



Broadcast Transcript

Broadcast: Has the Supreme Court Lost Its Way? – Part 2

Guest(s): Martin Nussbaum

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Roger Marsh: Welcome everyone to Family Talk, a production of the James Dobson Family Institute. A few weeks ago, the Supreme Court delivered a major blow to religious freedoms. In the majority opinion, the Civil Rights Act of 1964 was expanded to include the LGBTQ community. This means that no one can be discriminated against on the basis of their gender identity or sexual orientation. Now, this decision has set in motion a future ideological collision between this progressive movement and the religious community. As was the case with yesterday's program, the broadcast you're about to hear is intended for mature audiences. Parents with young children listening may want to occupy them elsewhere for the next half hour or so. Today, we'll hear the conclusion of Dr. Dobson's analysis of this devastating decision with Attorney Martin Nussbaum. Now last time, the two identified specific ways this controversial ruling could affect our everyday lives. But before we continue with that list, let's hear Dr. Dobson's thoughts at the beginning of yesterday's program.

Dr. Dobson: Please pay close attention today. There are some programs that make you feel good, there are some programs that offer some advice. There are others that go to the heart of what we believe, and it threatens to undermine our faith, this is one of those programs. Before we started we prayed that we would make clear what we're facing today. My guest is Martin Nussbaum. He's a great religious freedom attorney, he's a trial lawyer and an appellate advocate. Martin is also general counsel for our organization, so we work together very closely, and we're honored to have him. Martin is the senior partner of Nussbaum Speir Gleason, a boutique law firm that specializes in representing religious institutions around the country. I thank God for qualified people who can help us at a day and time like this, because we're all dragged into the legal arena and the outcome is increasingly dangerous. Among other achievements, Martin led the litigation team that won religious exemption for over 1000 Catholic and Protestant ministries and businesses from the Obama administration's contraceptive and abortifacient mandate under the Affordable Care Act, and we were included in that.

He and the attorneys for Alliance Defending Freedom fought off the awesome political power and unlimited resources of the federal government, and literally saved us from its tyranny. And without these individuals that I just mentioned,

JDFI would probably have been forced to pay ruinous fines that would likely have closed our doors. So I have great reason to appreciate these defenders of the faith. Martin just gave an overview of the recent Supreme Court decision to our board of directors. We met for our summer board meetings and we were alarmed by what he had to say and what the implications are. And that's what we're going to talk about today. So Martin, it's a pleasure to have you back with us. I appreciate what you do. You gave this report to our board that I really want to touch on as we go through, because it has so many implications for organizations like ours, for Christian ministries, for churches, for individuals. It is all consuming, it's broad as all outdoors. Let's talk about some of them. The next category you have here is immoral benefits.

Martin Nussbaum: Well, this is where I've been deeply involved. You mentioned in your introduction that we filed a lawsuit on behalf of JDFI, and then two large organizations, one Protestant and one Catholic organization. To be free from the regulation promulgated during the Obama administration, that required employers to provide coverage for contraceptives, abortifacient, sterilization and counseling. With the Catholics being opposed to all four of those and the Protestant evangelical community being opposed to abortifacients and the related counseling around that. What we're going to see now are mandates to cover transgender services and some of our clients that we represent have already received, from their insurance company, free what are called gender dysphoria riders. Which lists all the gender transitioning surgeries and hormone treatments that are now covered under policies. And that was required under this Obama regulation, which is now gone, but it may be back under the interpretation of what section 1557 of the affordable Care Act means, which is an anti-discrimination provision.

Now, there are arguments that are unique to this benefit area, that when it comes to medicine, where medicine distinguishes between male and female employees all the time, that it won't apply there, but we'll see in terms of the cultural winds and how they affect-

Roger Marsh: Explain that, I'm not sure what you mean.

Martin Nussbaum: So in medicine when a physician has a patient before the physician, and if the patient's a woman or a man, their biology is different. How drugs work, how certain medical conditions that they would be concerned about, so they discriminate all the time based upon sex in treating patients. So it might be that when it comes to transgender services, that section 1557 of the affordable Care Act won't be interpreted to not discriminate, pardon me, to prevent medical providers and employers from distinguishing around these issues. But in the other hand, that's an open issue. We'll see what's decided, but we know there's a very strong move to require employers to cover in their policies these gender mutilating surgeries that are contrary to any traditional beliefs, to require that. And I'm involved in lawsuits surrounding that.

Dr. Dobson: There is a possibility that this ruling will change the practice of medicine. If you don't acknowledge that there are men and women, and they're biologically different, you run into crazy kinds of things. One has a menstrual cycle, the other one does not. I mean, every cell of the body says an X or a Y.

