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SUPREME COURT: IT COULD HAVE BEEN WORSE

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At the beginning of this year's Supreme Court term, I wrote that the coming term offered an opportunity to see whether the Roberts Court was conservative with a small "c" or a capital "C." Would the Court pursue a minimalist conservative approach that sought to preserve precedent, or would it accept the invitations of litigants in numerous high-profile cases to overturn past precedents that are anathema to many radical conservatives? With the term concluded today, the results are now in—at least for this term. In each of the cases I highlighted where litigants asked the Court to pursue the more radical course of reversing prior precedents, the Court declined, and instead resolved the cases more narrowly. In some cases, the Court may have planted the seeds for future reversals of disfavored doctrine, but for now, the Court's approach is incremental rather than radical. Conservative, to be sure—but with a small "c."

This pattern of preferring a modestly conservative to a radically

conservative result was evident on Monday, as the Court issued its last two opinions, both 5–4 decisions in highly controversial cases. At stake in Harris v. Quinn was nothing less than the future of the public sector labor movement. Plaintiffs challenged an Illinois law that required homecare workers, employed jointly by the state and private customers, to pay fees to the union that represented them. They argued that the mandated fee violated their First Amendment right not to associate with the union. Thirty-seven years ago, in Abood v.Detroit Board of Education, the Court held that a law requiring all members of a public sector union to pay dues did not violate the First Amendment of those who did not want to pay. The Court reasoned then that the state had a compelling interest in preserving labor peace through a single union, and in avoiding the "free rider" problems posed by the fact that members benefit from union representation whether they pay their dues or not, and therefore, absent a mandate, many would not pay.

The plaintiffs in Harris devoted most of their argument to an attack on Abood, asking that it be overturned. The five-member conservative majority in Harris went out of their way to criticize Abood, but they pointedly did not overturn it. Instead, the lion's share of the opinion was devoted to distinguishing Abood from the case of the personal homecare assistants covered by the Illinois law. While the distinctions were justly criticized by the dissent, the most important point is that public sector unions lived on to fight another day. Evidently, one or more of the conservative justices in the majority was not ready to upend a nearly forty-year-old precedent on which thousands of state and federal contracts rely.

Burwell v. Hobby Lobby Stores, the Court's last-issued decision and the most closely watched case of the term, also reflected a preference for a narrow over a sweeping result. (I discuss the legal issues in detail here.) As expected, the Court ruled in favor of a privately-held corporation's right not to cover the costs of contraceptive methods that it deemed religiously objectionable because they operate after conception. The Affordable Care Act requires contraceptive coverage if the employer chooses to provide health insurance to its employees. But the Religious Freedom Restoration

Act, or RFRA, provides that when a federal law, even if otherwise neutral, imposes a "substantial burden" on the free exercise of religion, the religious believers affected by the law in question must be exempted unless the government can satisfy a strict standard of justification. It must show that there is no less restrictive alternative to further a compelling state interest.

In Hobby Lobby, the government argued that it had a compelling interest to ensure that women had free access to contraception, and that the corporate owners' religious beliefs did not justify denying coverage to their female employees. By a vote of 5–4, the Court sided with the corporation. But here, too, the Court did not go as far as some of its members no doubt would have liked. Justice Alito wrote the majority opinion, in which he questioned whether the government's interest in covering women's contraception costs is indeed "compelling," and also mused that one "less restrictive alternative" might be to require the government itself to cover the contraceptive costs. But he did not so rule, finding that it was enough to note that the government already had in place a less restrictive alternative. For nonprofit corporations who object to covering contraception, the government requires the insurer to pay the cost without charge to the employer. The Court found that the government had not shown why the same accommodation could not be provided to small, privately-held corporations with similar religious objections.

Justice Kennedy's concurring opinion makes clear why the majority did not go further. He provided the crucial fifth vote for the majority, and his separate concurrence is far more sympathetic to the notion that the government's interest in covering women's contraceptive costs is compelling. Kennedy also emphasized that the existence of a workable means to accommodate objectors was critical to the Court's conclusion that there was another less restrictive alternative. And both Kennedy and Alito went out of their way to emphasize the limits of the Court's decision, stating that RFRA would not permit corporations to practice discrimination by citing religious objections to anti-discrimination laws, or permit religious objectors to obtain exemptions from generally applicable

immunization requirements or tax obligations.

The same "it could have been worse" pattern can be seen in other important decisions of the term. In McCutcheon v. FEC, which I previously analyzed, the Court struck down federal limits on the total amount wealthy individuals could contribute to candidates, parties, and political action committees in a single election cycle. These "aggregate" limits had been in place since 1976, and the Court upheld them when they were first challenged, on the theory that they helped forestall circumvention of limits on contributions to individual candidates. In McCutcheon, the Court reasoned that other laws had been enacted in the interim to address the circumvention problem, and that limits on how much anyone could give to a particular candidate fully served the government's only legitimate rationale for regulating campaign contributions—avoiding the reality and appearance of quid pro quo corruption, or bribes.

