BEYOND BOSTOCK: JUSTICE GORSUCH'S FREE EXERCISE JURISPRUDENCE AS A MODEL IN ADDRESSING THE CONTEMPORARY CRISIS IN RELIGIOUS LIBERTY

*Nathan J. Moelker**

INTRODUCTION

"Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[1]

"In far too many places, for far too long, our first freedom has fallen on deaf ears."[2]

Perhaps no Supreme Court decision of the 2019–2020 term caused more controversy than *Bostock v. Clayton County*.[3] The Court held that "homosexuality and transgender status are inextricably bound up with sex." Such that if an employer fires an individual based on these factors, the employer has still ultimately fired the individual because of sex, an action prohibited under the Civil Rights Act.[4] Many conservatives were outraged at Justice Gorsuch's actions in writing the opinion for the majority after he claimed to be a textualist.[5] However, other conservatives have argued that *Bostock* should be examined with more nuance,

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[1] Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), REVOLUTIONARY SERV. AND CIVIL LIFE OF GENERAL WILLIAM HULL, 265–66 (Maria Campbell, ed., Applewood Books 2009) (1848).

[2] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 70 (2020).

[3] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[4] *Id.* at 1742 (Title VII of the Civil Rights Act prohibits sex discrimination).

[5] *See* Michael Knowles, *Justice Gorsuch Owes Me A Refund, So I Wrote Him A Letter*, DAILY WIRE (June 19, 2020), https://www.dailywire.com/news/knowles-justice-gorsuch-owes-me-a-refund (arguing that Justice Gorsuch's opinion was such a rejection of textualism that Gorsuch should send out refunds for his book and make a public repudiation of the title textualist).

emphasizing that the Civil Rights Act's broad language may allow this result.[6]

This Article's purpose is not to relitigate *Bostock* or to examine the exact parameters of the Civil Rights Act. *Bostock* was decided 6-3, and none of the Justices who made the decision show any indication of changing their mind. Instead, this Article examines the nature of Justice Gorsuch's jurisprudential philosophy through the lens of the Free Exercise Clause of the Constitution. This Article provides a systematic overview of all the cases in which Justice Gorsuch joined in or authored related to the Free Exercise Clause, the Religious Freedom Restoration Act (RFRA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[7] Examining these cases will demonstrate that, regardless of *Bostock*, Justice Gorsuch has demonstrated a deep commitment to protect free exercise for religious beliefs and practices, regardless of their popularity or social acceptance. This commitment provides a means to protect the religious rights of ideological minorities, even when their religious practices face social disfavor and discrimination.

Justice Gorsuch's jurisprudence continually returns to the foundational idea that "[t]he Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all."[8] Rather than carving out areas, opinions, or beliefs exempt from religious protection, Justice Gorsuch has fought to protect free exercise for all religious views, popular and unpopular. If the government can intrude into unpopular religious practices, those with deep faith leading to disfavored behaviors cannot live "true to their religious convictions."[9] While free to disagree with Justice Gorsuch in *Bostock*, or any other case for that matter, conservatives need not worry about Justice Gorsuch's jurisprudential philosophy. Justice Gorsuch's holding in *Bostock* can only be socially tolerable upon the foundation of a firm structure of religious liberty.[10] This Article seeks to show Justice Gorsuch's profound commitment to religious liberty, evidenced in well known cases like *Fulton* and *Masterpiece Cakeshop*, is fundamental to his basic philosophy of jurisprudence, and has been his commitment even since his time as a circuit judge. Further, Justice Gorsuch has consistently sought to develop

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[6] Ilya Shapiro, *After* Bostock, *We're All Textualists Now*, NAT'L REV. (June 15, 2020), https://www.nationalreview .com/2020/06/supreme-court-decision-bostock-v-clayton-county-we-are-all-textualists-now/.

[7] U.S. CONST. amend. I; 42 U.S.C.S. §§ 2000bb-1, 2000cc-1.

[8] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018).

[9] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2278 (2020) (Gorsuch, J., concurring).