Martin Nussbaum: Yep. So the first implication will be in employment regarding the benefits covered. And I would urge all of your listeners who have businesses, call your insurance agents and get very specific information. Are you covering gender transphoria services? To see if that's being covered today. I think most plans are covering that today.

Dr. Dobson: Do you have to do it?

Martin Nussbaum: That will be the argument under this ruling, it's an open question until the next wave of cases are decided. The second wave is going to be forcing physicians to perform these procedures that they find medically inappropriate or dangerous, and they're also morally opposed to them. In fact, the Obama administration published a regulation that required physicians to do just that. If they were capable of performing a hysterectomy for a woman suffering from cancer, then they must perform a hysterectomy for a woman wanting to transition. So, it'd be forcing them to engage in the act that they find medically... that they are both medically and morally opposed to do.

Dr. Dobson: All this takes my breath away. I mean, it just, we're only about halfway through the list of things that this may mean and it's all going to be determined, not only by what was in this ruling, but by lawsuits, by the thousands, perhaps, down the way.

Martin Nussbaum: There's going to be a lot of lawsuits filed and that's where, I'm guessing, that's where most of this will be determined. There may be some State legislation, but it's heavy litigation.

Dr. Dobson: Martin, being an attorney, are you reluctant to criticize a Supreme Court justice who would make a decision of this nature? We've got one there that we're very upset about.

Martin Nussbaum: Yes, I am certainly happy to speak to opinions and the logic, but calling out a judge by name is not something I'll do as an attorney.

Dr. Dobson: From our perspective, It looks to me like the new justice, one of the new justices appointed by Donald Trump, lied to him and to the American people and to the US Senate during confirmation hearings about being a strict constructionist. He said that it is his philosophy, and I'm paraphrasing because I'm not an attorney, that he believed in the wording that you are interpreting. You're not creating new law and he let us believe that that's what he stood for. But Justice Gorsuch is the one who led on this, in this case, he wrote the decision for the majority, and it's contrary to what he said. Is it not?

Martin Nussbaum: Justice Gorsuch and Justice Roberts-

Dr. Dobson: Both of them.

Martin Nussbaum: Both who joined the majority opinion, and Justice Gorsuch, who wrote it, as you know, are articulate defenders of a school of statutory interpretation called textualism. And this opinion was written as if it were textualist opinion, Justice Alito in dissent calls that opinion a pirate ship masquerading under the flag of textualism. That's what Justice Alito said.

Dr. Dobson: And textualism means that you interpret what's there, you don't create what's not there.

Martin Nussbaum: You read the plain language of the statute as it would be understood by ordinary folk at the time it was passed. So you would essentially ask yourself, if I went back to 1964 and said to a dozen different people on the street, what does the prohibition of sex discrimination mean? Or does that include a gender identity discrimination and sexual orientation discrimination? Would they say, "Oh yeah, of course that's what's included," or would they say "No, sex is male and female?"

Dr. Dobson: Well, that's what's so alarming to me and other people, because what has happened here is not according to what Scalia would have done, where you interpret the law, you don't create the law. And then the worst example of this is what has occurred here. And of course, Roe V. Wade and Obergefell. Yeah, I'm over my head here, but I know there's something here that really alarms me.

Martin Nussbaum: Yeah. Those two cases were constitutional decisions and were, Roe V. Wade and Obergefell, that have their own lack of any real mooring to the history of the constitution and what the framers intended. This lacks any real mooring, I think, to the common understanding of the language in 1964. And in fact, the majority opinion admits that the word "sex" means male and female, it just reasons that you can't discriminate on the basis of sexual orientation without reference to whether you're male or female. Now Justice Kavanaugh in his dissent goes right at that. He says, "imagine this circumstance, employer has four employees, A, who is a heterosexual woman, B, a heterosexual man, C, a lesbian and D, a gay man. And the employer decides to terminate a C and D, the two homosexual individuals. Would one say he discriminated on the basis of sex when both a woman and a man were fired and both a woman and a man survived?" That example shows the lack of reasoning in the majority opinion, I believe.

Dr. Dobson: The bottom line is that there's not a whole lot anybody can do about this.

Martin Nussbaum: Secular employers who care about this are in a very difficult position. And there is perhaps an argument, but they would have to be a very religious employer, like hobby lobby or more, in terms of how they integrated their faith into all

their business practices, to even have a chance at an argument that they fit within the, what's called the section 702 exemption to Title VII.

