A HISTORIC YEAR IN THE LAW: A REVIEW OF THE SUPREME COURT'S TERM

Webinar Presentation by

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Thanks to Prof. Gardner for the kind introduction.

This has been indeed a historic year for the Court: a momentous year, by far the most consequential Supreme Court term so far this century. SCOTUSBlog rated 10 of the c. 60 decisions as "major."

There have been BIG and far-reaching cases in many areas of the law, including (but not limited to) ones in which the Court:

a. limited the scope of criminal public corruption prosecutions;
b. found that States are free to punish presidential electors who fail to cast their votes for the candidate to whom they were pledged;
c. held unconstitutional State laws that permit criminal convictions by less than unanimous juries; and
d. found that much of the territory in eastern Oklahoma, including part of the City of Tulsa, belong to the Creek people and are sovereign Indian lands.

But what I will talk about today are several other areas, in which I think that the Court has said very important things: about the separation of powers, about how to read statutory texts, about such cultural flashpoints as abortion and gay rights, and about the role of religion in the public square.

There are several overall lessons that I think can be derived from this Term, and I will state them now and then try to justify my inferences when I analyze what I think are the key cases:

I. Chief Justice John Roberts is an institutionalist, keenly focused on the need to preserve the dignity and role of the Court;
II. Although this may make him the "swing vote" with some regularity, he is not a liberal, and those who see evidence to the contrary are engaging in wishful thinking;
III. The Court has selectively deployed *stare decisis* not only as a rule of decision, but as an important element in promoting public respect for the non-political image of the judicial branch;

IV. The conservative wing of the Court has abandoned the traditional insistence on strict constructionism;
V. The Court is willing to declare that the President – whoever he or she might be -- is not an emperor, and is subject to the rule of law, but it still remains extremely deferential to him, and is unwilling to address even obvious signs of abuse;
VI. The Court is prepared, more than it has been in years, to accept religious justifications for conduct that would otherwise be illegal.

A. The Powers of the President.

1. The subpoenas

a. Trump v. Vance

Cyrus Vance, District Attorney for New York County, has convened a grand jury charged with investigating whether campaign finance laws were violated when candidate Donald Trump allegedly paid for the silence of two women who claimed to have had affairs with him. The subpoena issued by the grand jury was directed not to the President, but to his accounting firm. It demanded the production of financial records, including tax returns, dating back to 2011, for use by the grand jury and subject to the general rules of secrecy.

The President filed suit in federal court, arguing that because he cannot be indicted for a crime while he is in office, he and his papers are absolutely immune from compulsory process. Two details here are important: (a) Mazars did not contest the subpoena, and (b) Trump made no argument other than the claim of immunity.

He was unsuccessful in the trial court, and appellate courts in New York. The Supreme Court agreed to review the case.

b. Trump v. Mazars USA

Three Congressional Committees also subpoenaed personal financial information of the President, members of his family, and various of his businesses. Again, he objected on the grounds of immunity, and he also argued that the subpoenas were not motivated by a "legitimate legislative purpose." And again, the addresses of the subpoenas – the accounting firm and also Deutsche Bank –indicated willingness to comply if so directed by the courts.
As in the New York case, Trump's challenge was rejected by the district court and by the court of appeals, and the Supreme Court granted review.

2. The outcomes

The outcomes of the two cases differed substantially, because the natures of the subpoenas were different.

a. Vance

There was really very little doubt about the decision in the *Vance* case. The notion of absolute presidential immunity from judicial process was considered and rejected in 1997, in *Clinton v. Jones*. The claim that the case should be treated differently because the subpoena was issued by a State and not a federal court was groundless, and the Court dispatched it.

Chief Justice Roberts wrote for the Court, demonstrating that presidents have been subject to judicial procedures since the first decades of the Republic. From the case of Aaron Burr – known to all as the villain of the piece in Hamilton – who had issued a subpoena to President Jefferson, to the more recent cases of Presidents Nixon and Clinton.

The arguments that the President is too busy, or that proceedings might be instituted to harass him, were quickly rejected. Thomas Jefferson, Richard Nixon, and Bill Clinton had to comply with court orders. So must Donald Trump.

The vote was 7-2, with Gorsuch and Kavanaugh, JJ, concurring in the judgment but not in the opinion. Thomas and Alito, JJ., dissented, with Alito, J., making the case for absolute immunity. Justice Thomas did not dissent in *Clinton v Jones*.

Vance gave the Chief Justice the chance to provide a lesson in civics: a lesson that should have been unnecessary. READ Slide #1.

Some have found an invitation to the President to delay matters further in Roberts C.J.'s concluding line. But remember: the sole basis for the challenge to the subpoena raised in New York was presidential immunity. To mount other challenges, Trump will have to amend his complaint, and it is unlikely that he can do so and remain in federal court. A State court is, in my view, unlikely to entertain a claim that this request for records is oppressively broad, or that it is not sufficiently linked to a legitimate criminal investigation.

