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Religious Freedom Amid the Tumult

Thomas C. Berg
tcberg@stthomas.edu

ARTICLE

RELIGIOUS FREEDOM AMID THE TUMULT

THOMAS C. BERG*

The US Supreme Court term ending in summer 2020, and the opening weeks of the next term, were action packed for religious freedom. The Court decided six cases pertaining to the issue in the 2019-20 term—double, even triple, the usual number—in contexts from school choice to public-health closures of churches to clashes between religious liberty and nondiscrimination laws.[1] The decisions also came at a time of extraordinary stress and turbulence in society, and they relate in striking ways to those forces of turbulence. This article discusses religious freedom in relation to three Ps of turbulence: pandemic, polarization of culture and politics, and protests over racial injustice.

In each of these areas, the article does two things. First, it explains the Court's approach to religious freedom in several, although not all, of the 2020 and 2021 cases. Second, it suggests arguments and lessons for defending religious freedom today as a vital aspect of human dignity along with other rights and interests.

I. PANDEMIC

A. *Closures of Worship*

We begin with pandemic. The most extraordinary religious-freedom question of the last two years has involved the bans and limitations on in-

* James L. Oberstar Professor of Law and Public Policy, University of St. Thomas School of Law (Minnesota). For comments on previous versions of this paper, I thank Angela Carmella, Maureen Kane Berg, and participants in an August 2020 webinar, with this title, sponsored by the Terrence J. Murphy Institute for Catholic Thought, Law, and Public Policy at St. Thomas. Thanks to Ryan Doerfler and Shawna Kosel for excellent research assistance. Most of this article was written in August 2020, to comment on the Supreme Court's rulings from the 2019 term and the summer 2020 emergency docket. I have since added abbreviated comments on decisions after August 2020.

1. The 2020 decisions, in chronological order, include S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

person worship gatherings pursuant to public-health orders designed to slow transmission of COVID-19. In the early weeks of the pandemic, in March and April 2020, many states and localities banned gatherings of more than ten people, including for religious worship. These strict rules relaxed as states and cities "opened up," but many places continued to limit worship services, with other "mass gatherings," to a certain number of people or percent of room capacity.[2] The vast majority of religious congregations complied with these orders or even closed voluntarily without an order governing them. But some did not, and a few challenged the restrictions in court.

Such restrictions, especially when they last several months, create an extraordinary burden on the fundamental right of exercising religion. The First Amendment protects free exercise because it's very important to believers, including in crises like a pandemic.

The interests on the other side were extraordinary too. Public health in a pandemic is perhaps the epitome of a compelling justification for a restriction. And in-person worship services present elevated levels of risk: several have been documented as "super-spreaders" of infection.[3]

One further key fact is that COVID-19 public-health orders always permitted some activities involving more than ten people in a place. Even the strict shutdowns of spring 2020 permitted the operation of grocery stores, restaurants providing takeout, liquor stores, transportation centers, medical services, "essential" manufacturing facilities, and other venues.[4] Later, states began phased "reopenings," permitting more and more activities: in-store retail shopping in general, in-restaurant dining (first outdoor then indoor), and the provision of physically close "personal services" at places like hair cutters and nail salons.[5] Many states relaxed their restrictions on worship, although often at a later stage.[6]

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2. For catalogs of decisions concerning these early orders, see J. Matthew Szymanski, *Tracking Faith-Based Legal Challenges to Pandemic Orders,* CHURCH LAW & TAX, https://www.churchlawandtax.com/web/2020/may/tracking-pandemic-related-religious-liberty-cases.html; for analysis of key decisions through much of 2020, see Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CAL. L. REV. ONLINE 282 (2020).

3. *See, e.g.*, Jack Jenkins, *With Coronavirus Infections Linked to Religious Gatherings, Debate Rages over Worship amid Pandemic*, NAT'L CATH. REP. (Apr. 6, 2020), https://www.ncronline.org/news/people/coronavirus-infections-linked-religious-gatherings-debate-rages-over-worship-amid.

4. See, for example, the orders involved in On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901 (W.D. Ky. 2020); and Gish v. Newsom, No. EDCV20755JGBKKX, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020), *appeal dismissed*, 987 F.3d 891 (9th Cir. 2021).

5. See, for example, North Carolina's three-phase plan, *Staying Ahead of the Curve*, NC.GOV, https://www.nc.gov/covid-19/staying-ahead-curve (last visited Apr. 13, 2021); and Minnesota's "Safely adjusting the dials" plan, *Overview of Stay Safe Plan*, MN.GOV, https://mn.gov/covid19/for-minnesotans/stay-safe-mn/stay-safe-mn.jsp (last visited Apr. 13, 2021).

6. *See, e.g.*, U.S. DEP'T OF HEALTH & HUM. SERVS., REOPENING GUIDANCE CURRENTLY AVAILABLE BY STATE, https://www.hhs.gov/sites/default/files/state-by-state-reopening-guidance.pdf (last updated Aug. 11, 2020).

If government permits other activities while banning or restricting religious worship, that can have two legal consequences, arising from the two different rules that potentially govern religious-freedom cases. In thirty-five states, constitutional provisions or religious-freedom statutes require that any substantial burden on religious exercise must serve a compelling (or otherwise very important) state interest and must be necessary (or the least restrictive means) for serving that interest.[7] When the state allows other activities presenting similar risks as religious worship, that tends to undercut the claim that the need is compelling.

That protective standard does not apply in the other fifteen states. They are governed primarily by the US Constitution's Free Exercise Clause, under which the Supreme Court has ruled that a burden on religion, however severe, need not be justified by a strong state interest if the law in question is "neutral and generally applicable."[8] That is the rule from *Employment Division v. Smith*,[9] which held that a general law prohibiting peyote use could be applied to Native American worshipers who ingest peyote as a sacrament. The state had no burden to show that applying the prohibition to worshipers was necessary.

But if a state sheltering order allows a significant number of other activities presenting similar risks as worship, then the order arguably fails the test of neutrality and general applicability. That test has a potential ambiguity: Does a law flunk neutrality and general applicability only when it singles out or targets religion for restriction, treating it worse than all other comparable activities? Such a rule would effectively limit free exercise protection to laws reflecting hostility or a distinctively negative attitude toward religion. Or in contrast, is it enough that the law treats religion worse than *some* other comparable activities, even while treating it no worse than some others? Such a law, even if not hostile or uniquely negative toward religion, could constitute a different constitutional wrong: "devaluing" religion, treating it as less important than other activities that the government values enough to permit. Multiple lower courts have reached that conclusion, most notably the Third Circuit in *Fraternal Order of Police v. City of Newark*.[10] There the court held, in an opinion by then-Judge Alito, that a police department that prohibited officers from wearing beards had to allow an exception for religiously commanded beards when it allowed an exception for medical

7. *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 844–45 (collecting constitutional decisions in fourteen states and religious-freedom statutes in nineteen); *State Religious Freedom Restoration Acts (RFRAs)*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (listing twenty-one states with religious-freedom statutes as of 2017).

8. Employment Division v. Smith, 494 U.S. 872, 878 (1990); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993).

9. 494 U.S. 872.

10. 170 F.3d 359 (3d Cir. 1999).

reasons.[11] Another court held that a public-university freshman who wished to live in a Christian rooming house could not be required to live in a dormitory when the university already exempted one-third of freshmen from the requirement under various exceptions.[12]

For several reasons, devaluing religion should count as a constitutional wrong, even absent targeting or hostility.[13] If government bans religious activity while exempting or permitting any meaningful number of secular activities that create the same potential harms, it should have to show a strong justification for its action. First, this position follows from the logic of the Free Exercise Clause, which treats voluntary religious exercise as an important interest by making it a constitutional right. When government prohibits some activities but exempts or protects others causing the same harms, it tends strongly to communicate that the protected activities are of greater importance to the persons involved. Religious exercise should be among the interests the government treats as important, not those it treats as unimportant.