Dr. Dobson: What else here has major implications for Christian organizations, Christian churches, Christian ministries, other than 501C3, Christian colleges, where do we all stand now?

Martin Nussbaum: Well, specifically ministries, Christian schools and colleges that you mentioned, need to do three things. They need to first be faithful to their religious values. That's what Christians are called to do. And there's cost to that through the centuries. We know that. Secondly, they need to continue to bear witness to those values. Silence will encourage more of these type of decisions and legislation and lawsuits. They need to bear witness. I think part of bearing witness is there are a number of organizations, Christian Colleges would be an example, this ministry would be an example, many churches that subscribe to traditional values would be an example. That are trying to inform the culture and help align the culture with traditional values. And those of us who are laypersons need to continue to support those organizations.

Dr. Dobson: What you're really saying is if you're a wishy washy about that, you won't have a leg to stand on.

Martin Nussbaum: Oh, absolutely not. You're absolutely correct in what you said. You will not have a leg to stand on if you're not intentionally-

Dr. Dobson: Consistent.

Martin Nussbaum: Orienting your business or your ministry with those values. And finally, you have to be wise. So you need to articulate in your various documents for your organization and your human resources documents, in your organizing documents, in your mission statements, in your websites, in your various applications you file. That how these values are being implicated and how they're rooted in your faith.

Dr. Dobson: So, even if you do all those things, according to the book, if you are consistent with what you believe, you still might be overridden?

Martin Nussbaum: Well, there's a lot of judges out there, and I don't know how to say this, but the study that we did in the, except to say it, the study that we did in this contraceptive litigation is there were 104 lawsuits filed, give or take, and many of them had a district court decision and then a circuit court decision. There wasn't one Democrat appointed judge who found for the religious liberty interest in that litigation. There wasn't one. So, who appoints judges matters, and judges that recognize the importance of religious freedom, matters. Judges that recognize they're not legislators matters. The rule of law is at stake.

Dr. Dobson: What's discouraging is when they get on the bench, they sometimes change their mind.

Martin Nussbaum: Yes.

Dr. Dobson: And in this case, I'll say it because you can't. It is very discouraging because we thought we had a conservative majority, even though it was by one vote. And it turns out that maybe we don't.

Martin Nussbaum: Yeah. And it will be very interesting by the time this program airs, there will be three religious freedom cases decided and one abortion case decided. So, we are in a very momentous fortnight-

Dr. Dobson: Can you summarize them very quickly.

Martin Nussbaum: Yeah. *Espinoza v. Montana Department of Revenue*, involves whether the Blaine Amendment, which is an anti-Catholic amendment from the civil war era that's now applied as an anti-religion amendment, whether it is constitutional.

Dr. Dobson: They're still on the books?

Martin Nussbaum: 37 States have it.

Dr. Dobson: And what are the implications of that for Catholic community?

Martin Nussbaum: And not just for Catholics, but the last case involved a Lutheran School: whether government can cooperate with religion and benefits that it provides for secular organizations, they can provide the same benefits to religion. That's what's at stake there. The second case is the, *Our Lady of Guadalupe* case before the Supreme Court. And it will give us greater insight into how broadly the court is going to protect individuals who engage in ministry on behalf of their employers, and whether civil rights laws apply against ministry positions. The third is the *Little Sisters of the Poor* case, which is a continuation of this massive litigation we've been involved with, having to do with the government's imposition or in this case, the Trump administration's relieving of that imposition of mandates, that they provide benefits that they consider to be immoral. And the last one, the *June Medical Services* case, which has to do with the Louisiana law that requires abortion performing physicians to hold active admitting privileges at a nearby hospital. Those are the four cases coming up.

Dr. Dobson: And that third one is alarming because there're physicians who do nothing but do abortions for pay, for a fee, and then they leave town or they go home to wherever they came from. And then a complication occurs at night and there's no one-

Martin Nussbaum: They can't follow their patients.

Dr. Dobson: They can't follow them. We're talking to Martin Nussbaum, our corporate attorney who specializes in religious liberty cases. I'm going to make a statement that may make you uncomfortable and if you don't want to respond to it, I understand. I am suggesting that people who are listening to us be very careful what the people that you vote for or against think and believe and how they come down on the moral issues. It's not wise now to cast your ballot without careful consideration for who those people are that you're putting in office and there're issues that you need to become informed about before you vote. Is that appropriate for me to say?

