Mini-Law School
2020 Supreme Court Review - A Humanists' View

UUSF Humanists Association
Leland Chan
Adjunct Professor of Law
Golden Gate University School of Law

- *Bostock v. Clayton County*: unlike mere human beings, are judges truly neutral?
- *June Medical Services v. Russo*: a lesson in *stare decisis*
- *Espinoza v. Montana Dept. of Revenue, Little Sisters of the Poor v. Pennsylvania* and other religion cases: further expansion of religious liberty
- *DHS v. Regents of the University of California*: further evidence of the Administration's incompetence

Bostock v. Clayton County (6-3)

Gerald Bostock

Donald Zarda

Aimee Stephens

Title VII of the Civil Rights Act of 1964

Title VII makes it unlawful for an employer to make an adverse employment decision or otherwise to discriminate against any individual “because of such individual's race, color, religion, sex, or national origin.”

Note: last year the House of Representatives passed bills to amend Title VII to expand protection both to “sexual orientation” and “gender identity.” The Senate has not acted on any such bills.

Bostock v. Clayton County (6-3)

Associate Justice Neil Gorsuch

Chief Justice John Roberts

Don’t Supreme Court justices vote their politics?

Justices Breyer, Gorsuch, Thomas, Sotomayor, Roberts, Kagan, Ginsburg, Kavanaugh, Alito

The “Ultimate Driving Machine”

But aren’t judges Ultimate Rational Machines?

David Hume

“Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them”

Jonathan Haidt

Moral Foundations Theory:
“Intuitions come first, strategic reasoning second”

“The Righteous Mind”

Jonathan Haidt

People tend to make their decisions instinctively and then try to find evidence to support their point of view. We apply confirmation bias. We engage our “internal lawyer” to supply reasoning to support our views that already fit our emotional beliefs.

Moral Foundations Theory

The major moral senses (liberals and conservatives prioritize these values differently)

Moral Foundations Theory

The major moral senses (**liberals** and **conservatives** prioritize these values differently)

- **Care; avoiding harm** (*BLM; prison conditions; death penalty; affordable housing; criminal justice; health care; welfare; abortion?*)

Moral Foundations Theory

The major moral senses, how liberals and conservatives prioritize these values differently (*policy positions implicated*)

- **Care; avoiding harm** (*BLM; prison conditions; death penalty; affordable housing; criminal justice; health care; welfare; abortion?*)
- **Fairness or proportionality**: (*income inequality; safety net v. welfare reform, "corporate greed"; socialism v. free markets; affirmative action*)

Moral Foundations Theory

The major moral senses (liberals and conservatives prioritize these values differently)

- **Care; avoiding harm** (*BLM; prison conditions; death penalty; affordable housing; criminal justice; health care; welfare; abortion?*)
- **Fairness or proportionality**: (*income inequality; safety net v. welfare reform, "corporate greed"; socialism v. free markets; affirmative action*)
- **Loyalty/in-group cohesiveness** (*America first; strong military; skepticism over the "international community," UN, and WHO; open v. restrictive immigration*)

Moral Foundations Theory

The major moral senses (liberals and conservatives prioritize these values differently)

- **Care; avoiding harm** (*BLM; prison conditions; death penalty; affordable housing; criminal justice; health care; welfare; abortion?*)
- **Fairness or proportionality**: (*income inequality; safety net v. welfare reform, "corporate greed"; socialism v. free markets; affirmative action*)
- **Loyalty/in-group cohesiveness** (*America first; strong military; skepticism over the "international community," UN, and WHO; open v. restrictive immigration*)
- **Authority or respect**: (*law and order; traditional values; organized religion; support for the military; hierarchy; less tolerance for diversity*)

Moral Foundations Theory

The major moral senses (liberals and conservatives prioritize these values differently)

- **Care; avoiding harm** (*BLM; prison conditions; death penalty; affordable housing; criminal justice; health care; welfare; abortion?*)
- **Fairness or proportionality**: (*income inequality; safety net v. welfare reform, "corporate greed"; socialism v. free markets; affirmative action*)
- **Loyalty/in-group cohesiveness** (*America first; strong military; skepticism over the "international community," UN, and WHO; open v. restrictive immigration*)
- **Authority or respect**: (*law and order; traditional values; organized religion; support for the military; hierarchy; less tolerance for diversity*)
- **Sanctity or purity**: (*American flag; religious symbols; patriotism; abortion; LGBTQ rights; asylum/immigration; school prayer; opposition to obscenity*)

Proceedings of the National Academy of Sciences: public opinions on six controversial topics

- stem cell research
- big bang
- human evolution
- climate change
- nanotechnology
- genetically modified foods

“We found that where religious or political polarization existed, it was greater among individuals with more general education and among individuals with greater scientific knowledge.” The study is consistent with several previous studies that show political conservatives are more likely to dispute the scientific consensus on climate change if they have **more** education.