[10] Adam White, *Is Religious Liberty "Dismantling" Progressive Legal Victories – or Making Them Possible in the First Place*, MEDIUM (July 12, 2020), https://medium.com/adamjwhite/is-religious-liberty-dismantling-progressive-legal-victories-or-making-them-possible-in-the-5bcce0482c6c.

a full orbed religious liberty jurisprudence that is not limited to traditional religions or popular beliefs, but protects wholeheartedly the religious beliefs of all individuals, popular and unpopular. Rejecting a *so-called* restraint that fails to attend to a judge's duty to defend the Constitution, Justice Gorsuch is wholeheartedly committed to the judicial task under the First Amendment.

I. BOSTOCK V. CLAYTON COUNTY: ITS HOLDING AND ABIDING QUESTION

The general perception is that in *Bostock v. Clayton County*, the Supreme Court held that Title VII of the Civil Rights Act of 1964's prohibition of sex discrimination is also a prohibition of discrimination based on sexual orientation and gender identity.[11] While this popular summary is not entirely inaccurate, the Court's decision was more nuanced and did not explicitly add these categories to discrimination law. In *Bostock,* the Court did not hold that there are new categories within discrimination law, but that "homosexuality and transgender status are inextricably bound up with sex," such that if an employer's decision in hiring or firing was upon the basis of these factors, the employer still fired the individual because of the individual's sex.[12] The Court did not claim that the 1964 drafters of the Act intended this result.[13] Justice Gorsuch, writing for the majority, recognized,

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . .. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.[14]

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[11] *Compare* Dan McLaughlin, *The Supreme Court Decides Who Is a Woman*, NAT'L REV. (June 15, 2020), https://www.nationalreview.com/2020/06/the-supreme-court-decides-who-is-a-woman/ (article from the right, critiquing the decision for applying Title VII "to discrimination based not only on sex but also on sexual orientation and transgender status"), *with* Tim Fitzsimons, *Supreme Court Sent 'Clear Message' with LGBTQ Ruling, Plaintiff Gerald Bostock Says*, NBC NEWS (June 16, 2020), nbcnews.com/feature/nbc-out/supreme-court-sent-clear-message-lgbtq-ruling-plaintiff-gerald-bostock-n1231190 (article from the left, praising the decision for the same result).

[12] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1742 (2020).

[13] *Id.* at 1757 (Alito, J., dissenting) ("[T]here is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted.").

[14] *Bostock*, 140 S. Ct. at 1737.

In this way, Justice Gorsuch characterized the decision not in terms of "changing social norms," but as a matter of applying the clear, "express terms of a statute."[15]

Bostock's factual issue was simple. Long-time employees were fired for revealing their homosexuality or transgender status and sued for sex discrimination.[16] The problem presented was thus whether such a discharge violated Title VII.[17] Justice Gorsuch emphasized throughout his analysis the need to apply the plain meaning of the statute.[18] "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. . .."[19] Relying upon this commitment to textualism and plain public meaning, Justice Gorsuch examined Title VII's words, that it is an unlawful employment practice "for an employer to fail or refuse to hire or to discharge any individual . . . because of such individual's . . . sex."[20]

The Court gave "sex" the biological definition relied upon by the defendants and did not argue that its definition should be broadened to sexual orientation.[21] Instead, Gorsuch centered on the adjectival phrase in the statute, "because of."[22] According to Supreme Court precedent, this "because of" standard is satisfied when the employment result would not have occurred "but for" the discriminatory act.[23] Congress could easily have taken a narrower and stricter approach, but instead wrote a law broad enough to encompass multiple forms of discrimination.[24] For example, instead of prohibiting actions taken "because of" specific categories, Congress could have prohibited actions taken solely "because of" those categories.[25] "But none of this is the law we have."[26] No matter how appropriate a narrow test may appear, a narrow test is not the test Congress enacted or the test the Court must apply.[27]

Because the language of the Act applies broadly, Title VII applies to many discriminatory actions.[28] An employer violates the law "[i]f the

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[15] *Id.*
[16] *Id.* at 1734, 1737.
[17] *Id.* at 1737.
[18] *Id.* at 1750.
[19] *Id.* at 1738.
[20] *Bostock*, 140 S. Ct. at 1738.
[21] *Id.* at 1739.
[22] *Id.*
[23] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343, 348 (2013).
[24] *Bostock*, 140 S. Ct. at 1739.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 1740.

employer intentionally relies *in part* on an individual employee's sex when deciding to discharge the employee."[29] Upon this basis, the Court held that it is impossible to discriminate against a person for being homosexual or transgender without discriminating at least in part based on the person's sex.[30] The Court used the example of two employees attracted to men, one a woman and one a man.[31] "If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."[32]