The records will be produced to a grand jury in Manhattan sooner than the press has been reporting.

b. Mazars

In the Congressional subpoena case, the Court focused on the threat that Congressional subpoenas might interfere with the President's ability to do his job. Apparently all of the Justices shared this concern; only Alito and Thomas, JJ., dissented, with Thomas, J., helpfully reminding us that if Congress wants to enforce its will over a recalcitrant President, its recourse is to impeach him.

That said, the Court essentially declined to rule. It sent the case back to the Court of Appeals, with instructions to assess four things before deciding whether to enforce the subpoena:

(i) could other sources provide Congress the information it needs? (here, the documents were not requested of the President, so "source" is not an issue)

(ii) is the subpoena broader than is reasonably necessary to support Congress's legislative objective? (the answer to this does not require remand)

(iii) has Congress adequately identified its legislative aims? (same) and
(iv) are the burdens on the President reasonable in the circumstances? (here there is NO burden, because the subpoena was not addressed to the President)

Lawyers representing the legislative branch insist that they can easily address these questions. But the effect of the non-decision is almost certainly to defer a definitive ruling on the congressional subpoenas until after the election.
This is an obvious win for the White House: to Trump, delay past November is victory.

3. The takeaway
   a. The President must comply with judicial process, like anyone else. He must not defy the courts.
   b. But: the role of Congress in calling him out for perceived violations is strictly limited, and the Court will not be lured into tugs-of-war between the executive and legislative branches. There is an argument that this reflects a serious abdication of its constitutional role.

B. The Abortion Case (*June Medical Services v. Russo*)

1. The constitutional framework: *Roe* and *Casey*

Essentially, it has been the law since *Roe v. Wade* in 1973: a woman has a constitutional right to an abortion, at least until the point of viability of the fetus she is carrying. Since *Planned Parenthood v. Casey* (1992), the test of legislative enactments relating to abortion is whether the law places an "undue burden" on that right.
The right is grounded in the right to privacy: something not mentioned in the Constitution, but found to be one of those unenumerated rights preserved by the Ninth Amendment. The people have a right to be left alone. Obviously, this analysis remains, after nearly 50 years, highly controversial among Americans.

2. *Whole Woman's Health*

In *Whole Woman's Health v. Hellerstedt* (2016) – only four years ago – a sharply-divided Court held that Texas had imposed an "undue burden" by requiring that doctors performing abortions have admitting privileges in a local hospital. The LA statute in *June* was virtually identical to the TX one in *WWH*.
There was only one reason for the Court to accept *June Medical Services*: the retirement of Kennedy, J., the fifth vote in *WWH*. This case was the vehicle that abortion opponents sought to use to overrule *Roe* and *Casey*.

3. Chief Justice Roberts controls the outcome

The result of *June Medical Services* was a shocker. The "liberal wing" wrote as they always do, and the "conservatives" said what they always say. Thomas and Gorsuch, JJ., argued that there

is no constitutional basis at all for abortion challenges; that is, they were ready to overrule *Roe* and *Casey* straightaway.
But the Chief Justice – who had dissented in *WWH* – cast the deciding vote, not on the basis of constitutional doctrine, but because, he said, of *stare decisis*: the bedrock meta-rule that a legal principle, once decided, stays decided, and sets a precedent that must be followed.
Of course, SCOTUS is not bound by *stare decisis:* it is free to overrule its own decisions. It does not do so lightly, but it does do it. In 1986, in *Bowers v. Hardwick*, the Court found that the Constitution does not prevent States from criminalizing private, non-commercial homosexual acts between consenting adults. Only 17 years later, in *Lawrence v. TX*, it reversed itself.
Nor has John Roberts been a staunch defender of *stare decisis*, as his concurrence in *Citizens United v. FEC* (2010) demonstrates. There, he wrote: "*stare decisis*... counsels deference to past mistakes, but provides no justification for making new ones."
And yet… READ Slide #2.

The Chief Justice voted against his conscience, and said so, because there was a more important principle at stake.

The issue was the role of the Court, and ensuring that it is not seen as a mere tool of the political branches. It is not just that the American people have come to rely on *Roe* and its progeny as the law for nearly half a century. It is that, in the Chief Justice's mind, a 5-4 vote to begin the dismantling of the established constitutional right to abortion would not be readily accepted by the people. In *Bush v. Gore* (2000), Stevens, J., warned that the deference Americans show to the Court could not survive a close call on something so heavily political. Justice Stevens was apparently wrong then; I think that Chief Justice Roberts was right in this instance.