And religious practice is important to the identity of religious believers—including, perhaps especially, in the stresses of a pandemic. Multiple studies indicate that religious adherence increases morale, reduces fear of death, and benefits individuals psychologically in other ways.[14] It also encourages volunteering time and donating to causes helping others.[15] But, sociologists tell us, these personal and behavioral benefits arise not because one is simply a religious believer, but because one participates in a religious "social support network":[16] attending services, "having close friends at church," "taking part in small groups at church."[17] Long-lasting shutdown orders restricted the very aspects of religious life that make it most vital to adherents and even to society.

Moreover, the Supreme Court had previously made clear that devaluing was a constitutional wrong. In striking down city ordinances that prohibited the killing of animals in ritual sacrifices but allowed killing in a

11. *Id.* at 364–67.

12. Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996). For a catalog of other decisions applying this principle, see Douglas Laycock & Stephen T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 19–23 (2016).

13. For elaboration of such reasons, see Laycock & Collis, *supra* note 12, at 23–27; Richard P. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi*, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001).

14. *See, e.g.*, RAM A. CNAAN ET AL., THE NEWER DEAL: SOCIAL WORK AND RELIGION IN PARTNERSHIP 139, 156 (1999).

15. ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 444–46 (Simon & Schuster 2010); *see also, e.g.*, JOHN J. DIIULIO JR., GODLY REPUBLIC: A CENTRIST BLUEPRINT FOR AMERICA'S FAITH-BASED FUTURE 158 (Lee Friedman ed., 2007) (noting how various religious groups "shower volunteer hours and money on nonmembers").

16. CNAAN, *supra* note 14, at 137.

17. PUTNAM & CAMPBELL, *supra* note 15, at 472.

large number of other circumstances, the Court stated that the ordinances unconstitutionally "devalue[d] religious reasons for killing [animals] by judging them to be of lesser import than nonreligious reasons."[18] In that case, *Lukumi*, the city permitted a very large number of nonreligious reasons for killing animals. But the Court made clear that its rule was not limited to that situation: it said that the ordinances fell "well below the minimum standard necessary to protect First Amendment rights"[19] and thus it was unnecessary to "define with precision the standard used to evaluate whether a prohibition is of general application."[20]

There is debate whether devaluing occurs when the government exempts or protects even one secular activity that threatens harms comparable to those from religious activity. A single exception for analogous activity can show devaluing of religion, especially in simple cases like the police department's beard prohibition with a prominent exception for medical needs. In cases involving pandemic gathering restrictions, it was not strictly necessary to resolve whether a single exception was enough; those restrictions almost always permitted several arguably comparable activities, not just one.

In this light, did pandemic restrictions devalue religious worship? On the one hand, many orders had the questionable feature of explicitly designating various entities and services as "essential"—grocery stores, food takeout, banks, and health care, but also less obviously vital services like professional accounting—while omitting in-person worship from that list.[21] (Most orders placed religion in a different, more restricted category of "mass gatherings," along with concerts, theater, or sporting events.[22]) That phrasing indeed threatened to devalue religion, suggesting that it is another entertainment or hobby rather than a person's fundamental right. Liquor stores may be essential, as many orders indicated, to avoid forcing alcohol-dependent people to undergo withdrawal during this crisis. But distinguish-

18. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 537–38 (1993).

19. *Id.* at 564.

20. *Id.* at 543. For more on why the Court's precedents support finding a violation in cases of devaluing, not just those of targeting, see Laycock & Collis, *supra* note 12, at 15–19.

21. See, for example, Vermont governor Philip Scott's executive order, Vermont Executive Order 01-20, add. 6 (Mar. 24, 2020), https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%206%20TO%20EXECUTIVE%20ORDER%2001-20.pdf; and Idaho's stay-at-home order, Idaho Department of Health and Welfare Order of the Director: Order to Self-Isolate (Mar. 25, 2020), https://coronavirus.idaho.gov/wp-content/uploads/2020/06/statewide-stay-home-order_032520.pdf.

22. See, for example, Alabama's stay-at-home order, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 (amended Apr. 28, 2020), https://governor.alabama.gov/assets/2020/04/Safer-At-Home-Order-Signed-4.28.20.pdf; and Iowa governor Kimberly Reynolds's Proclamation of Disaster Emergency (Apr. 2, 2020), https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Disaster%20Proclamation%20-%202020.04.02.pdf.

ing liquor stores from worship on that ground ignored the importance of communal religion to people and provoked resentment as a result.[23]

States cannot place worship in a more restricted category on the basis that it is nonessential. And the courts properly scrutinized orders that significantly restricted in-person worship, to ask whether they devalued religion by allowing a significant number of other activities presenting similar risks.

However, states could place worship in the restricted category not because it is nonessential but because it created elevated risks of transmission. That's probably why the Supreme Court in its first COVID-19 decision (May 2020), by a 5–4 vote, rejected a Pentecostal church's effort to obtain an emergency injunction against California's statewide order, in *South Bay United Pentecostal Church v. Newsom* ("*South Bay I*").[24] The state had entered reopening stage 2, under which retail shops, manufacturing facilities, and offices could open (as well as even schools and in-restaurant dining in cities that had met benchmarks for controlling COVID-19 spread).[25] Churches, which were deemed "high risk," were not to be permitted to reopen until several weeks later (along with movie theaters and nail salons).[26] But just before *South Bay I* reached the Supreme Court, the governor relaxed the rule for worship, allowing attendance up to "25 percent of building capacity or a maximum of 100 attendees," whichever is lower.[27] The church persisted, seeking a ruling that would allow it to exceed 25 percent room capacity in its worship service on the upcoming Sunday.[28]

The five-justice majority did not explain its reasons for denying the request. But Chief Justice Roberts, likely the swing vote, wrote a separate opinion concluding that the state was treating worship as well as it treated activities creating comparable risks. "Similar or more severe restrictions," he wrote, "apply 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."[29] In contrast, the order "exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats,

23. Thomas Berg & Shawna Kosel, *Religious Freedom Lessons from COVID-19 Disputes*, CHRISTIANITY TODAY (June 15, 2020), https://www.christianitytoday.com/ct/2020/june-web-only/religious-freedom-covid-church-restrict-reopening-lawsuits.html.

24. 140 S. Ct. 1613 (2020).

25. Emergency Application for Writ of Injunction at 7, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (No. 19A1044). These and other filings in *South Bay I* are at https://www.scotusblog.com/case-files/cases/south-bay-united-pentecostal-church-v-newsom.

26. *Id.*

27. Opposition of State Respondents to Emergency Application for Writ of Injunction at 11, S. Bay United Pentecostal Church v. Newson, 140 S. Ct. 1613 (2020) (No. 19A1044).

28. Reply Brief in Support of Emergency Application for Writ of Injunction at 11, 13, S. Bay United Pentecostal Church v. Newson, 140 S. Ct. 1613 (2020) (No. 19A1044).

29. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

in which people neither congregate in large groups nor remain in close proximity for extended periods."[30]

Duration, proximity, and meeting size are indeed relevant factors in risk of transmission, as the Centers for Disease Control have emphasized.[31] Worship presented other elevated risk factors as well: it can involve physical hugs, the sharing of sacraments or hymnals, and singing (which appeared to propel respiratory droplets further).[32] Roberts was right, then, to distinguish retail shopping from worship gatherings—although he neglected to confront that schools and restaurants, which could open in some circumstances, also present elevated risks.