Martin Nussbaum: Of course, it's appropriate. Citizens should vote and they should be very informed. These issues matter and we are in the midst of the sexual revolution that's been going on for the last 20 years. It's a culture changing moment and Christians and people with traditional values should care about this and it should inform their voting. I would end by just noting what someone else said, who is Rusty Reno, who is the editor and chief of First Things. He wrote a important article about this case called a Striking Display of Sophistry, where he likened the Bostock decision to, he calls it the 21st century analog to the Dred Scott Case. And at the very end, he says, he's talking about the relation between moral values and our laws. His mentor, Richard Neuhaus wrote a book called The Naked Public Square some years ago. Which he said, beneath all of our laws, or, all of our laws have an ought in it, we ought to be the kind of people who drive safely. We ought to be the kind of people who buckle up.

So, there's a moral value in all of our laws and Rito ends his article, he says, our legal regime, he's talking about under Bostock, has repudiated the book of Genesis and the scriptural account of God as creator. This puts our law on a collision course with human nature. And that's what's at stake here.

Dr. Dobson: It can't get any stronger than this.

Martin Nussbaum: That's strong language.

Dr. Dobson: And that was published in, First Things.

Martin Nussbaum: First Things by Rusty Reno.

Dr. Dobson: Martin, we've been talking about judicial decisions, but there are also legislative matters that should give us pause. Describe for us the States that are friendly to religious liberty and the kind of issues we've been talking about. Give us an overview of where the country is.

Martin Nussbaum: Well, the trend in the past five years especially, has been to be passing more and more of protections or mandates related to sexual orientation or gender identity. Let me just give you an example. 23 States in their State law now mandate contraceptive and abortifacient coverage like the Obama administration did under the affordable Care Act. Four States have gone beyond

to mandate surgical abortion coverage. And you know that the governors of Virginia and New York have said that abortion includes infanticide of babies born alive but intended to be aborted. That they've essentially said that it's permissible to discuss and decide whether to permit those children to live. 21 States, prohibit gender identity discrimination, over 20 States now mandate in their state law, transgender services coverage, and eight States have passed physician assisted suicide statutes. So that's a problem as well. And that tends to be, you can imagine the States that are progressive, if you will, that are passing those mandates.

Dr. Dobson: And those are all spiritually laced issues.

Martin Nussbaum: Heavily, so. Yes.

Dr. Dobson: Before you leave, I want people to understand how they could reach you if they need to. First of all, say again, what the scope of your practice is.

Martin Nussbaum: Well, we are a boutique law firm and we-

Dr. Dobson: What does that mean?

Martin Nussbaum: It means we're small and focused and we serve religious institutions all over the country. And you can learn more about us by simply Googling the name of our firm, Nussbaum Speir Gleason, or www.nussbaumspeir.com.

Dr. Dobson: Are we entering a time of great danger for Christian endeavors?

Martin Nussbaum: We are. This revolution has been massive and it's been successful on the sexual left. I mean, they've won on the abortion issue, they've won on marriage and they've won in Title VII and the anti-discrimination statutes. And the only institution left standing is the church and Christian ministries. And as I mentioned, there's already been a lawsuit filed that's addressing that. And there'll be many more in all these different circumstances that we've talked about.

Dr. Dobson: So the pastors that stand up on Sunday morning and say, proudly, I'm not political, are really denying reality. They may not have the right to say what they want to say if we continue down this road.

Martin Nussbaum: The church is called to be leaven in the world, and the church needs to speak to justice issues, of all types and right now, one of the huge ones is regarding sexuality and who we are as men and women.

Dr. Dobson: Thank you, Martin.

Martin Nussbaum: You bet.

Roger Marsh:

A poignant end to this vital discussion on the recent US Supreme Court rulings infringing upon religious freedoms. Dr. Dobson's guests for the past couple of days here on Family Talk has been Attorney Martin Nussbaum, our ministries general counsel. Learn more about Martins law firm or request a CD of this two part interview when you go to drjamesdobson.org. Also, if you're wanting to be more informed on other public policy issues, be sure to join The Dobson Policy Center group on Facebook. This page will keep you up to date on various cultural and legislative news that will impact the family. Find all of this content when you visit today's broadcast page at drjamesdobson.org. Well, that wraps up today's broadcast. Thanks so much for joining us and for faithfully supporting our ministry. Tune in again tomorrow as we usher in the July 4th weekend with a timeless presentation from David Barton. This well-known American historian will talk about America's Christian founding that began at the pulpit. Don't miss this patriotic edition of Dr. James Dobson's Family Talk. I'm Roger Marsh. Have a blessed day.

Announcer:

This has been a presentation of the Dr. James Dobson Family Institute.