This case does not stand for any judicial endorsement of *Roe* or *Casey*. It stands only for the proposition that John Roberts does not want to be the last Chief Justice of the United States. In my view, the Chief's worry will dissipate the moment another "pro-life" justice is appointed to the Court.

C. Gay Rights: *Bostock v. Clayton County, GA*

1. <u>The statutory framework: discrimination "on the grounds of sex"</u>

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer - … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … sex."
Many observers believe that this language was introduced in 1964 by racist Southern Congressmen as a "poison pill," ensuring that the Civil Rights Bill would never become law because a blanket ban on sex discrimination would be considered completely unacceptable.

But sex discrimination in employment has been prohibited nationally since 1964. Generally speaking, courts assess claims of discrimination by asking whether, if the individual involved were of a different (race, religion, age, national origin, … or sex), would s/he have been treated differently? SCOTUS has endorsed that approach numerous times.

If we start from that premise, then the question whether sexual orientation discrimination is sex discrimination answers itself. This should not have been a hard case.

2. <u>The facts</u>

The plaintiffs were two gay men and a transgender woman. All were fired from their employment because of sexual orientation, or because they did not conform to conventional sex norms. All claimed that their dismissals were "because of [their] sex."

3. <u>Justice Gorsuch looks for meaning</u>

Writing for the Court, Gorsuch, J., simply asked the question I just asked: what happens if we subject sexual orientation discrimination to the usual "but for" test? The outcome is obvious. But it is equally obvious that this was not what the drafters of the 1964 Act had in mind. They did not list "sexual orientation" as a category on the basis of which discrimination would be forbidden. Does that matter?

The "strict constructionist" answer would be no. As Justice Scalia – Patron Saint of strict constructionism – wrote, "obviously, Congress cannot express its will by a failure to legislate." *In re Estate of Romani* (1998). He said that the argument that would base meaning on what Congress did **not** say – "should be laughed out of court."

Now, of course, conservatives have never been consistent in this "conviction." In *Obergefell v. Hodges* (2013), in which the Court held that States may not decline to issue marriage licenses to same-sex couples, Scalia, J., himself centered his blistering dissent on what he considered to be the lack of legislative support for gay marriage.

Still, Gorsuch, J., noted that the Civil Rights Act does not mention sexual harassment, yet in 1998, the Court concluded that "Sexual harassment is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep." *Oncale v. Sundowner Offshore Services.* READ Slide #3. So the meaning of words governs: inferred legislative intent does not.

4. <u>The dissents</u>

Justice Alito's dissent, joined by Thomas, J., openly disregarded the strict constructionist ideology, relying on evidence of what various Members of Congress thought as they voted in 1964. But Kavanaugh, J., tried to have it both ways: he argued that the "because of sex" simply does not mean "because of sex."

Kavanaugh, J., wrote that words have "ordinary meanings," alongside "literal meanings." Obviously reading the Civil Rights Act "literally" would lead to a result he does not like. But if we are guided by "ordinary meanings," he said, then we end up where we want to be. And how do we know that this is so? How do we find the "ordinary meaning" of the words "because of sex"?
Well, all we can do is ask how people use the term in common speech: an empirical analysis. This represents, of course, the absolute opposite of the way conservative jurists have approached such matters in the past. Apparently, the outcome here – limiting the rights of gay individuals even when the law protects them – somehow is more important than consistency.

For those listeners who have been in my Jessup course, I have to share this: READ Slide #4.

The example he gives is ludicrous. Of course a baby stroller is a "vehicle." There is no ambiguity about the definition of the word. But the reason a judge would not convict a parent for pushing a perambulator through the park is not the meaning of the word: it is that the result would be absurd (indeed, it is hard to imagine a statute – as opposed to a sign, speaking in shorthand – actually banning "vehicles" from the park for that very reason).

5. Why this is important?

Based on *Bostock*, we should be able to be confident that Roberts, C.J., as well as Gorsuch, J., will apply and interpret statutory law as written. And perhaps we can anticipate a little relief from the empty quadrennial debate about how liberal judges "legislate from the bench." In *Bostock* there can be no doubt: the majority applied the law as it is written; the dissenters were the ones who, dissatisfied with the words Congress enacted, tried to pass them through a filter to change their meaning.

D. Religion in 21st Century America

Finally, the Court had important things to say about the role of religion in America. Two of the three cases I will mention are "important" ones; the third slipped under the radar of most observers.