Roberts's brisk approval in *South Bay I* had another, understandable impetus. Courts should be reluctant to question public-health orders, he said, since "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement."[33] Such matters, "fraught with medical and scientific uncertainties," should be left to "politically accountable officials," free from "second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."[34]

But two months later, the same 5–4 Court denied an injunction in a far more troubling case, *Calvary Chapel Dayton Valley v. Sisolak*.[35] The case involved Nevada's gubernatorial order, which, at that stage in the state's reopening, limited worship to fifty persons but allowed potentially far more people (up to 50 percent of room capacity) in restaurants, bars, gyms, bowling alleys, and—no surprise—casinos.[36] The idea that Vegas casinos might be safer than churches is "hard to swallow," as Justice Alito observed in his dissent: "50% capacity [in casinos] often means thousands of patrons, [with] far less physical distancing and other safety measures than [in] worship services," since patrons often come from around the nation, frequent multiple tables and multiple casinos, crowd around tables, and drink alcohol.[37] Bars, gyms, and indoor restaurants also posed high risks.[38] This time

30. *Id.*

31. *Ways COVID-19 Spreads*, CENTERS FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last updated Oct. 28, 2020) ("[T]he more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread.").

32. *Funeral Guidance*, CENTERS FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/funeral-guidance.html (last updated Dec. 28, 2020); Lea Hamner et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, CDC: MORBIDITY & MORTALITY WKLY. REP. (May 12, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm.

33. 140 S. Ct. at 1613.

34. *Id.* at 1613–14 (internal quotation omitted).

35. 140 S. Ct. 2603 (July 24, 2020) (mem.).

36. *Id.* at 2606–07 (Alito, J., dissenting).

37. *Id.* at 2605–06 (Alito, J., dissenting).

the chief justice did not explain his decisive vote against the church. In summer 2020, he appeared committed to deferring to elected officials in every case.

Even giving appropriate deference to public-health officials, courts can and should invalidate policies that clearly devalue the importance of religious exercise. Nevada's policy in *Calvary Chapel* showed clear devaluing, given the number of activities it permitted whose risks equaled or exceeded those of worship. Justice Gorsuch aptly remarked: "In Nevada, it seems, it is better to be in entertainment than religion."[39] The state may value the jobs and revenue that casinos and bowling produce; but it may not value the constitutional right of religion less.

Reading "neutrality and general applicability" to require close review whenever the state exempts any meaningful number of comparable secular activities can give substantial protection to religious freedom. But the pandemic cases also revealed the downsides to that approach. It calls on judges to make contentious, potentially resentment-provoking judgments about whether religious activities are being treated as well as various secular activities. Those threshold disputes could be avoided if courts simply required government to show "compelling," or at least strong, reasons for significant restrictions on in-person worship—while tempering that standard, as Roberts suggested, with reasonable deference to officials' expertise in "dynamic and fact-intensive" circumstances. Carefully considered restrictions on in-person worship would likely have survived under such an approach.

In the 2020-21 term, in *Fulton v. City of Philadelphia*,[40] the Court considered whether to make the shift above: to overrule the test of *Employment Division v. Smith* and require that even generally applicable laws satisfy some kind of heightened scrutiny. Inquiring whether religious exercise is being "devalued" is legitimate, but revisiting *Smith* would have avoided the complications in the inquiry. Applying heightened scrutiny would itself value the right of religious exercise highly while still allowing government to pursue its important interests. Ultimately, however, the majority in *Fulton* dodged the issue, deciding the case under the aspects of *Smith* that are protective of religious freedom.[41] Several Justices indicated that *Smith*'s unprotective aspect was mistaken, but the swing Justices held off modifying

38. *See, e.g.*, TEX. MED. ASS'N, BE INFORMED: KNOW YOUR RISK DURING COVID-19, https://www.texmed.org/uploadedFiles/Current/2016_Public_Health/Infectious_Diseases/309193%20Risk%20Assessment%20Chart%20V2_FINAL.pdf (last visited Apr. 1, 2021); Sukbin Jang et al., *Cluster of Coronavirus Disease Associated with Fitness Dance Classes, South Korea*, 26 EMERGING INFECTIOUS DISEASES J. 1917 (2020), https://dx.doi.org/10.3201/eid2608.200633.

39. 140 S. Ct. at 2609 (Gorsuch, J., dissenting).

40. 141 S. Ct. 1868 (2021).

41. *Id.* at 1878–81 (holding that provision for discretionary exceptions in Philadelphia's nondiscrimination policy created a "mechanism for individualized exemptions," triggering strict scrutiny) (citing *Smith*, 494 U.S. 884).

that aspect, at least until they knew what would replace it.[42] I have offered my own answer to that question, in an article with Douglas Laycock, calling for strong protections that balance free exercise claims with state interests with a thumb on the scale for the former.[43]

In the meantime, the Court in late 2020 shifted its rulings on general applicability in the COVID-19 cases. With Amy Coney Barrett replacing Ruth Bader Ginsburg, a 5–4 majority began relying on the general applicability principle to grant emergency injunctive relief when a governor's order restricted religious worship more than it restricted some meaningful number of nonreligious activities. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[44] the new majority enjoined the application of New York Governor Andrew Cuomo's order limiting gatherings at houses of worship in certain areas with COVID-19 outbreaks to ten persons (in the severe "red zones") or twenty-five persons (in less severe "orange zones").[45] The majority opinion (the only one in a case involving COVID-19 and worship) noted that while the order severely limited worship gatherings, in red zones it allowed unlimited numbers of persons in a long list of businesses deemed "essential," and in orange zones it allowed unlimited numbers in any business.[46] The Court cited the example of "a large store in Brooklyn that could 'literally have hundreds of people shopping there on any given day' " while nearby churches or synagogues were severely restricted.[47]

These differential treatments might have shown a devaluing of religious worship. But the Court's argument was incomplete, because it relied largely on analogizing worship to shopping and business activities, even though in the latter (as the chief justice had observed in *South Bay I*), people generally "neither congregate in large groups nor remain in close proximity for extended periods."[48] On the other hand, the case differed from *South Bay I*, as the Court said, because the flat ceiling of ten or twenty-five worshipers was far more restrictive—applying even in the largest churches or synagogues—than the earlier case's limit on percentage of capacity.[49] Moreover, by November 2020, state orders had burdened in-person worship

42. See *id.* at 1894–1924 (Alito, J., concurring in the judgment) (calling for overruling *Smith*); *id.* at 1882–83 (Barrett, J., concurring) (suggesting *Smith* was mistaken but asking questions about "what should replace [it]").

43. *See* Douglas Laycock and Thomas C. Berg, *Protecting Free Exercise under* Smith *and After* Smith, 2021 CATO. SUP. CT. REV. 33, 41–60.

44. 141 S. Ct. 63 (2020) (per curiam).

45. *See* Emergency Application for Writ of Injunction, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (No. 20A87).

46. *Roman Cath. Diocese*, 141 S. Ct. at 66.

47. *Id.* at 67.

48. 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring); see *supra* notes 29-30 and accompanying text.