One plausible explanation for this finding, according to the researchers, is the notion of “motivated reasoning,” namely that “more knowledgeable individuals are more adept at interpreting evidence in support of their preferred conclusions.”

The Supreme Court Justices’ Toolbox

How judges pull off neutrality -

The Supreme Court Justices' Toolbox

How judges pull off neutrality -

- Apply a judicial philosophy that corresponds with their values
- Rely on different premises or value them differently
- Selectively give a rendering of the facts
- Selectively apply precedents
- Ignore or diminish contrary decisions
- Apply varying degrees of deference legislatures, agencies, etc.
- Use secondary sources such as dictionaries, treatises, legislative history
- Appeal to authorities

Bostock v. Clayton County (6-3)

Justice Gorsuch's textualism -

Title VII: No discrimination "because of . . . sex"

Neil Gorsuch

Bostock v. Clayton County (6-3)

Our duty is to interpret statutory terms to mean what they conveyed to reasonable people *at the time they were written*. If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

Samuel Alito

June Medical Services v. Russo (5-4)

Is Roberts soft on abortion?

C.J. John Roberts

June Medical Services v. Russo (5-4)

Is Roberts soft on abortion?

"*Stare decisis* instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking pre-viability abortions to the same extent as the Texas law . . . I concur in the judgment of the Court that the Louisiana law is unconstitutional."

C.J. John Roberts

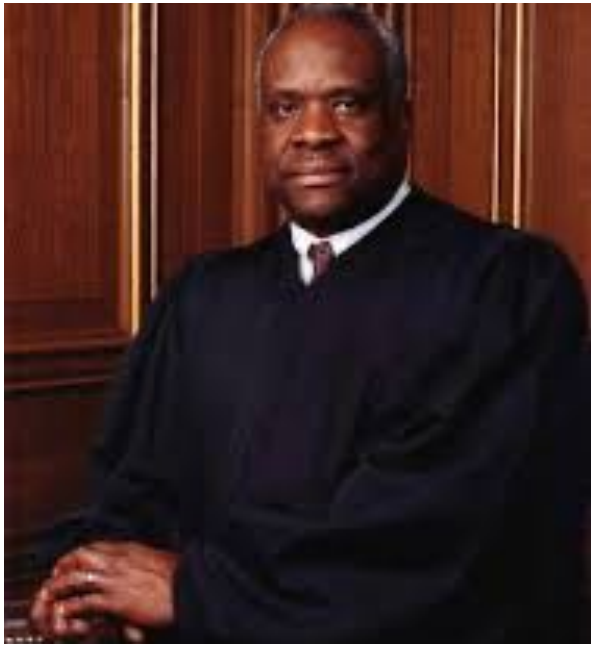
June Medical Services v. Russo

“Our precedents rarely permit a plaintiff to assert the rights of a third party, and June Medical cannot satisfy our established test for third-party standing.”

Samuel Alito

June Medical Services v. Russo

"This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the "legal fiction" of substantive due process, *McDonald* v. *Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in judgment). As the origins of this jurisprudence readily demonstrate, the putative right to abortion is a creation that should be undone."



Clarence Thomas

Dept. of Homeland Security v. Regents of the University of California (5-4)

C.J. Roberts joined the four liberals to overturn the DHS's rule to eliminate DACA because the rule making was done without the "reasoned analysis" required by the Administrative Procedures Act.

John Roberts

Dept. of Homeland Security v. Regents of the University of California (5-4)

When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters. Yet that is what the [DHS Secretary] Duke Memorandum did.

John Roberts

This Term's Religion Cases

Espinoza v. Montana Department of Revenue (state support of religious education)

Our Lady of Guadalupe School v. Morrissey-Berru (ministerial exception)

Little Sisters of the Poor v. Pennsylvania (exception from Obamacare mandate to provide basic medical coverage - including contraception)

Calvary Chapel Dayton Valley v. Sisolak (Covid-19 restrictions do not violate church's free exercise)

Espinoza v. Montana Dept. of Revenue (5-4)

- Montana law provided state funding of scholarships to private schools.