Justice Gorsuch's holding in this momentous case has caused a variety of responses. Some accused Gorsuch of a halfway textualism that built "an elaborate textualist framework on a shaky foundation."[33] Justice Alito's dissent in the case argued that "[t]here is only one word for what the Court has done today: legislation."[34] A few conservative commentators have gone so far as to compare Justice Gorsuch with Justice Souter.[35] Liberals have made textualist arguments in favor of Gorsuch's result.[36] Some on the left have gone as far as arguing that "the plain language of the text" mandated the result.[37] Moderates emphasized that this holding, along with the religious liberty cases of the 2019-2020 term, is designed to encourage greater pluralistic recognition of sincere claims of conscience.[38]

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[29] *Bostock*, 140 S. Ct. at 1741 (emphasis added).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/.

[34] *Bostock*, 140 S. Ct. at 1754 (Alito, J., dissenting). *See also id.* at 1755–56 (Alito, J., dissenting) ("The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society.").

[35] Damon Linker, *Justice Gorsuch Fires a Torpedo at Trump's Re-election*, THE WEEK (June 15, 2020), https://theweek.com/Articles/920057/justice-gorsuch-fires-torpedo-trumps-reelection.

[36] *See* Ilya Somin, *Bostock v. Clayton County and the Debate over the Meaning of "Ordinary Meaning,"* VOLOKH CONSPIRACY (June 19, 2020), https://reason.com/2020/06/19/bostock-v-clayton-county-and-the-debate-over-the-meaning-of-ordinary-meaning/; Walter Olson, *With Nod to Scalia, Surprise Plain Meaning Carries Day for LGBT Plaintiffs*, CATO (June 15, 2020), https://www.cato.org/blog/nod-scalia-surprise-plain-meaning-carries-day-lgbt-plaintiffs.

[37] Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 3 (2020).

[38] William J. Haun, *The Supreme Court Wants Religious Americans—and Those who Disagree with Them—to Live and let Live*, WASH. POST (July 14, 2020),

The fairest reactions to the case have recognized that in many ways, the ambiguous Title VII in *Bostock* presented "a case of statutory interpretation with no clear answer."[39] Before taking his seat upon the Supreme Court, Gorsuch published the book, *A Republic, If You Can Keep it.*[40] In opposition to those who "perceive a judge to be just like a politician who can and must promise (and then deliver) policy outcomes that favor certain groups,"[41] Gorsuch emphasized that "the judge's job is only to apply the law's terms as faithfully as possible."[42] Judges must "ensure that their decisions aren't based on which persons or groups they happen to like or what policies they happen to prefer."[43] If conservatives had read Justice Gorsuch's book more carefully, they would have seen that in examining difficult textual questions, such as the one raised in *Bostock*, Gorsuch would remain focused on the original public meaning of the law's language, not the debates of public policy. The accuracy of the holding is not in debate here. However, *Bostock* raises the crucial issues of how religious liberty will fare because of the decision.

Justice Alito argued in his dissent that the holding would "threaten freedom of religion."[44] Gorsuch did not ignore religious liberty in his opinion. "We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."[45] However, no religious liberty claim was brought before the Supreme Court in *Bostock*.[46] "[W]hile other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties."[47] This Article examines what "careful consideration" Justice Gorsuch is likely to provide when such free exercise concerns will be raised in future cases.

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https://www.washingtonpost.com/opinions/2020/07/14/supreme-court-wants-religious-americans-those-who-disagree-with-them-live-let-live/. (This is largely the approach taken throughout this Article, although it does not focus upon the precise contours of the textual issues raised in the case.).

[39] Shapiro, *supra* note 6.

[40] NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019) (ebook).

[41] *Id.* at 6.

[42] *Id.* at 7.

[43] *Id.*

[44] *Id.* at 1778 (Alito, J., dissenting).