49. *Roman Cath. Diocese*, 141 S. Ct. at 67.

for months; the Court observed, with some force, that governors should have figured out more tailored approaches by then.[50]

Finally, in the latest of its emergency-docket COVID-19 cases, the Court in *Tandon v. Newsom*[51] appeared to adopt the most stringent version of the general-applicability rule. In striking down California's gathering limits as applied to in-home religious gatherings, the Court said: "[G]overnment 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."[52] And under strict scrutiny, the government could not simply argue that religious worship was more risky than permitted activities: "Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied."[53]

It is beyond the scope of this article (which focuses on 2020 cases) to analyze the details of the most recent orders. But I will make three points. First, the Court was correct to begin subjecting COVID-19-related restrictions on worship to meaningful review—the review it should have applied to the Nevada order that disfavored worship compared with casinos and other risky entertainments.[54] Review to prevent devaluing of religion is a legitimate enterprise, for the reasons already given.[55] And by November 2020, states' judgments about the relative risks of worship and other activities could have been more tailored, and better grounded in specific evidence, than the relatively general judgments made early in the pandemic.

Second, however, such review still should contain a fair measure of deference. *Roman Catholic Diocese* reemphasized that "[m]embers of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area"—even as it then added that before allowing major restrictions on the core religious act of communal worship, "we have a duty to conduct a serious examination of the need for such a drastic measure."[56] A corollary of deference is that the Court in COVID-19 cases should not have readily found "devaluing" of religion, and a lack of general applicability, based on a small number of protected nonreligious activities. One such analogous secular exception can

50. *See, e.g.*, *id.* at 70 (Gorsuch, J., concurring) ("[A]s we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, [the argument for deference given medical uncertainty] has expired according to its own terms.").

51. 141 S. Ct. 1294 (2021) (per curiam).

52. *Id.* at 1296 (emphasis in original) (citing *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67–68).

53. *Id.* at 1296–97.

54. See *supra* notes 35–39 and accompanying text (discussing *Calvary Chapel*, 140 S. Ct. 2603).

55. See *supra* notes 10–20 and accompanying text.

56. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68.

be sufficient in a case like *Fraternal Order of Police*,[57] where the alleged interests in forbidding beards on police officers were relatively simple. But because the analogies in COVID-19 cases involved complex, specialized knowledge about degrees of risk, any single secular exception is less likely to show clear devaluing of religion, and ordinarily the challenger, to succeed, should show more than a very few such exceptions. But there were more than a few such exceptions in New York in *Roman Catholic Diocese*, and certainly in Nevada in *Calvary Chapel*.[58]

If courts uphold religious freedom claims in the extremity of a pandemic without giving any deference to public-health judgments, there's a danger that religious freedom will lose credibility. Moreover (and this is my third point), sustaining such credibility calls on religious congregations themselves to exercise responsibility. The vast majority of congregations likely acted responsibly; the Court in *Roman Catholic Diocese* noted that both plaintiffs, the Catholic diocese and Agudath Israel, had followed, even exceeded, safety protocols and that neither had suffered any outbreaks.[59] But there were widely publicized irresponsible exceptions.[60] Had the irresponsibility been even more common, it might have made even the religion-protective Court worry about the consequences of protecting worship gatherings. And instances of irresponsibility surely make some fair-minded people more skeptical of religious-freedom claims—which threatens uncertain but potentially serious long-term harm to religious freedom.[61]

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57. 170 F.3d 359.

58. *See supra* notes 45–51 and accompanying text (discussing *Roman Catholic Diocese*), notes 35–39 and accompanying text (discussing *Calvary Chapel*).

59. 141 S. Ct. at 67.

60. *See, e.g.*, Amy Jamieson, *The Safe and Unsafe Ways People Are Worshipping During COVID-19*, HEALTHLINE (Aug. 3, 2020), https://www.healthline.com/health-news/the-safe-and-unsafe-ways-people-are-worshipping-during-covid-19.

61. The credibility of religious-exemption claims is at stake in the recent objections to COVID-vaccine mandates (which I can discuss only briefly within this article's scope). Although there are sincere objections to the vaccines on the ground that they utilized decades-old stem-cell lines derived from abortions in their testing (Pfizer and Moderna) or composition (Johnson & Johnson), there is good reason to think most claims are using religious grounds as cover for other objections, such as fear of shots or political resistance to COVID-19 restrictions. *See, e.g.*, Dorit Rubenstein Reiss, *Religious Objections to Vaccines and the Anti-Vax Movement*, BILL OF HEALTH, July 16, 2021, https://blog.petrieflom.law.harvard.edu/2021/07/16/religious-exemptions-to-vaccines-and-the-anti-vax-movement/. The difficulty of separating out numerous claims that are not sincerely religious, combined with the underlying interests in public health, gives government a stronger claim for vaccine mandates than for extended restrictions on worship. And medical exceptions to vaccine mandates, for persons with medical reactions to vaccines, do not undercut the government's broad interest in promoting health the way some permitted nonreligious gatherings undercut the interest in preventing COVID-19 transmission. *See* We the Patriots USA, Inc. v. Hochul, 2021 WL 5121983 (2d Cir. Nov. 4, 2021); *but see* Does 1-3 v. Mills., No 21A90 (Oct. 29, 2021) (Gorsuch, J., joined by Thomas, J., and Alito, J., dissenting from denial of application for injunctive relief), https://www.supremecourt.gov/opinions/21pdf/21a90_6j37.pdf#page=2.

B. Pandemic-Related Funding

The pandemic has touched on another religious-freedom issue in the 2020 decisions: whether government funding provided to private organizations can or must include otherwise eligible religious organizations on equal terms. The federal Paycheck Protection Program (PPP) provided loans to businesses and nonprofit organizations during the economic crisis caused by COVID-19 shutdowns.[62] If they kept their workers on payroll, their loan was forgiven,[63] effectively becoming a grant. Religious nonprofits have been eligible, including houses of worship; as a result, PPP loans have paid the salaries of clergy, which has triggered objections from organizations that promote church-state separation.[64]

The Supreme Court's doctrine on government funding of religious organizations has changed dramatically in the last thirty years. In the 1970s and 1980s, the Court frequently held that programs aiding private K–12 schooling violated the Establishment Clause because they provided substantial aid to religious schools.[65] But the no-aid rule, premised on a broad understanding of church-state separation, has given way since the 1990s to an approach based on equal treatment of religion and respect for families' private choice to use religious schools. The Court held in 2002 that the Establishment Clause did not require states to exclude religious schools from neutrally designed voucher programs where money followed families' choices.[66] But that left open the question whether a state had discretion to exclude those schools if it wanted to pursue strict, no-aid separation.

Now the Court, in two recent decisions, has forbidden government to exclude entities just because they are religious: if government gives aid to private organizations for a secular purpose, it must not discriminate against otherwise qualified organizations because of their religious character. In the latest case, *Espinoza v. Montana Dept. of Revenue*,[67] Montana gave a tax credit to individuals who donated money to private organizations that in turn funded tuition for low-income students attending private schools, nonreligious or religious. Montana's Supreme Court invalidated the program

62. 15 U.S.C. § 636(a)(36), *amended by* Pub. L. No. 116-136, § 1102, the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Mar. 27, 2020).

63. 15 U.S.C. § 9011, *amended by* CARES Act, Pub. L. No. 116-136 § 1106 (Mar. 27, 2020).

64. *See* Letter from Americans United for Separation of Church and State et al. to Jovita Carranza, Administrator, Small Business Administration (Apr. 7, 2020), https://www.au.org/sites/default/files/2020-04/CARES%20Act%20Loan%20Forgiveness%20SBA%20Letter.pdf.