The law's challengers had asked the Court to rule much more broadly, eliminating the Court's generally more accepting approach to contribution limits, but the Court declined to go that far. It did, however, narrow the permissible justifications for campaign finance laws, holding that the only legitimate interest they can serve is avoidance of quid pro quo corruption and its appearance. The Court had as recently as 2003 ruled that "Congress's legitimate interest extends beyond preventing simply cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" This interest apparently no longer justifies the regulation of campaign spending, and as a result, Congress's hands are even more tightly tied when it comes to addressing the problem of money in the electoral process.

Similarly, in Town of Greece v. Galloway, the Court reached a conservative result, but avoided a more radical outcome. The case concerned whether religious prayer at the opening of town board meetings violated the Establishment Clause because the prayers were sectarian in nature and overwhelmingly Christian. Defenders of the town's practice asked the Court to abandon an Establishment Clause doctrine that forbids any

government practice that a reasonable observer would understand as "endorsing" religion. This approach, first advanced by Justice Sandra Day O'Connor, renders many public displays of religion suspect; Justice Scalia and others have long criticized it as too open-ended and hostile to religion. The Court sustained the town meeting prayers, but did so on narrow grounds, emphasizing the long historical practice of holding a prayer at the opening of legislative sessions, extending back to the Constitution's adoption and continuing unabated to this day. Given this pedigree, the Court reasoned, such prayer is permissible as long as it does not reveal a pattern of proselytizing, denigrating other religious or non-religious views, or promoting religion. And because of this historical record, the Court did not need to address the "endorsement" test at all.

In Bond v. United States, the Court declined to limit Congress's power to pass laws to enforce international treaties, a longtime bugaboo of conservatives. Bond challenged her conviction for attempting to poison her husband's lover under a criminal statute enacted to enforce the Chemical Weapons Convention, an international treaty. Conservative lawyers and scholars committed to limiting Congress's power filed briefs in the case asking the Court to overturn a 1920 precedent, Missouri v. Holland, which affirmed Congress's power to pass laws to implement any treaty. The Court ruled for the defendant, but did so on the narrow ground that the statute was not intended to cover garden-variety crimes of this nature. It thereby left intact Congress's authority to legislate in this area.

In Schuette v. Coalition to Defend Affirmative Action, the Court yet again declined to overturn prior precedents long criticized by conservatives. The Court upheld a Michigan state constitutional amendment, adopted by popular referendum, which prohibited race-based admissions to public universities, and therefore barred affirmative action. This was not surprising; while race-based affirmative action may in some circumstances bepermissible, it is certainly not required. The challengers had maintained that by passing a constitutional amendment, the voters of Michigan had made it too difficult for those who favored affirmative action to get their way: because of the amendment, they would have to

amend the state constitution again, not simply convince a university board, or pass a state statute.

The amendment's challengers relied on precedents that established a "political process" principle, which the Court had used to strike down laws that banned busing to integrate schools, precluded anti-discrimination housing ordinances, and insulated race-based rental and sale of residential properties from legal challenge. Defenders of the Michigan amendment asked the Court to overturn these precedents, but Justice Kennedy did not do so. Instead, he interpreted these precedents as limited to situations in which laws are enacted with the purpose of frustrating efforts to respond to discrimination, and thereby pose a "serious risk, if not purpose, of causing specific injuries on account of race." Justices Scalia and Thomas wrote separate concurring opinions and would have gone further, overruling the prior precedents altogether. But they attracted no other votes for that radical view.

Finally, in McCullen v. Coakley, a challenge to a Massachusetts law that imposed a thirty-five-foot "buffer zone" around abortion clinics, the plaintiffs invited the Court to overturn Hill v. Colorado, a 2001 decision that had upheld an eight-foot buffer zone around health care facilities in Colorado. The Court unanimously invalidated the Massachusetts law, but did not even discuss, much less overturn, Hill v. Colorado. The Massachusetts buffer zone was more expansive than the Colorado law, and the Court found that Massachusetts failed to show that more narrowly tailored alternatives—prohibiting intimidation, harassment, and obstruction—were insufficient to preserve access to the clinics. Justices Scalia, Thomas, and Alito would have gone further, deeming laws that protect abortion clinics content- and viewpoint-based, and therefore virtually always unconstitutional. But again, their more extreme view did not prevail.

In each of these cases, then, the Court stepped back from the precipice of radically conservative outcomes, and instead resolved the cases on more limited grounds. In some cases, the reasoning was sufficiently constrained to obtain the assent of the liberal justices, as in McCullen. In others, the

vote was 5–4 along the usual conservative-liberal lines, but one or more of the conservative justices was unwilling to go as far as the lawyers urged, or as some of the Court's most conservative members would have preferred.

Make no mistake about it. This is a conservative Court. Only a small handful of cases this term could be characterized as reaching liberal outcomes. (The Court's unanimous ruling in Riley v. California that police cannot search arrestees' cell phones without first obtaining a warrant, a case which adapts Fourth Amendment law to the digital age, is by far the most notable of these.) But as conservative as some of the justices are, it still takes five votes to issue an opinion of the Court. And in most cases this term, that requirement meant that the Court's results were less radical than some may have feared—usually because Justice Kennedy, the Court's least conservative conservative, was not willing to go as far as his colleagues. Liberals can breathe a sigh of relief. But it better be a short sigh. The battle is far from over.