Espinoza v. Montana Dept. of Revenue

- Montana law provided state funding of scholarships to private schools.
- The state's Dept. of Revenue issued a rule (Rule 1) clarifying that no funds may used to attend religious schools.

Espinoza v. Montana Dept. of Revenue

- Montana law provided state funding of scholarships to private schools.
- The state's Dept. of Revenue issued a rule (Rule 1) clarifying that no funds may used to attend religious schools.
- Montana Constitution's "no aid" provision*: The legislature . . . shall not make any direct or indirect appropriation or payment . . . for any sectarian purpose or to aid any church [or other institution] controlled in whole or in part by any church, sect, or denomination."*

Espinoza v. Montana Dept. of Revenue

- Montana law provided state funding of scholarships to private schools.
- The state's Dept. of Revenue issued a rule (Rule 1) clarifying that no funds may used to attend religious schools.
- Montana Constitution's "no aid" provision*: The legislature . . . shall not make any direct or indirect appropriation or payment . . . for any sectarian purpose or to aid any church [or other institution] controlled in whole or in part by any church, sect, or denomination."*
- Montana Supreme Court overturned the state's law and, rather than try to limit it to private non-sectarian schools, invalidated the entire program.

James G. Blaine (1830-1893)

Espinoza v. Montana Dept. of Revenue

SCOTUS: C.J. Roberts and the four conservatives reversed, holding that Rule 1 violated the Free Exercise clause of the 1st Amendment.

Expanding on *Trinity Lutheran Church of Columbia v. Comer (7-2)*

Espinoza v. Montana Dept. of Revenue

What does this mean?

- The wall of separation is coming down
- Establishment Clause is at its weakest since the 1950s
- Free exercise clause is regaining its strength since *Smith v. Dept. of Human Svs. of Oregon* in 1990
- Enforceability of Blaine amendments across the country in doubt

Our Lady of Guadalupe School v. Morrissey-Berru (7-2)

(Expanding the “ministerial exemption”)

The Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion. State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion.

Samuel Alito

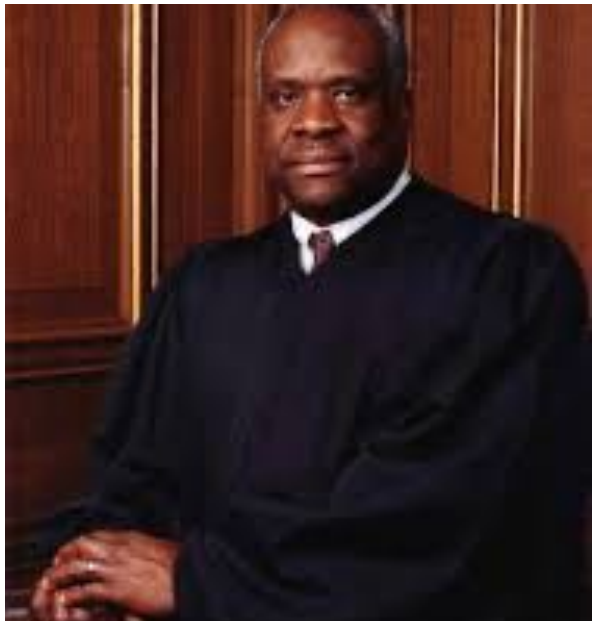
Our Lady of Guadalupe School v. Morrissey-Berru

Precedent: *Hosanna-Tabor Evangelical Lutheran Church v. EEOC (2012),* a unanimous decision in favor of the church against a “lay minister” who was fired after taking disability leave. The Supreme Court for the first time recognized the ministerial exception in this case where the employee was in fact a minister, the position required religious training, it involved teaching religion, and she held herself out as a minister furthering the mission of the church.

John Roberts

Our Lady of Guadalupe School v. Morrissey-Berru

"The Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is "ministerial." See *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171, 196 (2012) (Thomas, J., concurring).

