
RELIGIOUS LIBERTY AND RELIGIOUS DISCRIMINATION: WHERE IS THE SUPREME COURT HEADED?

*Michael Helfand**

In the Illinois Law Review's previous *100 Days Symposium*, I wondered whether the Supreme Court—with the addition of Justice Gorsuch—might serve as a bulwark protecting religious minorities even against unconstitutional excesses from the Trump administration.¹ That assessment—brimming with optimism—certainly overestimated the Supreme Court's willingness to extend the protections of the Establishment Clause to strike down the Trump administration's travel ban.² It also underestimated the number of Supreme Court justices President Trump would have the opportunity to nominate—and that the senate would ultimately confirm—solidifying the Court's already-existing conservative majority.

But the idea that the Court's jurisprudence might take unique account of religious minorities has, by and large, come to pass. In recent years, the Court has repeatedly recast religion-clause cases as sounding in religious discrimination. This is far from surprising given the continued application of the Court's 1990 decision, *Employment Division v. Smith*, which interpreted the Free Exercise Clause as only prohibiting laws that fail to be neutral and generally applicable with respect to religion.³ Put in the inverse, where laws abide by such non-discrimination standards—they satisfy the demands of neutrality and general applicability—then the Free Exercise Clause affords no protection.

No doubt, these categories have been notoriously complex to interpret and have, as a result, generated significant doctrinal and scholarly debate. But in applying these twin standards of neutrality and general applicability in recent years,

* Professor of Law and Vice Dean for Faculty & Research, Pepperdine Caruso School of Law; Visiting Professor and Oscar M. Ruebhausen Distinguished Fellow, Yale Law School; and Senior Fellow, Shalom Hartman Institute of North America.

1. Michael Helfand, *A New Age for Religious Minorities*, 2017 U. ILL. L. REV. ONLINE: TRUMP 100 DAYS (2017), <https://www.illinoislawreview.org/symposium/first-100-days/a-new-age-for-religious-minorities/> [<https://perma.cc/K57S-HWPT>].

2. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); see also Michael A. Helfand, *The Supreme Court Travel-Ban Decision, Explained*, TABLET (June 27, 2018), <https://www.tabletmag.com/sections/news/articles/the-supreme-court-travel-ban-decision-explained> [<https://perma.cc/ZWV9-4GZA>].

3. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

the Court has both bolstered and expanded the category of religious discrimination⁴—a move that speaks to the concerns of religious minorities who often lack the political power to shield themselves from the inequalities that can persist in the political process.⁵ Consider the following examples.

In both *Trinity Lutheran v. Comer* and *Espinoza v. Montana Department of Revenue*, the Supreme Court addressed the constitutionality of state laws that exclude religious institutions from otherwise available government funding programs.⁶ Finding in both cases that the government had violated the Free Exercise Clause, the Court concluded that such exclusions did not constitute permissible attempts to expand the separation of church and state, but instead held that singling out religious institutions in this way discriminates against religion.

The Supreme Court invoked a similar theme in its most recent ministerial exception case—a doctrine which insulates religious institutions from liability in the hiring and firing of “ministers”—where the Court zeroed in on how determining who qualifies as a religious leader can all too often discriminate against religious minorities. Thus, in *Our Lady of Guadalupe v. Morrissey Berru*, the Court concluded that limiting the ministerial exception only to those with a ministerial title “would constitute impermissible discrimination” given the diffuse leadership structures within many minority faith communities.⁷

But maybe the most prominent example of the Court’s discrimination paradigm was its decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,⁸ a case in which a Christian Colorado baker refused to bake a cake for a same-sex couple celebrating their wedding. While the case initially appeared to put LGBT rights on a collision course with religious liberty rights, the Court largely sidestepped the clash of constitutional values. To do so, the Court held that the Colorado Civil Rights Commission’s failed to adjudicate the baker’s claims—both in the words used during the hearing and the inconsistency of its logic across cases—“with the religious neutrality that the Constitution requires.”⁹

To critics, however, the Court’s failure in *Masterpiece Cakeshop* to address the clash of constitutional values demonstrated an underlying limitation of the religious discrimination paradigm. By focusing on the lack of neutrality, the

4. Michael A. Helfand, *Religious Discrimination Takes Center Stage at the Supreme Court*, TABLET (July 20, 2020), <https://www.tabletmag.com/sections/news/articles/supreme-court-religious-discrimination> [https://perma.cc/745D-L369].