65. *E.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

66. Zelman v. Simmons-Harris, 536 U.S. 639 (2002). Other decisions upholding "private choice" programs include, for example, Witters v. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

67. 140 S. Ct. 2246 (2020). The other decision is Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

based on a state constitutional provision that forbade any state aid to religious schools, however indirect and attenuated (as this aid was).[68] But the US Supreme Court held, 5–4, that Montana's rule violated the Free Exercise Clause by discriminating against religious schools and the families that chose them.[69] *Espinoza* solidifies the idea that the constitutional norm is to respect people's choice of religious providers and treat those providers equally.[70]

Including clergy and houses of worship in PPP loans fares well under this approach. Since the PPP law itself included them, the question is not (as in *Espinoza*) whether Congress was required to do so. The question is whether Congress had discretion to do so, and the answer is fairly easy. Recall that for twenty years and longer, the Court has rejected Establishment Clause limits on that discretion.[71] Moreover, although funding of clergy is exceptional in our tradition—since the early 1800s we've generally kept government out of that sphere[72]—our recent circumstances are exceptional. Government orders shut down the economy for public-health reasons. To mitigate that effect, government acted to keep individuals and entities on their feet, a policy that likewise serves legitimate public purposes. The result is not readily distinguishable from sending police or firefighters to protect a house of worship from violence or fire—or allowing houses of worship to receive disaster funds on equal terms to rebuild their structures safely.[73]

II. Polarization: Nondiscrimination Laws and Religious Exemptions

Even before the pandemic, Americans were on edge—and at odds with each other. In 2016, the *New York Times* documented how "[m]embers of the two parties are more likely today [than any time in the last fifty years] to

68. 2018 MT 306, 393 Mont. 446, 435 P.3d 603, *rev'd and remanded*, 140 S. Ct. 2246 (2020) (applying Mont. Const. art. X, § 6).

69. *Espinoza*, 140 S. Ct. at 2256–57.

70. For analysis of *Espinoza*'s reasoning and ramifications, see Thomas C. Berg & Douglas Laycock, Espinoza*, Government Funding, and Protection of Religious Choice*, 35 J.L. & Relig. 161 (2020).

71. See Laycock and Berg, *supra* note 43 and accompanying text.

72. *See* Locke v. Davey, 540 U.S. 712, 722–23 (2004) (identifying longstanding tradition against state funding of education of clergy, although noting that state may include clergy training in overall educational aid).

73. *See* Everson v. Board of Education, 330 U.S. 1, 18 (1947) (stating that cutting off religious institutions from police, fire, sewage, or road services "is obviously not the purpose of the First Amendment"); Cameron Langford & Britain Eakin, *FEMA Does About-Face on Disaster Aid for Churches*, Courthouse News Serv. (Jan. 3, 2018), https://www.courthousenews.com/fema-does-about-face-on-disaster-aid-for-churches/. The Court will likely confirm, in its pending case involving tuition assistance to K-12 students in locations without a public-school, that the state cannot exclude religious providers on the ground that they provide religious instruction along with a K-12 education. *See* Carson v. Makin, No. 20-1088, https://www.supremecourt.gov/docket/docketfiles/html/public/20-1088.html.

describe each other . . . as selfish, as threats to the nation, even as unsuitable marriage material."[74] By now it's common to recognize that polarization has taken on dangerous features. Where once various differences among Americans cut across each other—for example, the Democratic Party included both liberal Northerners and conservative Southerners—now differences tend to align with each other across a host of features not just political but social and personal, including "race, religion, ethnicity, gender, neighborhood, and favorite grocery store."[75] Thus "each party gradually comes to have less contact with, knowledge of, and sympathy for the constituencies of the other."[76] Relatedly, polarization is increasingly "negative": each side focuses more on thwarting its evil opponents than on advancing a positive vision, and so politicians "need only incite fear and anger toward the opposing party to win and maintain power."[77] Whichever side is at greater fault overall or in particular cases—a subject beyond the scope of this essay—the dangers from alienation and anger were shown most ominously by the January 6, 2021, assault on the Capitol aimed at overturning the results of the 2020 election.

Among the drivers of polarization are disputes over religious freedom, especially its conflicts with nondiscrimination laws. As LGBTQ people gain equal treatment in marriage, employment, and other fields, conservative Christians fear that equal-treatment claims will harm their organizations. Catholic adoption agencies may be forced to certify and place children with same-sex couples.[78] In 2016, religious colleges in California with policies against same-sex conduct nearly lost all state aid for their low-income students.[79] In that year's election, religious-liberty fears helped drive up conservative Christian support for Donald Trump.[80]

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74. Emily Badger & Niraj Chokshi, *How We Became Bitter Political Enemies*, N.Y. TIMES (June 15, 2017), https://www.nytimes.com/2017/06/15/upshot/how-we-became-bitter-political-enemies.html?smid=TW-share.

75. LILIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 14 (2018).

76. MORRIS P. FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE 74–75 (2017).

77. Alan Abramowitz & Steven Webster, *"Negative Partisanship" Explains Everything*, POLITICO (Sept./Oct. 2017), https://www.politico.com/magazine/story/2017/09/05/negative-partisanship-explains-everything-215534.

78. *See* Kelsey Dallas, *What's Going On with Faith-Based Adoption Agencies? And What Will Happen Next?*, DESERET NEWS (June 2, 2019), https://www.deseret.com/2019/6/3/20674661/explainer-what-s-going-on-with-faith-based-adoption-agencies-and-what-will-happen-next#winnie-buck-5-snuggles-with-mom-melissa-buck-at-the-large-familys-home-in-holt-mich-monday-june-11-2018-melissa-and-chad-buck-adopted-their-five-children-through-st-vincent-catholic-charities-and-theyve-defended-the-faith-based-agency-in-court.

79. Thomas C. Berg, *Does This New Bill Threaten California Christian Colleges' Religious Freedom?*, CHRISTIANITY TODAY (July 5, 2016), https://www.christianitytoday.com/ct/2016/july-web-only/california-sb-1146-religious-freedom.html.

80. Jeremy Weber, *Billy Graham Center Explains Survey on Evangelical Trump Voters*, CHRISTIANITY TODAY (Oct. 18, 2018), https://www.christianitytoday.com/news/2018/october/evangelicals-trump-2016-election-billy-graham-center-survey.html.

Religious freedom in the West arose to counteract fear and murderous conflict between Protestants and Catholics.[81] Fear of the other side likewise drives today's milder, but still serious, division. Religious freedom, like other important freedoms, can mitigate polarization, by calming fear: assuring each side that they can live according to their deep beliefs without facing penalties for doing so. Today, as in the past, religious liberty can serve the crucial purpose of ensuring that "all [the conflicting] groups can live together in peace and equality, cooperating in the task of self-governance, with no one forced to suffer for their faith or lack of one."[82]

The right solution is to protect both LGBTQ people and religious conservatives: to pass LGBTQ nondiscrimination laws along with meaningful exemptions for objecting religious organizations and individuals. Protecting both groups not only serves the practical purpose of minimizing fear and conflict but also reflects that for all their conflict, the two share similar features and "make essentially parallel claims on society."[83] Both argue that a fundamental component of their identity, and the conduct that flows from that identity, should be left to each individual, free of all nonessential regulation.[84] Both seek to live out their identities in all aspects of their lives, including those that are publicly visible: not just in private intimacy but in civil marriage, not just in worship but in social services and the workplace.[85] And both face animosity that subjects them to substantial risks of intolerant and unjustifiably burdensome regulation.[86]

It's possible to give substantial protection to both sides, if we draw careful lines. In theory, the two sides might've reached this bargain by statute, with each getting something important. Deep-red Utah passed such a law, and a federal bill, the Fairness for All Act, would have done the same.[87] But polarization in Congress, state legislatures, and society has blocked virtually every deal.