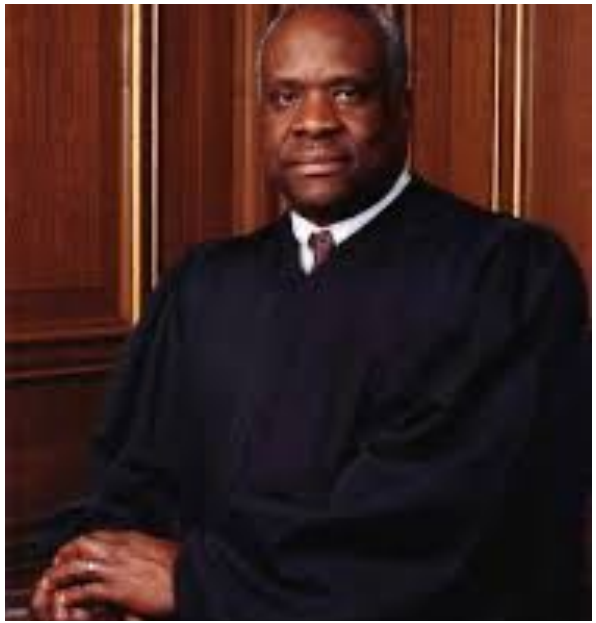


Clarence Thomas

Our Lady of Guadalupe School v. Morrissey-Berru

"The Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is "ministerial." See *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171, 196 (2012) (Thomas, J., concurring).

This deference is necessary because judges lack the requisite understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.



Clarence Thomas

Our Lady of Guadalupe School v. Morrissey-Berru

Our precedents do not warrant this “judicial abdication” in which churches get to decide for themselves which employment laws apply or do not apply to them.

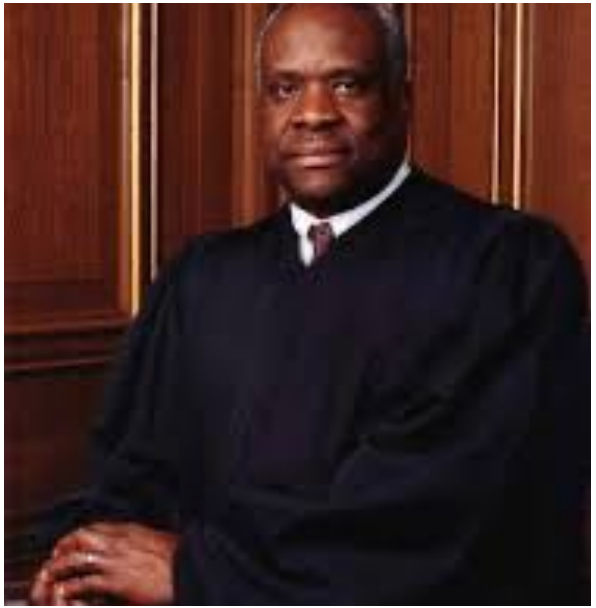
Sources suggest that hundreds of thousands of Catholic school teachers are at risk of employment discrimination because of this decision.

Sonia Sotomayor

Little Sisters of the Poor v. Pennsylvania (7-2)

Commonwealth of Pennsylvania sued HHS and other agencies to challenge expansion/creation of exemptions from the Obamacare mandate to provide “minimum essential coverage” at no cost to the insured that included conception.

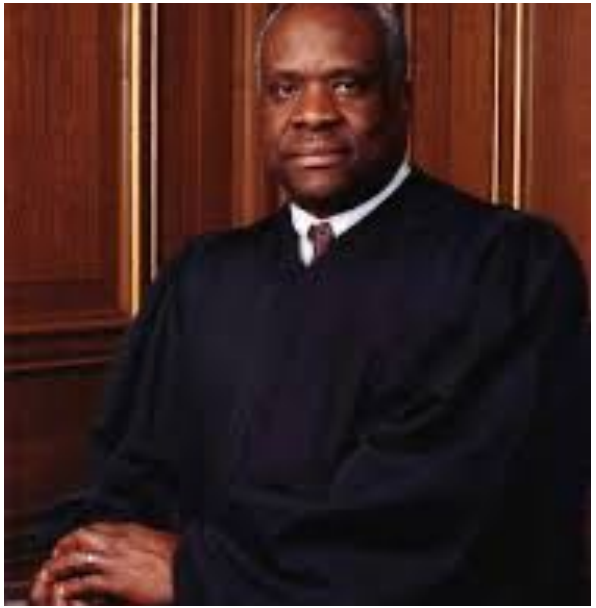
Trump administration greatly expanded the religious exemption and created a new “moral exemption.”



Clarence Thomas

Little Sisters of the Poor v. Pennsylvania (7-2)

Held: agencies have the authority to issue exemptions and they complied with the Administrative Procedures Act.



Clarence Thomas

Calvary Chapel Dayton Valley v. Sisolak (5-4)

C.J. Roberts joined the four liberals to deny emergency relief to this Nevada church that claimed the Nevada governor's Covid-19 order discriminated against churches in violation of the Free Exercise clause of the First Amendment.

John Roberts