5. In addition to these examples, the outcome of the Court’s decision in *Tanzin v. Tanvir* also served as a victory for religious minorities. 141 S. Ct. 486 (2020) (holding that monetary damages were available to two Muslim claimants whose rights under the Religious Freedom Restoration Act were violated when FBI agents wrongfully included them on the No Fly List).

6. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020).

7. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). For more on this point, see Michael A. Helfand, *The First Amendment and the Vocabulary of Freedom*, JEWISH REV. BOOKS (2020), <https://jewishreviewofbooks.com/articles/7798/the-first-amendment-and-the-vocabulary-of-freedom/> [https://perma.cc/9CDL-5LE6].

8. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

9. *Id.* at 1724.

Court is able, at times, to sidestep the important constitutional questions at the heart of the culture wars: instances where religious liberty and anti-discrimination law clash. Indeed, it isn't surprising that commentators across the ideological spectrum characterized the Court's *Masterpiece Cakeshop* opinion as a "dodge," failing to provide guidance on the underlying constitutional questions.¹⁰ Academic responses hit similar notes. Most prominently, Leslie Kendrick and Micah Schwartzman argued in the *Harvard Law Review* that the Court, using the frame of religious discrimination, focused on the existence of purported animus without actually evaluating the allegations of discriminatory treatment. In their view, the Court's opinion in *Masterpiece Cakeshop* "elevat[es] matters of etiquette . . . over giving a reasoned justification for resolving conflicts between religious liberty and antidiscrimination law."¹¹

Which brings us to the following question: how will the prevailing politics in the early days of the Biden administration impact the Court's free exercise doctrine? Is the Court willing to branch out beyond the confines of the religious discrimination paradigm and address head on culture-war dilemmas? With *Fulton v. City of Philadelphia* already before the Court, the opportunity to branch out is readily available. Consider that at stake in *Fulton* is the City of Philadelphia's decision to cease contracting with Catholic Social Services, a private foster family care agency, because it—in light of its religious commitments—refuses to place foster children with same-sex couples.¹²

Consensus among prognosticators is that the Court will side with Catholic Social Services. But even assuming these prognostications are correct, the bigger question is what kind of justification the Court will provide for such an outcome. One option is to continue applying the prevailing non-discrimination paradigm for religious liberty and then determine that Philadelphia's conduct failed to comply with the demands of neutrality. Certainly the petitioners have advanced such arguments, providing the Court with a fertile ground to do so.

The other option is far more revolutionary. The Court could overturn *Employment Division v. Smith* and discard the non-discrimination paradigm. Doing so would send shockwaves throughout the legal world, recasting free exercise jurisprudence as providing a "substantive right to be left alone by government"¹³ even where the law at stake was both neutral and generally applicable.

So which path is the Court likely to take in the early days of the Biden administration? Although three justices have previously intimated a desire to

10. See, e.g., Amanda Marcotte, *Supreme Court Dodges the Big Issue in Masterpiece Cakeshop Ruling: Is There a Loophole for Bigots?*, SALON (June 4, 2018, 5:20 PM), <https://www.salon.com/2018/06/04/supreme-court-dodges-the-big-issue-in-masterpiece-cakeshop-ruling-is-there-a-loophole-for-bigots/> [<https://perma.cc/2AK2-BXE4>]; Walter Olson, *Masterpiece Cakeshop Ruling Dodges the Big Question*, CATO INSTITUTE (June 4, 2018), <https://www.cato.org/commentary/masterpiece-cakeshop-ruling-dodges-big-question> [<https://perma.cc/3QNK-2SXZ>].

11. Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 135 (2018).

12. Brief for Petitioners, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (No. 19-123), https://www.supremecourt.gov/DocketPDF/19/19-123/144320/20200527150724005_19-123ts.pdf [<https://perma.cc/KVL9-TTBX>].

13. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 10 (1990).

pursue a more revolutionary approach,¹⁴ there are good reasons to think the Court ultimately won't go down that path.

One reason to think that the Court will not pursue a more revolutionary approach is President Biden's establishment of a commission to evaluate the Supreme Court, including proposed reforms that include adding to the existing nine justices. As Philip Hamburger has recently argued, the specter of "court-packing" may very well make the judges more reticent to issue bold decisions—a dynamic which he criticizes as tantamount to political "intimidation."¹⁵ Indeed, it seems hard to believe that increasing the size of the Court isn't on the mind of the justices; for example, in a recent speech, Justice Breyer expressed concern over the possibility of adding justices to the Court, noting that in his view "Structural alteration motivated by the perception of political influence can only feed that latter perception, further eroding that trust."¹⁶

These political concerns and pressures aren't the only reason to think the Court won't ultimately pursue the revolutionary alternative of expressly overturning *Employment Division v. Smith* and thereby discarding the religious discrimination paradigm. Over the past year, the Supreme Court has been extremely active in responding to clashes between religious liberty and COVID restrictions. Initially, it appeared the Court would address such claims through its religious discrimination paradigm. Thus, in May 2020, the Court rejected a California church's First Amendment argument that claimed California had unconstitutionally restricted its maximum capacity. In an oft-cited concurrence, Justice Roberts explained that California's rules did not discriminate against religion. While it was true that some businesses faced less restrictive capacity restrictions than houses of worship, houses of worship faced "[s]imilar or more severe restrictions . . . to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."¹⁷ Viewed in this way, houses of worship were treated just as favorably as similarly risky secular institutions and therefore California's rules were neutral and generally applicable.

But with the death of Justice Ginsburg and the confirmation of Justice Barrett, the Court's approach to the COVID cases shifted.¹⁸ In a recent series of cases, the Court has deemed various state COVID restrictions unconstitutional

14. *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (statement of Alito, J. concurring in the denial of cert.).

15. Philip Hamburger, Opinion, *Court Packing Is a Dangerous Game*, WALL. ST. J., Apr. 16, 2021, at A.15.

16. Robert Barnes & Ann E. Marimow, *Justice Breyer Warns Proponents of Packing Supreme Court to 'Think Long and Hard' About the Risks*, WASH. POST (Apr. 7, 2021, 3:00 PM), https://www.washingtonpost.com/politics/courts_law/justice-breyer-says-expanding-the-supreme-court-will-erode-trust/2021/04/06/cabc95c4-9730-11eb-a6d0-13d207aadb78_story.html [<https://perma.cc/8R7H-L3LC>].

17. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020).

18. It is worth noting that even initially, the Court's application of this doctrine was far from uniform. See *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (denying church's claim for emergency relief even though casinos and restaurants were afforded far more lenient capacity restrictions).

on free exercise grounds. And it has done so without expressly overruling *Employment Division v. Smith*, but by tinkering within the contours of the religious discrimination paradigm. In the first such case, *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court concluded that New York's new "hot spot" restrictions on houses of worship were not neutral or generally applicable because essential businesses were "treated less harshly" than houses of worship under these new restrictions.¹⁹ In another case, *South Bay v. Newsom II*, the Court deemed California's updated rules prohibiting any indoor religious worship unconstitutional because they similarly failed the test of neutrality.²⁰ While the patchwork of concurring opinions somewhat obscured the Court's underlying rationale, it seems clear that once again the fact that retail and other businesses could operate at either 25% or 50% capacity served as prime motivations for the justices.²¹

At first glance, the religious discrimination paradigm doesn't provide a clear methodology that would justify striking down these state laws. The various businesses identified by the Court did not obviously pose the same level of risk as houses of worship. Therefore, to claim that the various state laws were not neutral because they treated houses of worship "more harshly" seemed to ignore the position advanced by both California and New York—that they simply had harsher capacity and occupancy restrictions for institutions that posed more significant health risks than retail stores and businesses. Put differently, the standard religious discrimination paradigm, as applied to the COVID cases, did not obviously explain why houses of worship were winning these lawsuits.