[45] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

[46] *Id.*

[47] *Id.*

II. THE FREE EXERCISE JURISPRUDENCE OF NEIL GORSUCH, AS BOTH JUDGE AND JUSTICE

A. Gorsuch's 10th Circuit Opinions: Protecting Unpopular Religions

Many seem to believe today that religious liberty is a shield used by the religious right to hide "discriminatory" views that are out of step with contemporary society.[48] Some claim that the religious right seeks to "create a special class of rights" that exists for itself alone.[49] A pair of early cases from then-Judge Gorsuch demonstrates the falsity of such a mischaracterization. Gorsuch has protected religious liberty for unpopular religions with vigor. He has emphasized the constitutional need to show particular deference to the tenets and practices of religions that are not commonly practiced.[50]

In *Abdulhaseeb v. Calbone*,[51] Gorsuch analyzed a claim under RLUIPA, a law designed to protect prisoners when their religious practices had been substantially burdened.[52] An Islamic prisoner was denied permission to eat halal food according to his religious belief and was forced to choose between "starving to death" and violating his religion.[53] The court held that the prison had acted to violate RLUIPA, and Gorsuch wrote a concurrence uniquely underscoring the constitutional importance of the individual's religious liberty claims.[54] The prisoner "has been forced to choose between violating his religious beliefs and starving to death. Whatever else might be said about RLUIPA, redressing this sort of Hobson's choice surely lies at its heart."[55]

Most importantly, the majority had argued that "[t]he standards under RLUIPA are different from those under the Free Exercise Clause."[56] The majority attempted to distinguish the heightened scrutiny of religious claims required by RLUIPA from the protections offered by the Free

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[48] *See* Paul Waldman, *The Supreme Court Just Helped the Trump Administration Limit Access to Contraception*, WASH. POST (July 8, 2020), https://www.washingtonpost.com/opinions/2020/07/08/supreme-court-just-helped-trump-administration-limit-access-contraception/ ("Religious conservatives . . . have an ally in that war: a conservative majority on the Supreme Court, one that is determined to create a class of special rights that in practice are enjoyed only by conservative Christians. . . . [R]eligious conservatives have looked to the courts to expand their 'religious liberty,' which in practice means giving them exemptions from laws they don't like.").

[49] *Id.*

[50] Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014).

[51] Abdulhaseeb v. Calbone, 600 F.3d 1301, 1325 (10th Cir. 2010).

[52] *Id.*

[53] *Id.* (Gorsuch, J., concurring).

[54] *Id.* at 1309, 1324.

[55] *Id.* at 1324.

[56] *Abdulhaseeb*, 600 F.3d at 1314.

Exercise Clause itself, viewed as a limited right against laws that are not generally applicable.[57] In contrast, Gorsuch argued that the claim was governed directly by *Sherbert v. Verner*, a case applying heightened scrutiny of religious claims.[58] His argument drew a close connection between the protections offered by RLUIPA and the Free Exercise Clause.[59] While both the majority and Gorsuch's concurrence applied RLUIPA, Gorsuch applied the RLUIPA standard as viewed in accordance with prior Supreme Court precedent, under which strict scrutiny of religious claims is the general rule, and religious liberty is robustly emphasized.[60]

Likewise, in *Yellowbear v. Lampert,* Gorsuch authored an opinion analyzing the RLUIPA claims of a Native American prisoner.[61] Yellowbear was a member of the Northern Arapaho Tribe, denied "access to the prison's existing sweat lodge to facilitate his religious exercises."[62] In his analysis of the prison's actions, Gorsuch stressed that RLUIPA is not a general protection of any claim of conscience but protects the heightened, constitutional value set upon religious liberty.[63]

> RLUIPA requires the plaintiff to show a *religious* exercise. The law does not protect from governmental intrusion every act born of personal conscience or philosophical conviction. It protects only those motivated by religious faith—in recognition, no doubt, of the unique role religion, its free exercise, and its tolerance have played in the nation's history.[64]

Rather than merely stating and applying RLUIPA, Gorsuch highlighted the constitutional protections RLUIPA is designed to protect.[65] Gorsuch urged the Court to recognize the unique role the Constitution itself, in the light of the importance of tolerance and free exercise, sets on the public role of religion.[66]

Gorsuch likewise emphasized, in utilizing RLUIPA to protect Yellowbear's religion, that "federal judges are hardly fit arbiters of the world's religions."[67] The sincerity of a plaintiff's religion, or the centrality

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[57] *Id.*
[58] *Id.* at 1325. (Gorsuch, J., concurring).
[59] *Id.*
[60] *Id.*
[61] Yellowbear v. Lampert, 741 F.3d 48, 52–53 (10th Cir. 2014).
[62] *Id.* at 53.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Yellowbear*, 741 F.3d at 54.