Now the Supreme Court has transformed the situation. First, in *Bostock v. Clayton County, Ga.*,[88] the Court held that discrimination against

81. *See, e.g.*, Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1049–68 (1996) (summarizing the history in Europe and early America).

82. *Id.* at 1088–89.

83. Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1, 3 (2013), https://www.virginialawreview.org/wp-content/uploads/2020/12/LaycockBerg.pdf.

84. *Id.* at 3–4.

85. *Id.* at 4.

86. *Id.* at 4–5. For the parallels in detail, see Thomas C. Berg, *What Same-Sex Marriage and Religious Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 212–26 (2010).

87. Laurie Goodstein, *Utah Passes Antidiscrimination Bill Backed by Mormon Leaders*, N.Y. TIMES (Mar. 12, 2015), https://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html; Fairness for All Act, H.R. 5331, 116th Cong. (introduced Dec. 6, 2019).

88. 140 S. Ct. 1731 (2020).

both gay and lesbian persons and transgender persons already violates Title VII's prohibition on discrimination because of sex.[89] In one swoop, LGBTQ-rights proponents achieved much of what they had sought, and achieved it nationwide. Now in any bargaining process, religious conservatives' leverage is greatly reduced.

If there will be corresponding religious-freedom protections, it now falls mostly to the Court to declare them, drawing on existing laws. Justice Gorsuch's majority opinion in *Bostock* appeared to embrace the task, saying that the Court was "deeply concerned with preserving" free exercise of religion, which "lies at the heart of our pluralistic society."[90] He listed several sources of protection, including a religious-organization exemption in Title VII itself;[91] the Religious Freedom Restoration Act (or "RFRA");[92] and finally the so-called ministerial exception, which bars the application of nondiscrimination laws to claims by ministers against their religious employers. That exception, unanimously endorsed in the 2012 *Hosanna-Tabor* decision,[93] rests on the premise that discrimination suits by ministers "interfere with the internal governance of the church, depriving [it] of control over the selection of those who [teach and] personify its beliefs."[94]

Within two weeks, at the 2019-20 term's end, the Court began to deliver on these suggestions. In two cases, consolidated as *Morrissey-Berru v. Our Lady of Guadalupe School*,[95] it held that the ministerial (or "internal governance") exception applied to suits by two Catholic-school teachers who taught fifth-grade classes but also religion classes that set forth Catholic doctrine. The Ninth Circuit had allowed the teachers' discrimination suits to proceed, holding that they fell outside the category of "minister" because they lacked a formal title or ministerial-type training.[96] But the Supreme Court held, correctly, that the teachers fell within the exception, because "what matters, at bottom, is what the employee does"—and "educating young people in their faith[ ] [and] . . . training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[97]

89. *Id.* at 1737.

90. *Id.* at 1754.

91. *Id.* (citing 42 U.S.C. § 2000e-1(a)).

92. *Id.* (citing 42 U.S.C. § 2000bb *et seq.*).

93. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

94. *Id.* at 188.

95. 140 S. Ct. 2049 (2020).

96. Morrisey-Berru v. Our Lady of Guadalupe Sch., 769 Fed. Appx. 460, 461 (9th Cir. 2018) (following Biel v. St. James Sch., 911 F.3d 603, 608–11 (9th Cir. 2018)).

97. *Morrissey-Berru*, 140 S. Ct. at 2064. For originalist and other reasons supporting this approach, see Nathaniel M. Fouch, Erik Money, & Thomas C. Berg, *Credentials Not Required: Why an Employee's Significant Religious Functions Should Suffice to Trigger the Ministerial Exception*, 20 FED. SOC'Y REV. 182 (2020), https://fedsoc.org/commentary/publications/credentials-not-required-why-an-employee-s-significant-religious-functions-should-suffice-to-trigger-the-ministerial-exception.

It's unclear how far this protection will extend. Does the exception cover teachers who don't teach doctrine classes but are encouraged to integrate religious insights in their English or history classes? Is it enough that, as many schools say, teachers must act as "role models" of faith for their students? What about other employees?

The other protections the Court mentioned are likewise promising but uncertain. The Title VII exception permits religious organizations to prefer "individuals of a particular faith" in employment, which courts have confirmed includes preferring individuals who adhere to religiously based standards of sexual conduct.[98] But there is debate whether the provision protects only against claims of religious discrimination, not against claims of sex discrimination.[99] And the Religious Freedom Restoration Act is potentially broad, prohibiting substantial government-imposed burdens on religion unless they're necessary to serve a "compelling interest"—but there's debate whether the statute applies in suits brought by private parties, such as individuals claiming discrimination.[100]

A final possible protection has already been noted: the Court might overrule *Employment Division v. Smith*.[101] That would trigger heightened scrutiny even if a nondiscrimination law is considered religion-neutral and generally applicable. And that heightened scrutiny would apply even when RFRA did not. Suits by private parties clearly invoke state action (court rulings or jury verdicts) under the Fourteenth Amendment,[102] and the First and Fourteenth Amendments apply even in states that lack their own RFRA or protective constitutional provision.

As noted in Part I,[103] overturning *Smith* would shift focus to what should be central in free exercise cases: requiring strong justification when law has a significant impact on the important, constitutionally recognized interest in religious exercise. In the context of LGBTQ nondiscrimination and religious objectors, this shift would also reduce the need to look for decisionmakers' "animus" or "hostility" toward conservative religion. The Supreme Court relied on evidence of such hostility in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, protecting a baker

98. *See, e.g.*, Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000); Little v. Wuerl, 929 F.2d 944, 947–51 (3d Cir. 1991).

99. *Compare* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & RELIG. (2015) (interpreting exception broadly), with Rose Saxe, *The Truth About Religious Employers and Civil Rights Laws*, RELIGIOUS FREEDOM INST. (July 28, 2014), https://www.religiousfreedominstitute.org/cornerstone/2016/6/30/the-truth-about-religious-employers-and-civil-rights-laws?rq=saxe (interpreting it narrowly).

100. *See* Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Parties*, 99 VA. L. REV. 343 (2013) (collecting cases).

101. *See supra* note 38 and accompanying text.

102. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011) (intentional infliction of emotional distress); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation).

103. *See supra* note 38 and accompanying text.

from an administrative order requiring that he provide a custom-designed cake for a same-sex wedding.[104] But as I've argued elsewhere, accusing officials of mere animus against religious objectors—and likewise, accusing religious objectors of mere bigotry against LGBTQ people—tends to create a cycle of charges and countercharges that aggravates polarization and resentment.[105] There is value in denouncing government hostility, but courts had best reserve such denunciation for clear cases and not make it a staple in their reasoning.

As already noted, in its 2021 *Fulton* decision, the Court dodged the issue whether to overrule *Smith* and instead used *Smith*'s rules themselves to protect a Catholic agency's ability to continue to contract with the city of Philadelphia to provide foster-care services.[106] The ground on which the Court relied—that the city's nondiscrimination rule had a provision for individualized discretionary exceptions and therefore must provide for religious exceptions as well—could have significant effects, since many laws contain discretionary exceptions.[107] And overruling *Smith*'s unprotective aspects remains a possibility, although doing so will require answering Justice Barrett's concerns about what will replace them.[108]

Whatever the uncertainties concerning the governing doctrine, the Court seems to have undertaken the task of protecting traditionalist religious objectors as well as LGBTQ plaintiffs. That task is indeed necessary to preserving "the heart of our pluralistic society," in *Bostock*'s words,[109] in conflict-driven, fear-filled times. Ideally our legislators would take on this task, but court rulings are better than nothing. Learned Hand warned that "a society so riven that the spirit of moderation is gone, no court *can* save."[110] Let us hope his warning doesn't come true. But even if courts do declare strong religious-freedom rights, it will take years of litigation.