But a majority of the Court, however, clearly views the religious discrimination paradigm as sufficiently capacious to even support the outcomes in these recent COVID cases. There could be a couple of reasons why. One option is to view the Court's more recent COVID decisions as taking what might be described as a more three-dimensional view of comparisons between houses of worship and essential businesses. Yes, it may be true that essential businesses do not pose as much of a risk as houses of worship; but the differences in risk, in the eyes of the Court's majority, were insufficient to justify New York authorizing essential businesses to operate at 100% capacity and houses of worship to operate, in some circumstances, at a maximum capacity of 10 people; and they were insufficient to justify California allowing retail and other businesses to operate at 25% and 50% capacity, but not allow anybody to engage in indoor worship. On this view, the Court remained true to the religious discrimination paradigm, but simply analyzed neutrality by assessing whether the restrictions were proportional to the risk—and extreme deviations from proportionality were then struck down as failing that neutrality test.

Alternatively, the COVID cases might be viewed as expanding the religious discrimination paradigm along a different axis. Consider that in the latest challenge to California's COVID restrictions, *Tandon v. Newsom*, the Court once

19. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

20. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

21. *See id.* at 717 (statement of Gorsuch, J.).

again found in favor of the petitioners; and in so doing, it noted that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.”²² Accordingly, “[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.”

The language here is, no doubt, somewhat slippery. But it does seem to indicate that the inquiry is not quite about proportionality, but that the Court is not willing to countenance any circumstance where government treats religion as worse off than any other activity—even where the religious and secular activities aren’t completely analogous. This kind of argument—one that Douglas Laycock characterized over thirty years ago as granting religion a “most-favored nation status”²³—would appear to provide religion with enhanced protections that press the boundaries of the religious discrimination paradigm even further. On this view, a law would fail the test of neutrality if it included exceptions for secular activity, but failed to do so for religious activity as well. And given the frequency with which laws have exceptions, such an approach would go quite far in transforming the religious discrimination paradigm; it would provide a basis for deeming laws not neutral in cases where any secular conduct was granted favorable treatment as compared to religious conduct even if the secular and religious conduct in question were not quite comparable. Such a jurisprudential path forward demonstrates how far the Court can press the boundaries of religious liberty protections even while still deploying the terminology of neutrality and discrimination.

Critics have argued that this second alternative represents a break with the religious discrimination paradigm.²⁴ But regardless of whether one sides with those critics, what has become clear is that the Court can broaden the umbrella of religious liberty protections significantly without expressly overruling *Employment Division v. Smith* or explicitly discarding the religious discrimination paradigm. Under such circumstances, one can see the political allure of continuing to adjudicate even the most challenging religious liberty cases without signaling a jurisprudential sea change. And with the specter of President’s Supreme Court Commission lurking, one can see why we are unlikely to see a constitutional revolution with respect to religious liberty under the Biden administration. The religious discrimination paradigm—and all its attendant flexibility—seem to do just fine.

22. *Tandon v. Newsom*, No. 20A151, 2021 WL 1328507, at *1 (U.S. Apr. 9, 2021), https://www.supremecourt.gov/opinions/20pdf/20a151_4g15.pdf [<https://perma.cc/RK3V-UZ34>].

23. Laycock, *supra* note 13, at 49.

24. *See, e.g.*, Jim Oleske, *Tandon Steals Fulton’s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), <https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/> [<https://perma.cc/L2PR-UE5H>].