of a particular tenet of that religion, is beyond the scope of a court's authority.[68] "Just as civil courts lack any warrant to decide the truth of a religion, in RLUIPA, Congress made plain that we also lack any license to decide the relative value of a particular exercise to a religion."[69] Courts cannot determine in an individual's behalf the extent to which that individual has been affected by a regulation burdening free exercise.[70]

Gorsuch particularly emphasized the need to avoid unnecessary scrutiny of unpopular or unfamiliar beliefs.[71] "That job would risk in the attempt not only many mistakes—given our lack of any comparative expertise when it comes to religious teachings, *perhaps especially the teachings of less familiar religions*—but also favoritism for religions found to possess a greater number of 'central' and 'compelled' tenets."[72] A judge or justice is simply not equipped to determine which beliefs are central to a religion, especially when a religion is unfamiliar or strange to that judge.[73] Gorsuch stresses the need to protect the religious beliefs of religious minorities whose beliefs are not accepted or understood throughout society.[74] The courts cannot examine the sincerity of a religious belief or delineate the importance of that belief to the individual.[75] "[T]he inquiry here isn't into the merit of the plaintiff's religious beliefs or the relative importance of the religious exercise: we can't interpret his religion for him."[76]

B. Gorsuch's 10th Circuit Opinions: Protecting Unpopular Beliefs

The 10th Circuit was the lower court for one of the most significant Supreme Court religious liberty cases in the last several years, *Hobby Lobby Stores, Inc. v. Sebelius.*[77] Gorsuch's concurrence in that case highlighted the need to protect unpopular religious beliefs and practices against majoritarian discrimination.[78]

In *Hobby Lobby Stores, Inc. v. Sebelius,* the 10th Circuit held that RFRA allowed for relief against the mandate that corporations purchase

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[68] *Id.*
[69] *Id.*
[70] *Id.* at 54–55.
[71] *Yellowbear*, 741 F.3d at 54.
[72] *Id.* at 54 (emphasis added).
[73] *Id.*
[74] *Id.* at 54–55.
[75] *Id.*
[76] *Id.* at 55.
[77] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).
[78] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1152–53 (Gorsuch, J., concurring).

contraceptive abortifacients for their employees.[79] Gorsuch's concurrence emphasized the significance of the religious claims of the individuals in the case, the Green family, who were Hobby Lobby's primary owners.[80] His concurrence focused on the need for the Greens themselves to determine the extent to which their religious practice has been affected, not a judge making a value judgment.[81] "[R]eligion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability."[82] The Green's conviction that they are morally culpable if their company helps purchase contraceptive abortifacients is itself a matter of religious conviction, not a belief that can be recontextualized or dismissed by the 'superior' reasoning of a court.[83] The Greens not only had a sincere religious belief in opposition to the use of contraception, but they also had a sincere religious belief that "the ACA's mandate requires them to violate their religious faith by forcing them to lend an impermissible degree of assistance to conduct their religion teaches to be gravely wrong."[84]

Gorsuch drew upon the Supreme Court's analysis in *Thomas v. Review Board*,[85] wherein the Supreme Court affirmed a Jehovah's Witness's decision to make sheet steel but not tank turrets for the war effort in the Second World War.[86] "The Supreme Court acknowledged this line surely wasn't the same many others would draw, and that it wasn't even necessarily the same line other adherents to the plaintiff's own faith might always draw."[87] *Thomas* demonstrates that the courts must not determine whether an individual made a decision of religious conscience that rightly reflects the individual's religion, but must respect the sincere commitments of religious practice.[88] In other words, when a religious believer draws a sincere line regarding what practices are religiously permissible, it is not for the courts to redraw the line.[89]

Justice Gorsuch argued not only for the importance of RFRA generally but for the importance of taking religious claims at their word concerning the extent to which the individual has been substantially burdened.[90]

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[79] *Id.* at 1124–25.
[80] *Id.* at 1152 (Gorsuch, J., concurring).
[81] *Id.* at 1153.
[82] *Id.* at 1152.
[83] *Id.* at 1152–53.
[84] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1152 (Gorsuch, J., concurring).
[85] Thomas v. Review Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 711 (1980).
[86] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1153 (Gorsuch, J, concurring).
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 1153–54.