III. Protest: Racial Justice and Religious Liberty

In today's third wave of turbulence, Americans are confronting racial injustice in the wake of the Minneapolis police murder of George Floyd. With that subject so prominent in public debate today, what are the connec-

104. 138 S. Ct. 1719 (2018).

105. Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, 2017–18 Cato Sup. Ct. Rev., at 139, 154–59, 167.

106. *See supra* notes 40-44 and accompanying text.

107. *See, e.g.*, Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith*,* Sherbert*, Hogwarts, and Religious Liberty*, 83 Neb. L. Rev. 1178 (2005) (collecting cases involving policies in public schools, state universities, government employment, and land-use regulation).

108. *See* Laycock and Berg, *supra* note 43, at 41–60 (addressing Barrett's questions).

109. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

110. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, *in* The Spirit of Liberty: Papers and Addresses of Learned Hand 172, 181 (Irving Dilliard ed., 1952).

tions between racial justice and religious liberty? I would answer that protecting religious liberty is essential—and that protecting it fits with, indeed calls for, prioritizing racial justice as well.

Racial equality and religious liberty can come in conflict, but those cases don't reflect a fundamental disconnect. It's true, of course, that many white Christians made religious-liberty arguments to maintain slavery and segregation.[111] But those arguments are unusual today, mostly because they repeatedly lost. Bob Jones University, a fundamentalist Christian college, lost its federal tax-exempt status because it prohibited interracial dating by students.[112] The Supreme Court upheld the withdrawal of exemption, reasoning that government had a compelling interest in "denying public support to racial discrimination in education,"[113] as shown by a "myriad" of court decisions, statutes, and executive orders forbidding such discrimination.[114]

Racial justice and religious liberty, unfortunately, can also be put in unwarranted competition with each other. The Black Lives Matter (BLM) protests against police killings broke out during COVID-19-related shutdowns, and some critics complained that the protests violated the mass-gathering prohibitions still in place in many states. Churches began to point to the BLM protests as another activity governments were permitting, reinforcing the argument that shutdown orders were not generally applicable and were devaluing religious worship compared with other risky activities.[115]

Unfortunately, at least one prominent official, New York Mayor Bill de Blasio, gave impetus to this charge. A few weeks after closing houses of worship and threatening sanctions against Orthodox Jewish mourners at a mass outdoor funeral, de Blasio defended the rights of racial-justice protesters, saying: "When you see a nation, an entire nation simultaneously grappling with an extraordinary crisis seeded in 400 years of American racism, I'm sorry, that is not the same question as the understandably aggrieved

111. *See, e.g.*, JEMAR TISBY, THE COLOR OF COMPROMISE: THE TRUTH ABOUT THE AMERICAN CHURCH'S COMPLICITY IN RACISM (2019); ALAN CROSS, WHEN HEAVEN AND EARTH COLLIDE: RACISM, SOUTHERN EVANGELICALS, AND THE BETTER WAY OF JESUS (2014); CAROLYN RENEE DUPONT, MISSISSIPPI PRAYING: SOUTHERN WHITE EVANGELICALS AND THE CIVIL RIGHTS MOVEMENT, 1945–1975 (2013); MICHAEL O. EMERSON & CHRISTIAN SMITH, DIVIDED BY FAITH: EVANGELICAL RELIGION AND THE PROBLEM OF RACE IN AMERICA (2001).

112. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

113. *Id.* at 604 n.29 (1983); *see id.* at 604 ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education.").

114. *Id.* at 593–95.

115. *See, e.g.*, Soos v. Cuomo, 470 F. Supp. 2d 268 (N.D.N.Y. 2020) (granting preliminary injunction based on complaint by Catholic and Orthodox Jewish plaintiffs that New York governor and New York City encouraged mass protests while restricting religious worship and funerals). In *Calvary Chapel*, Justice Alito argued that Nevada's governor and other officials had made the same direct comparison endorsing racial-justice protests but devaluing the importance of worship to people. 140 S. Ct. at 2607–08 (Alito, J., dissenting).

store owner or the devout religious person who wants to go back to services."[116]

De Blasio was right about the urgency of the BLM protests. And he could have argued for a distinction based on relative risks (a criterion I've already suggested is proper), since the protests were outdoors, unlike many worship services. Instead, he gave a textbook example of devaluing the importance of religion. As Michael Helfand observes, de Blasio "encourage[d] the public to think of these two constitutional values as in a zero-sum competition where progress for one comes at the expense of the other."[117]

Such devaluing helps solidify polarization. White social conservatives, who are disproportionately religious, already include a fair number who are skeptical of the urgency of the need for racial justice. Although they are wrong in that skepticism, they are justified in resenting the dismissiveness that progressives display toward them. The resentment stiffens their resolve to fight whatever progressives support. So goes the cycle of negative polarization described above:[118] resentment of the other side overwhelms whatever inclination people might have had to solve problems together.

But in turn, when many white religious conservatives dismiss the urgency of racial justice, they undercut support for their own deepest concerns, like religious liberty. In particular, they discourage the black church itself from being a vocal supporter of religious-liberty claims in current clashes. Harvard sociologist Jacqueline Rivers, an expert on the black church, has described this cost in stark terms in an article for a University of St. Thomas School of Law symposium.[119] Professor Rivers, who herself holds a number of social-conservative views, points out that

> the support of the black church, which represents irrefutable victims of hateful prejudice, could still do much to silence the charge that religious freedom claims are a thin disguise for discriminatory behavior. . . . It would greatly benefit the cause to be able to induce a more positive attitude toward religious freedom among the American public.[120]

But the black church has been lukewarm overall toward religious-freedom campaigns, Rivers observes, largely because "[t]he face of the strenuous defense of [religious freedom today] has often been Southern white

116. *Transcript: Mayor de Blasio Holds Media Availability*, NYC.GOV (June 2, 2020), https://www1.nyc.gov/office-of-the-mayor/news/397-20/transcript-mayor-de-blasio-holds-media-availability. *See Soos*, 470 F. Supp. 3d at 275–76, 282–83 (citing this and other comments and actions by de Blasio and Governor Andrew Cuomo).

117. Michael Helfand, *Racial Justice and Religious Liberty Go Hand in Hand. De Blasio Pitted Them Against Each Other—and Got Sued.*, FORWARD (June 16, 2020), https://forward.com/opinion/448911/de-blasios-gaffe-pitted-racial-justice-and-religious-liberty-against-each.

118. *See supra* notes 77–80 and accompanying text.