1. *Espinoza v. Montana Department of Revenue*.
   a. Facts: The State of Montana extended certain (modest) tax benefits to people who donated to private schools, but not religious ones, on the grounds that to do otherwise would indirectly aid religion in violation of the free exercise clause.
   b. Background: The Court used to be quite rigorous in insisting that public funds not be dedicated to sectarian education. Although it has long been legal for States to provide funds for, among other things, buses to take students to religious schools, the Court demanded that public money not be used for instruction that might promote a religion, or religion in general.

c. Outcome: Roberts, C.J., wrote for the Court that "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." The Montana statute was held unconstitutional, because it discriminated against religious schools.

d. Analysis: This may seem innocuous, but it is not. To the contrary, Thomas, J., concurring, characterized this case as part of a larger effort to eliminate "needless obstacles in [individuals'] attempts to vindicate their religious freedom." No one knew that religious freedom lay in the balance as Montana decided how to allocate tax benefits. Alito, J. concurring, saw the case as defending the rights of parents who "believe that their local schools inculcate a worldview that is antithetical to what they teach at home."
There is no question that *Espinoza* will be used by States seeking new and creative ways to undermine public education, and to provide benefits to parents who demand a sectarian, not a secular, alternative.

2. *Little Sisters of the Poor SS. Peter and Paul Home v. Pennsylvania*.

a. Facts: Under the Affordable Care Act (Obamacare), employers must provide health insurance to employees, including reproductive health coverage. The law contains a religiously-based "opt-out," under which an employer stating religious objections may omit the coverage, which is then provided from public funds. But Little Sisters of the Poor did not want even to accept that option, since they claimed that **any** involvement in the purchase of reproductive health coverage was inconsistent with their religious dogma ("deliberately avoiding reproduction through medical means is immoral").

b. Caveats: The case came before the Court in a complex procedural posture, and much of the decision turns on detailed questions of administrative law. And the coverage at issue does **not** include abortion: this is about contraception and similar services.

c. Analysis: this is about as far as the Court has gone in accommodating religious – or even "sincerely-held moral" – beliefs in the face of legislation of general applicability. In *Employment Division v. Smith* (1990), in a very controversial decision by Scalia, J., the Court held that religion does not provide immunity from laws that apply to everyone, so long as certain conditions are met. The Religious Freedom Restoration Act (1993) – a statute of dubious constitutionality – was passed to undo what was seen as the damage to religion caused by *Smith*.

As a result of this decision, as many as 125,000 female American workers will lose their contraception coverage, as employers find "religious or moral" objections to providing it. There is no test to determine the sincerity of such claimed "beliefs." The Little Sisters themselves do not object to making the required certification: they have a problem only with how it would be used.

d. Prospects: There is a slippery slope here. As Gorsuch, J., noted in his otherwise progressive decision in *Bostock*, we can anticipate "religious" objections to extending equal rights to gay Americans. Some of us are old enough to recall "religious" objections to laws prohibiting racial segregation, and certainly there are today "religious" arguments against equal opportunities for women.
And while this case concerns reproductive health, what of employers who have, or who make up, religious or moral objections to blood transfusions? Or vaccinations?
The promulgation of objections like these will be an inevitable result of *Little Sisters*.

3. *South Bay United Pentecostal Church v. Newsom*
Finally, a case that was not argued or fully briefed before the Court, but which Linda Greenhouse of the NYT suggested – correctly – is a troubling development, especially in light of *Espinoza* and *Little Sisters*.
   a. Facts: The State of California restricted public gatherings to 25% capacity, including religious services, in light of the pandemic. A church sought to enjoin the executive order, on the grounds that it burdened religion.
   b. Outcome: Roberts, C.J., explained why the Court denied relief. But the vote was 5-4. And that is scary: 4 Justices were prepared to conclude that churches should be exempted from an exercise of the State's police power, putting public health at risk.
   c. Dissent: Kavanaugh, J., insisted that businesses such as supermarkets are "comparable" to churches. But the Order exempted or treated more leniently only dissimilar activities, such as grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods. He used the word "comparable" 8 times in his 4-page dissent. And he was wiling to find a federal constitutional issue here, merely because a religious institution was involved.

E. Conclusion

This has been indeed a momentous SCOTUS term. But while it is reassuring to see the Court rein in the imperial claims of the President, other signs are troubling. The Court seems motivated more by the need to preserve its own profile, rather than to step up and to perform its constitutional role, adjudicating battles between the political branches. Its reiteration of the significance of *stare decisis* encourages stability, but there is no guarantee that it will last. And it seems odd, at least, for the Court to increase the protection for self-asserted religious views, especially when religion is so often merged into political ideology.

The most hopeful sign, in my mind, is the decision in *Bostock*. That case, at least, suggests that judges may be willing to risk public backlash, even from their comfort zones, to defend the sanctity of the Constitutional structure.

I admit: some of this discussion may have a “deck chairs on the Titanic” flavor, when we realize the magnitude of the challenges our Republic faces today.

Despite everything, and even in light of the disagreements and concerns I have expressed, there is every reason to hope that the integrity of this branch of Government can be counted on, even when the other two branches seem to have lost their moorings.

I hope I have provoked some thinking, and I will be happy to take your questions.