> [I]t is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes "too much" moral disapproval on those only "indirectly" assisting wrongful conduct. Whether an act of complicity is or isn't "too attenuated" from the underlying wrong is sometimes itself a matter of faith we must respect.[91]

RFRA lacks effect if the courts are free to recontextualize as insubstantial the unpopular beliefs they do not believe merit protecting.[92] The courts must not determine for individuals what religions teach or what behavior is permissible.[93]

Gorsuch emphasized the Constitution's protection of counter-majoritarian beliefs from the scorn of the majority.[94] The protection of the free exercise of religion "doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance."[95]Although "[s]ome may even find the Greens' beliefs offensive,"[96] Gorsuch emphasized that the sincerity of their religious beliefs must be recognized and not dismissed, minimized, or recontextualized.[97]

C. Masterpiece Cakeshop and the Need to Respect Religious Claims

Gorsuch further developed his emphasis on the need to recognize the sincere claims of religious conscience when he came to serve on the Supreme Court. His jurisprudence continually demonstrates the need to take religious claims sincerely, rather than courts determining people's closely held religious beliefs for them or the centrality of those beliefs.[98] *Masterpiece Cakeshop v. Colorado Civil Rights Commission* concerned one of the most significant issues of contemporary religious liberty concerns, the conflict between religious liberty and the interests of the LGBTQ community. Joining in the opinion of the majority, finding in favor of a religious baker, Justice Gorsuch wrote his own concurrence, highlighting

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[91] *Id.*
[92] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1153–54 (Gorsuch, J, concurring).
[93] *Id.*
[94] *Id.* at 1153–54.
[95] *Id.* at 1152–53.
[96] *Id.* at 1152.
[97] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1152–54 (Gorsuch, J, concurring).
[98] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018).

the importance of recognizing and protecting the claims of religious conscience, even when those claims are considered socially distasteful.[99]

Justice Gorsuch emphasized the danger of allowing the Colorado Civil Rights Commission to dismiss the beliefs of Mr. Philips, the baker, as offensive.[100] "That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all."[101] The Commission had presumed prejudice in the case of a religious believer acting according to his religious belief, while not making such a presumption in other contexts, demonstrating an intentional desire to discriminate toward the claims of religious conscience.[102]

In critiquing the Commission, Gorsuch emphasized the necessity to protect free exercise for all religious beliefs, popular or unpopular.[103] "[N]o bureaucratic judgment condemning a sincerely held religious belief as 'irrational' or 'offensive' will ever survive strict scrutiny."[104] While the majority focused on the unusually hostile nature of the Commission's actions, Gorsuch emphasized that any discrimination against or condemnation of religious practice is intolerable.[105]

For Gorsuch, vigilantly protecting the First Amendment is most needed when the beliefs requiring protection are considered "offensive."[106] "Just as it is the 'proudest boast of our free speech jurisprudence' that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive."[107] Religious liberty is meaningless if it does not include the protection of unpopular beliefs and practices.[108] "Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."[109] It is not the place of any legal body to determine which religious beliefs are worth valuing and which are not.[110] "The

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 1737.
[104] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all."[111]

Also, Gorsuch highlighted the inability of the Court to determine the sincerity of Mr. Philip's religious belief.[112] It is beyond the Court's authority to tell Mr. Philips that it is "just" a cake.[113]

> It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.[114]

The courts cannot tell Mr. Philips or anyone else the religious significance of particular actions.[115] Gorsuch made the same argument that he made in *Hobby Lobby*.[116] Religious principles not only define the content of an individual's beliefs, but they also define the scope and reach of those beliefs.[117] Courts must never redefine religious commitment by redefining the extent of the burden on religious practice.[118]

Courts must heed Justice Gorsuch's call to take religious claims honestly and not condemn "a sincerely held religious belief as 'irrational' or 'offensive.'"[119] There is an increasing perception among some in our society that sincerely held religious beliefs on controversial matters serve as shields for "bigotry and discrimination."[120] Addressing this concern requires judges to take sincere religious claims seriously, recognizing that religion often includes convictions regarding the effect of a regulation on one's religious practice. "Whether an act of complicity is or isn't 'too attenuated' from the underlying wrong is sometimes itself a matter of

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[111] *Id.* at 1734.

