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A (Mostly) Cautious Supreme Court Term

By Glenn C. Smith

Let's set aside for the moment whether the Supreme Court's opinion in *Burwell v. Hobby Lobby Stores* is as "startling" in breadth as the dissenting justices claimed. And please put the cellphone-search cases (*Riley v. California* & *United States v. Wurie*) temporarily on hold.

That done, the Supreme Court term completed earlier last week appears noteworthy for how the justices mostly decided big cases in cautious and evolutionary, rather than bold and revolutionary, ways.

This cautious approach is most evident in several high-profile cases where justices rejected invitations to overturn past precedents and applied — and, unfortunately, often *misapplied* — currently governing law.

One prominent example of this resist-overruling dynamic is *Town of Greece v. Galloway*. In allowing the town's council to begin its monthly deliberations with the almost-always-Christian prayers of community volunteers, the court nevertheless rejected the pro-prayer advocates' invitation to "replace" the "endorsement test" frequently used for assessing establishment clause compliance. Advocates called the endorsement test, which invalidates governmental involvement with religion when messages of favoritism would be read by hypothetical reasonable observers, "fatally flawed" and "ultimately threaten[ing to] religious pluralism and free expression."

Yet the *Town of Greece* majority declined to do any precedent changing. Instead, the majority used an existing line of "legislative prayer" cases and overly charitable characterizations of key facts to find no religious favoritism. (I disagree, but the point here is that most of the justices decided on conventional grounds *within* the existing precedents.)

A similar thanks-but-no-thanks response came in at least three other "big" cases. In *McCutheon v. FEC* the justices declined to overrule *Buckley v. Valeo* (1976) — instead following its wrong but inexorable logic to overrule additional federal campaign-finance limits in the name of free speech. And while invalidating a Massachusetts law keeping abortion-clinic protestors out of a fixed buffer zone, the *McCullen v. Coakley* majority declined to change legal horses — despite urgings from justices who for years have sought to overrule precedents so that abortion-protest restrictions would be seen as "content-based" and thus harder to uphold. In *Harris v. Quinn*, allowing home-healthcare workers to decline to support union activities on their behalves, the majority criticized and declined to extend — but refused to overrule — the 1977 holding in *Abood* v. *Detroit Board of Education*.

The court proceeded cautiously in other ways this term. The challenge to President Barack Obama's "recess appointments" (*NLRB v. Canning*) saw the justices choosing the narrowest of three theories for rejecting the authority of presidents to end run Senate confirmation. Justice Stephen Breyer's majority opinion still left room for presidents and congresses to wrangle politically over appointments.

Schuette v. BAMN illustrated caution in yet another sense. A six-justice majority (including Justice Breyer, a strong supporter of affirmative action) concluded that existing precedents, treating facially neutral laws as racially discriminatory when they distort the political process, just couldn't be stretched to prevent Michigan voters from limiting race-based remedies at the ballot box. Justice Anthony Kennedy's majority opinion viewed the precedent-expanding arguments as unprincipled and incompatible "with the Court's settled equal protection jurisprudence." Breyer's concurrence saw the *Schuette* fact pattern as "not easily fit[ting]" existing precedents; extending them "pose[d] significant difficulties."

So, what about the *Hobby Lobby* case? Certainly, the court distorted congressional intent and opened a can of worms by holding that for-profit corporations could assert religious-freedom-based claims under federal law and avoid the contraception-coverage mandate of the Affordable Care Act. Yet, Justice Samuel Alito's majority opinion specifically disclaimed any corporate right to flout anti-discrimination laws; Alito also suggested that a different balancing calculus could prevent avoidance of other health benefit coverage, such as for vaccinations. And, while providing the critical fifth vote for the majority, Kennedy wrote an important concurring opinion underlining the narrow reach of the majority's rationale.

This term's (mostly) cautious legal changes underscore three important points about the Supreme Court's place in American law and society.

First, although the court is a political institution making important contributions to public policy, the court is also very much a *legal* institution. The justices are the most prominent practitioners of a legal-reasoning tradition proceeding step-by-step and promoting orderly reliance by sticking with past legal rules.

A second, related point is that this strong impulse to follow past precedent and proceed incrementally flows directly from the court's awkward role as a life-tenured, non-majoritarian policymaker in the midst of an American governmental system based on politically accountable officials representing the will of the majority. For several reasons, the justices need to avoid strong push back from the public, legal-system elites and public officials. Justices don't want to be perceived as too dramatically interjecting themselves into pitched political controversies. (Witness last term's Proposition 8 "decision not to decide" whether state same-sex marriage bans are constitutional.)

Third, this term's generally cautious decision-making approach is a significant byproduct of the current court's justice alignment. In the most controversial, ideologically sensitive

cases these days, blocs of “liberals” and “conservatives” usually vie for the vote of one or two “swing voting” justices.

The current need to run to the middle generally pulls for majority decisions using narrow theories and declining to overrule precedents. (As noted earlier, if *Hobby Lobby* turns out to be less “startling” than critics fear, this will mainly be because of limitations signaled in the concurring opinion of crucial middle-of-the-road Kennedy.) This observation about center-moderating balance becomes especially important when judicial vacancies threaten to disturb the equilibrium.

I’ll close this term wrap up with an observation for those who think of the court as an always-“conservative,” right-wing institution: Interestingly, this term’s boldest decision came in the cellphone-search cases. In broadly ruling that police searches of arrestee cellphones must almost always be preceded by a search warrant, a unanimous court confounded expectations and refused to draw finer distinctions based on the technological capability of the cellphone or the intrusiveness of the search at issue. Thus, this term’s least cautious big-ticket ruling was a “liberal” one protecting privacy and favoring criminal defendants!

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