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Supreme Court Ends Term with Very Mixed Bag of Religious Liberty Decisions

As the Supreme Court closed out its session for the year, five decisions were issued that will have an impact on how Americans exercise their religious freedoms. Some of these may have an impact on Christian teachers, and the effects are not all improvements. In the first two decisions discussed below, one or more justices that have been labeled by the media as “conservative” sided with the four so-called “liberal” justices to shift the majority toward more restrictions on religious liberty. In the final three (of the five) decisions, the conservative justices hung together and in two cases, even brought over a couple of the liberals toward a more robust exercise of these rights—at least in the private context of religious schools and churches.

First, the difficult news...

LGBT advocates scored a major victory in [Bostock v. Clayton County, Georgia](#). In this case Neil Gorsuch, one of the recent Trump appointees to the court, surprised many by writing the majority opinion which declares that the prohibition on sex discrimination in Title VII of the 1964 Civil Rights Act also prohibits discrimination on the basis of sexual orientation or gender identity. Gorsuch had the support of Chief Justice Roberts and the four more liberal members of the court for this 6-3 decision. The twisted logic of the Court opinion rests on the concept that if an employer establishes male and female dress policies, the employer has discriminated against a cross-dressing man solely on the basis of his gender because if he were female he would be allowed to wear women’s clothes. Unfortunately, this replaces the biblical belief that gender is determined by the Lord that has long been a part of Constitutional law with the concept of

“gender identity” that says individuals establish their own gender and can change it as they see fit.

Many believe that [the ramifications of this decision will be profound and far reaching](#). Justice Alito in his dissent outlined some of the possible results which include continued battles over locker rooms and women’s sports and a chilling effect on free speech for those whose religious convictions teach that marriage should be between one man and one woman. As Alito put it,

The Court’s decision may also pressure employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures. Employers are already imposing such restrictions voluntarily, and after today’s decisions employers will fear that allowing employees to express their religious views on these subjects may give rise to Title VII harassment claims (pg. 52 of Alito dissent).

Alito also shared concerns regarding how this decision may impact public school teachers. “The Court’s decision may even affect the way employers address their employees and the way teachers and school officials address students.”

Alito’s concerns regarding possible abridgment of free speech and freedom of religion of public school employees echo the prophetic concern he expressed in his dissent to [United States v. Windsor \(June, 2013\)](#). This was the case that overturned the Defense of Marriage Act and established that states must issue marriage licenses to same sex couples. Justice Alito at that time warned,

I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

CEAI is genuinely concerned regarding the outcome of this case and immediately called for discussions with attorneys regarding the free speech and religious liberty rights of members. I participated in those discussions and was convinced that this decision will make it more difficult for Christian teachers to live out their faith in the public schools.

While serving as a witness in the public schools will become more challenging, missionaries across the globe bear witness that it is often in times of intense persecution that the Lord moves decisively. It is worth emphasizing that [CEAI polling](#) makes it clear that members who work in the public schools are almost unanimous in their desire to treat LGBTQ students with dignity

and respect. However, at the same time these public-school employees feel very strongly that they should not be required to personally affirm LGBTQ identities of students.

Another unfortunate decision from this Supreme Court session made advocates for unrestricted access to abortion the big winners in *June Medical Services v. Russo*. Chief Justice Roberts provided the critical swing vote by joining with the four liberal justices to strike down a Louisiana state law that required abortion providers to have admitting privileges at a hospital within thirty miles of their abortion clinic. Roberts' decision to join the four liberal justices surprised many as he had previously voted against striking down such state restrictions on abortion in a very similar case, *Whole Women's Health v. Hellerstedt*. In *Whole Women's Health*, Roberts voted in the minority, and the majority ruled that in Texas such restrictions on abortions were not permitted. Roberts explained his flip-flop in his concurring opinion,

The legal doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore, Louisiana's law cannot stand under our precedents.

Stare decisis is the legal concept that courts should let the decisions made in previous cases set a precedent for future rulings. Roberts' flip-flop based on his extreme view of stare decisis was lamented by many Christians and could certainly mean that counting on Chief Justice Roberts as a possible vote to overturn the *Roe v. Wade* decision is a long shot.

And now, three glimmers of hope...

In *Espinoza v. Montana Department of Revenue*, the court voted, in keeping with their ideological 5-4 differences, to take a step forward in protecting religious schools from discrimination. The court ruled that a provision in the Montana constitution blocking any religious school from receiving scholarship money that the legislature had made available to private schools is unconstitutional. These provisions, often called "Blaine Amendments," are found in 37 other states and were passed in the second half of the 19th century to prevent Catholic Schools from spreading. Most court watchers think this decision and a similar ruling in *Comer v. Trinity Lutheran Church* three years ago make it clear that the Blaine Amendments across the nation are not enforceable. This will open the way for state funding to support religious schools.

Our Lady of Guadalupe School v. Morrissey-Berru was a 7-2 decision in which traditionally liberal Justices Breyer and Kagan joined the five more conservative justices to extend religious liberty protections further than *Espinoza v. Montana*. The decision establishes that religious

[schools can claim a “ministerial exemption,”](#) from employment law for teachers employed by them. This means that such teachers can be dismissed for not holding to important tenets essential to the faith of the school. It should follow that religious schools will not be forced to comply with the *Bostock v. Clayton County* decision discussed above.

Finally, in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* the Court ruled that [the Catholic institution could be exempted by a presidential executive order from the Affordable Care Act mandates to provide coverage for contraception](#). The vote followed the same 7-2 majority as *Guadalupe School v. Morrissey*. The Little Sisters of the poor have been fighting for this commonsense exemption ever since the passage of the Affordable Care Act, so it is good to see their perseverance pay off. However, this exemption rested on an executive order by the Trump administration which could be rescinded by future presidents. [Candidate Joe Biden has already announced](#) that if he becomes President, he will rescind the Trump policy that made this exemption possible.

These five cases seem to paint a picture that, in the future, Christians who work for religious institutions like religious schools and churches may be extended exceptions to practice their faith. However, for Christians who choose to work outside church or religious school settings it seems that protections enabling them to live out their faith in the workplace or in other public venues are becoming weaker. Such a cloistered view of the free exercise of religion cannot be what the framers of the First Amendment had in mind. I pray that this is not the complete picture and that a few bold brush strokes from the Lord will alter this distorted picture of religious liberty in America.

Please share your thoughts on this column that you would like other readers to see by entering them in the form below. Personal comments can be sent to JMitchell@ceai.org. John Mitchell is on staff at CEAI and teaches part-time in the suburbs of Washington, DC.

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