or subsequently represent *the reasoning of a majority* of the Court.
17. This is the argument of the brief filed by O. Carter Snead and Mary Ann Glendon.
18. This is the argument of the brief filed by Robert George and John Finnis.

Court since *Casey*.[19] Subsequent cases will allow the Court to further cut back on abortion before eventually overruling it.

The anticipation that the Court will overturn *Roe* hinges on the fact that there are now five pro-life originalists on the Court—Alito, Gorsuch, Thomas, Barrett, and Kavanaugh. Since no originalist believes that a right to abortion can be found in the Constitution (whether in privacy or liberty), it is expected by many pro-life observers that these five (perhaps joined by Roberts) will form a majority and vote to overturn *Roe.* But here is where the disagreement in *Fulton* becomes relevant.

As noted above, Kavanaugh and Barrett parted company with Alito, Thomas, and Gorsuch over whether to overrule a decision (*Smith*) that was clearly unconstitutional, and they did so at least partly on the basis of uncertainty over what to replace it with. Like *Smith*, *Roe*, *Doe*, and *Casey* are clearly unconstitutional; will Barrett and Kavanaugh duck again, perhaps because they do not know what to replace the current standard with?

The fear of what will happen has led many to put as much pressure on those two justices as possible. For instance, *The Atlantic* ran a story about Kavanaugh, clearly designed to invite him to "do the right thing" and uphold *Roe*.[20] Many op-eds by prominent pro-life Americans have urged the Court to overturn *Roe*. Further, pro-abortion and pro-life forces demonstrated in Washington, DC, around the time the Court heard oral arguments in the case on December 1.[21]

I believe it is likely that the outcome will be either (1) a six-vote majority to overturn *Roe* or (2) a three-three-three decision; that is, three justices will vote to overturn *Roe* (Gorsuch, Alito, Thomas), three will vote to overturn that part of *Casey* that seems to prohibit pre-viability abortions (Kavanaugh, Barrett, Roberts),[22] and three will vote to overturn the Mississippi law (Kagan, Sotomayor, Breyer). If this split occurs, that will be a clear majority of six to uphold the law, but the reasoning

19. Some might argue that Gonzales v. Carhart (2007) was a significant pro-life win. However, the promise in *Gonzales* was not fulfilled a few years later in Whole Women's Health vs. Hellerstedt (2016), making the promise more apparent than real.

20. McKay Cooper, "Is Brett Kavanaugh Out for Revenge?" *The Atlantic*, June 2021, https://www.theatlantic.com/magazine/archive/2021/06/brett-kavanaugh-supreme-court/618717/.

21. Although oral argument in this case occurred subsequent to the date of this column, the author believes it tracked the substance of his points.

22. Roberts is known to favor narrow rulings which can draw the most votes from his colleagues. For instance, he wrote the opinion in *Fulton* on the narrowest possible grounds. It is likely he will be trying to prevail upon Barrett and Kavanaugh to join him on the narrowest possible grounds to uphold the Mississippi law. However, it is hard to imagine that the first pro-life originalist female justice—Barrett—would want to go down in history as the justice who failed to overturn *Roe*. That would leave the question of the decisive fifth vote to what Kavanaugh does. Assuming he votes to overturn *Roe*, the question then is what the pro-life Chief Justice will do. He could write a separate concurrence, but it would have little impact, since his opinion is not necessary to form a majority. Therefore, he might join the other five to form a six-vote majority. The advantage of doing so is that he, as Chief Justice, can assign the writing of the actual opinion to whichever justice he chooses. He might write it himself to make the language as limited as possible.

will be fractured between two blocks of three, a "bold" block of Gorsuch, Alito and Thomas, and a "timid" block of Kavanaugh, Barrett, and Roberts. This would provide little guidance for the lower courts in the next case or for state legislatures considering new laws. Such a result would be deeply disappointing for many pro-life Americans, but it would not prevent the scourge of abortion from being knocked down in later cases. We should remember Gorsuch's words in *Fulton* quoted above: "[The decision] committed a constitutional error. Only we can fix it."

Other Significant Developments

The White House issued a statement supporting a bill to make abortion a national right, that is, no longer dependent on *Roe*.[23]

The Court will decide a case, Carson v. Makin, concerning whether a state can ban families from participating in a student-aid program if they choose to send their children to religious schools. In Maine some districts cannot afford to have public schools; thus, the state provides aid to families to send their children to private schools, provided those schools are not religious. Recent cases such as Trinity Lutheran v. Comer and Espinoza v. Montana Department of Revenue would seem to prohibit such discrimination.[24] Perhaps the Court took the case to make this clear.

The Court consolidated its rulings in COVID-related shutdowns of churches in April in *Tandon v. Newsom*. This was a five-to-four decision, with the five conservatives opposing the three liberals and Roberts. The decision, of course, predated *Fulton*, so it applied the prevailing standard of *Smith*. It held,

> First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. . . .
>
> Second, whether any two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulations at issue. . . .
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> Third, the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities" the government may allow." Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities.[25]

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23. Executive Office of the President, "H.R. 3755—Women's Health Protection Act of 2021," statement of administrative policy, September 20, 2021, https://www.whitehouse.gov/wp-content/uploads/2021/09/SAP-HR-3755.pdf.
24. *Trinity Lutheran* held that religious organizations could participate equally in taxpayer-funded state programs. *Espinoza* held that states cannot bar families participating in student-aid programs from choosing religiously affiliated schools.
25. Tandon v. Newsom, 593 U.S. ___, 1–2 (2021), citing South Bay United Pentecostal Church v. Newsom, 592 U.S. ___ (2021), slip op. at 2 (Gorsuch, J., concurring).