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Don't Mistake Roberts' 'Let's Make a Deal' Regime for a Religious Freedom Win

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Whether for good or for ill, three court decisions in the past two days make clear that Chief Justice John Roberts's "Let's Make a Deal" regime continues to predominate in American jurisprudence.

Don't be fooled by the headlined "results" in a challenge to the Affordable Care Act or religious liberty cases about a cake maker and a foster care service. Concentrate on this: The parts of the legal community left in the cold here are the conservatives wishing, with Justice Samuel Alito, for more definitive constitutional decisions rather than narrow procedural or technical rulings. From a legal standpoint, very little in the Roberts regime ever seems final; instead, the courts invite seemingly endless rounds of judicial hair-splitting.

In each case, a legitimate argument might be made for punting away the bigger constitutional questions. The undeniable pattern of punting, however, continues to frustrate constitutional conservatives' hopes.

To understand that frustration, first consider this week's decision *not* by the Supreme Court but by a Colorado judge doing an end-run around an earlier Supreme Court decision. The issue is now famous: Cake artist Jack Phillips creates confections for any customer in general but reserves the right to refuse to bake products that imply endorsement of particular *messages* he believes are contrary to his faith. Colorado activists and authorities, though, insist he must bake cakes celebrating "progressive" positions in the gender-bending wars.

The Supreme Court already ruled once in Phillips's favor, but, very much to the point here, on narrow grounds. Rather than wholeheartedly affirming Phillips's religious liberty claims, the court in 2018 instead ruled merely the particular process used, and attitudes expressed by a Colorado reviewing board demonstrated illicitly overt hostility to his faith. However, the court did not answer the central question of how fundamental Phillips's religious rights are in and of themselves.

The result was predictable: Colorado activists again began harassing Phillips, trying to exploit the high court's loopholes to force him to use his expressive abilities to their satisfaction. On June 15, a local Colorado court ruled against Phillips in one of those new cases — a case, and a decision, that would not have been possible if the Roberts Court had more squarely addressed the larger constitutional issue. Phillips's appeal almost certainly will reach the Supremes again, which may *finally* be forced to decide an issue they could have put to bed years ago.

In two decisions just two days after the Colorado judge's decision, the Roberts Court was up to its old split-the-baby routine. The first was in another religious liberty case in which the short-term result favors conservative desires. *All nine* justices agreed the city of Philadelphia improperly discriminated against religion when it “stopped referring children to [a Catholic foster-care program] upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage.”

Again, the court ruled on narrow grounds.

Rather than wholeheartedly affirm the Catholic organization's religious exercise claims, the court ruled in *Fulton v. Philadelphia* that the city's system failed because it allows individual exceptions to its “non-discrimination” policy, and that *if* exemptions are discretionary, it means the policy itself is not “generally applicable” in a way that lets it disfavor religion. Notably, Justices Amy Coney Barrett and Brett Kavanaugh not only agreed to this narrower ruling but also filed a concurrence expressing at least some skepticism about the extent and force of the broader religious liberty claims sought by conservatives.

It was left to Alito, joined by Justices Clarence Thomas and Neil Gorsuch, to write separately that the religious liberty claim should be seen as a “bedrock constitutional right.” Because only those three, rather than a majority, agreed to that interpretation, the city of Philadelphia might be able to revise its policy at the edges, removing its one “discretionary” aspect and again make the Catholic organization ineligible to partner with the city on behalf of foster children.

In sum, Catholic Social Services, just like Jack Phillips, may be forced into another lengthy, expensive round of litigation — litigation that Alito and his court allies would spare the group and the young people the group so kindly serves.

Finally, in *California v. Texas*, the state of Texas and numerous allies had partially won an appeals court ruling that the so-called “individual mandate” in Obamacare is unconstitutional because it no longer applies as a tax. The Supreme Court was asked to rule on that question and whether that provision's alleged unconstitutionality would also invalidate other parts or all of the Affordable Care Act.

Again, the court found a way — whether legitimate or not is debatable — to avoid both the constitutional question and the extent of the legal remedy required. Instead, it ruled that Texas and its fellow plaintiffs lacked legal standing to bring the suit at all.

Again it was left to Alito, joined again by Gorsuch and in some of his logic by Thomas, to complain about the judicial dodgeball.

“Today’s decision is the third installment in our epic Affordable Care Act trilogy,” Alito wrote, “and it follows the same pattern as installments one and two. In all three episodes, with the Affordable Care Act facing a serious threat, the Court has pulled off an improbable rescue.”

This is what Justice Roberts does: He prefers to get wider court majorities, or even court unanimity on narrower rulings, rather than mere 5-4 majorities on broader constitutional questions — or to otherwise dodge rocking the boat politically — and obviously works to engineer such results. As Ilya Shapiro of the Cato Institute (among others) has noted, Roberts has repeatedly done this sort of thing on cases with subjects ranging from immigration to abortion to sexual/gender issues to gun rights.

Interestingly, so far in her short tenure on the court, Justice Barrett has seemed wont to join Roberts's camp rather than Alito's. This week's decisions show that despite liberal fears and conservative hopes, American courts still aren't primed for anything approaching a sweepingly