119. Jacqueline C. Rivers, *The Paradox of the Black Church and Religious Freedom*, 15 U. ST. THOMAS L.J. 676 (2019).

120. *Id.* at 700.

evangelicals"—a demographic "which blacks are loath to support and with which they refuse to collaborate."[121] Their first reason for refusing, she argues, is "the deep and enduring historical connections between white evangelicals and virulent racism": "while black pastors are concerned about religious freedom, they are unwilling to work closely with white churches that historically perpetuated brutal and bloody racial practices."[122] Indeed, there is a long, well-documented history of white evangelical apologies for slavery and for segregation—and at the least, for ignoring those evils on the asserted ground that the Christian Church should not concern itself with social or political matters.[123]

Several black Christian ministers gave a similar diagnosis in a 2018 article in *Christianity Today*, shortly after the Supreme Court's *Masterpiece Cakeshop* decision. In the article, the Rev. Justin Giboney of the AND Campaign remarked that African Americans know that "American Christianity has a history of using its faith as a pretext or even justification for bigotry and hate. . . . [Thus] we might agree theologically [with objections to LGBTQ identification and behavior], but historically speaking, we have little reason to believe the concerns aren't pretext for prejudicial impulses."[124] Texas Baptist leader Kathryn Freeman added that because "religion was used as a reason to exclude [blacks] from many facets of American life," blacks tend to be cautious about aligning with social-conservative claims, and "more focused on procuring their freedom from racial injustice than [on] religious freedom."[125]

The second reason why the black evangelical community is lukewarm on conservative religious-freedom claims, Rivers says, is "the current day politics of white evangelicals."[126] They "ha[ve] overwhelmingly supported the Republican party" with its "consistent [o]pposition to policies advantageous to blacks"—especially now that "[a]ny illusion about the lack of connection between Republican positions and racial animus was swept away [by] the vulgar, racially loaded rhetoric of Donald Trump."[127]

Discussing the various policies to which Professor Rivers refers would go well beyond this short article's scope. And for white conservatives to develop some credibility on issues of freedom and equality, they need not reject the Republican Party or adopt every progressive proposal on racial justice. But they must reject those leaders who aim to exploit white racial

121. *Id.*

122. *Id.*

123. *See, e.g.*, books cited *supra* note 114.

124. Kate Shellnutt, *For Black Evangelicals, How Does* Masterpiece Cakeshop *Compare to Jim Crow?*, CHRISTIANITY TODAY (June 10, 2018), https://www.christianitytoday.com/ct/2018/june-web-only/masterpiece-cakeshop-jim-crow-service-refusals-gay-weddings.html (quoting the Rev. Justin Giboney).

125. *Id.*

126. Rivers, *supra* note 122, at 701.

127. Rivers, *supra* note 122, at 701.

grievances. They must confront rather than downplay the urgency of racial inequality, the ongoing tragedy and scandal that has divided Christians for decades. And they must acknowledge that systemic factors contribute to racial inequality. They must break the longstanding evangelical habit of "fix[ing] on individual conversion without a corresponding focus on transforming the racist policies and practices of institutions, a stance that has . . . furthered the American church's easy compromise with slavery and racism"[128] by enabling it to disregard causes of inequality and treat "social ills" as outside the church's mission.

The truth is that, as Michael Helfand has observed, "racial justice and religious liberty go hand in hand."[129] Both are central norms in America's constitutional tradition, even if we have frequently ignored both in fact, often appallingly so. Religious liberty has also been a source of remarkable power for Americans of color. Jacqueline Rivers has coined the term "enacted religious freedom" to describe how in the civil-rights years, "[r]eligious faith"—biblical language and preaching, church-based energy and organization—"was the driving force that empowered the sacrifice and victory of the Movement. . . . Without the right to assemble freely in churches and to act on deeply-held religious beliefs, the faithful who fueled the movement would have been unable to act."[130]

Moreover, religious minorities claiming religious freedom are often racial minorities too. American Muslims, who are 60 percent people of color and 20 percent black,[131] include significant groups of African Americans (black Muslims and others) and African immigrant communities.[132] Racial minorities are a significant share of Seventh-day Adventists and Jehovah's Witnesses, who are regular religious-freedom claimants.[133] RFRAs and

128. TISBY, *supra* note 114, at 69.

129. Helfand, *supra* note 120.

130. Rivers, *supra* note 122, at 689.

131. PEW RSCH. CTR., U.S. MUSLIMS CONCERNED ABOUT THEIR PLACE IN SOCIETY, BUT CONTINUE TO BELIEVE IN THE AMERICAN DREAM: FINDINGS FROM PEW RESEARCH CENTER'S 2017 SURVEY OF U.S. MUSLIMS 30–49 (July 26, 2017), https://www.pewforum.org/wp-content/uploads/sites/7/2017/07/U.S.-MUSLIMS-FULL-REPORT-with-population-update-v2.pdf.

132. Besheer Mohamed & Jeff Diamant, *Black Muslims Account for a Fifth of All U.S. Muslims, and About Half Are Converts to Islam*, PEW RSCH. CTR.: FACTTANK (Jan. 17, 2019), https://www.pewresearch.org/fact-tank/2019/01/17/black-muslims-account-for-a-fifth-of-all-u-s-muslims-and-about-half-are-converts-to-islam.

133. Only 36 percent of Jehovah's Witnesses and 37 percent of Adventists are white. *Religious Landscape Study: Racial and Ethnic Composition*, PEW RSCH. CTR., https://www.pewforum.org/religious-landscape-study/racial-and-ethnic-composition; Michael Lipka, *A Closer Look at Seventh-Day Adventists in America*, PEW RSCH. CTR.: FACTTANK (Nov. 3, 2015), https://www.pewresearch.org/fact-tank/2015/11/03/a-closer-look-at-seventh-day-adventists-in-america. In two recent petitions by Adventists raising important religious-accommodation questions under Title VII, both petitioners were black. Patterson v. Walgreen Co., No. 18-349, *cert. denied*, 140 S. Ct. 685 (2020); Petition for Certiorari, Dalberiste v. GLE Associates, No. 19-1461, at 7, https://www.scotusblog.com/case-files/cases/dalberiste-v-gle-associates-inc, *cert. denied*, 141 S. Ct. 2463 (2021).

other religious-freedom statutes have benefited religious communities of color.

Finally, sociologists have documented the immense importance of congregations and other religious organizations in empowering and serving vulnerable people in African American communities.[134] These too, Professor Rivers says, "are examples of enacted religious freedom, believers acting on deeply held religious beliefs."[135] Religious liberty creates the space for these organizations to do their work and maintain the identity that inspires them. In this and other concrete ways, religious liberty is vital to individual persons and to the common good.

IV. Conclusion

Among many lessons from recent crises is that religion, freely chosen and exercised, is a vital aspect of human identity. Religious exercise provides individuals with strength and comfort in the stresses of a pandemic. Religious belief motivates service to others in schools and social-service agencies; credible legal threats to those organizations aggravate our already dangerous polarization. Now as much as ever, it is vital to defend religious freedom for all. Despite some mixed signals, the current Supreme Court seems willing to shoulder that task.

But to defend religious freedom credibly means recognizing rights for others too. That calls for something I've not discussed in full: Christian conservatives must support religious liberty and equality for Muslims as well.[136] A credible defense of religious freedom also calls for confronting rather than denying the problems of racial inequality. And it calls for drawing careful lines so that LGBTQ people can participate in economic life and traditionalist religious organizations and individuals can follow their religious identity.

134. Rivers, *supra* note 122, at 696–98 (citing and describing findings in Ram A. Cnaan et al., The Other Philadelphia Story: How Local Congregations Support Quality of Life in Urban America 143–44, 153 (2006); and Sandra L. Barnes, *Priestly and Prophetic Influences on Black Church Social Services*, 51 Soc. Probs. 202, 215–19 (2004)).

135. Rivers, *supra* note 122, at 698.

136. *See, e.g.*, Thomas C. Berg, *Religious Freedom and Nondiscrimination*, 50 Loy. U. Chi. L. Rev. 181, 184 (2018) ("[F]or religious conservatives to attack, or fail to defend, Muslim religious freedom is a serious error—of pragmatics and of principle."); Thomas C. Berg, *4 Ways Muslims' Religious Freedom Fight Now Sounds Familiar to Evangelicals,* Christianity Today (Sept. 9, 2019), https://www.christianitytoday.com/ct/2019/september-web-only/muslims-religious-freedom-evangelicals-legal-fight.html.