[112] *Id.* at 1739–40.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Compare* Masterpiece Cakeshop, Ltd., 138 S. Ct. at 1739–40 (Gorsuch, J., concurring), *with* Hobby Lobby Stores, Inc, 723 F.3d at 1153–54 (Gorsuch, J., concurring).

[117] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1739–40 (Gorsuch, J., concurring).

[118] *Id.*

[119] *Id.* at 1737.

[120] *The Administration's Religious Liberty Assault on LGBTQ Rights: Hearing Before the Comm. on Oversight & Reform H.R.*, 116th Cong. 50 (2020) (statement of The Hon. Alexandria Ocasio-Cortez). *See also* David G. Savage, *In L.A. Case, Supreme Court Rules Job Discrimination Laws Don't Protect Church-School Teachers*, L.A. TIMES (July 8, 2020), https://www.latimes.com/politics/story/2020-07-08/court-rules-catholic-schools-are-free-to-fire-teachers-who-sue-over-discrimination (arguing that hearing religious claims on controversial matters "elevates a distorted notion of religious freedom over fundamental civil rights").

faith we must respect."[121] Unpopular religious beliefs merit just as much protection as popular, and beliefs regarding the extent of an obligation just as much protection as beliefs regarding the nature of that obligation.

D. Gorsuch's Critique of the Distinction between Status and Use

Another critical aspect of Justice Gorsuch's jurisprudence is his critique of any distinctions between religious status and use in the Court's jurisprudence. A variety of reasons underlie his reluctance. First, there is nothing in the Constitution itself that provides for this distinction, but it "protects the right to *act* on those [religious] beliefs outwardly and publicly."[122] Second, the distinction between one's religious status and one's actions as a religious person is often a matter of perspective, leaving far too much in the subjective hands of a judge.[123] Third, Gorsuch has demonstrated that the right to "religious status," without the protections of religious actions, ultimately provides no protection at all.[124]

In *Trinity Lutheran Church of Columbia, Inc. v. Comer,* Justice Gorsuch wrote a concurrence critiquing the distinction drawn by the majority between religious status and religious use.[125] The Court's decision held that it was a violation of the Free Exercise Clause to deny a generally available benefit to a preschool solely based on the preschool's religious identity.[126] The Court held that a policy barring religious organizations from participating in funds for a schoolyard paving system "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[127]

Gorsuch's concurrence argued that such a distinction is difficult to apply, and there's no reason why the "Free Exercise Clause should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief."[128] The use/status distinction ultimately makes the same mistake as the distinction between belief and practice drawn in

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[121] *Hobby Lobby Stores, Inc.*,723 F.3d at 1153 (Gorsuch, J., concurring).

[122] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2276 (2020) (Gorsuch, J., concurring).

[123] *Id.* at 2275.

[124] *Id.* at 2278.

[125] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017) (Gorsuch, J., concurring).

[126] *Id.* at 2019 (majority opinion).

[127] *Id.* at 2021.

[128] *Id.* at 2026 (Gorsuch, J., concurring).

Reynolds v. U.S, protecting religious beliefs without recognizing the freedom to practice those beliefs in the public sphere.[129]

However, Gorsuch's concern with the use/status distinction did not lead to an argument for the overruling of *Locke v. Davey,* wherein a bar of scholarships for theology decrees was upheld.[130] Rather than rejecting *Locke*, Gorsuch argued that *Locke* only permits a bar on the use of public funds to train clergy.[131] *Locke* ultimately does not concern whether a student is discriminated against for his use of funding or for his status as a religious individual.[132] Unlike a status/use distinction, *Locke* does not necessitate any examination of subjective examination of the effects of the law on the individual conscience.[133] *Locke* is a discrete rule based in part on the establishment clause, not a general test applicable to every situation.[134]

Further applying *Trinity Lutheran,* in *Espinoza v. Montana Department of Revenue*,[135] the Supreme Court held that the no-aid provision of the Montana Constitution, barring the use of public funds by religious schools,[136] violated the First Amendment.[137] In striking down this portion of the Montana Constitution, the Court emphasized that "Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools."[138] Chief Justice Roberts, writing for the majority, focused his analysis on statutory language that discriminated against institutions and individuals based on their religious status.[139] As he did in *Trinity Lutheran*, Justice Gorsuch wrote a separate concurrence.[140] This concurrence brought his critique of the distinction between religious status and use into sharper relief.[141] He centered on the constitutional need to protect religious practices, not merely protecting religious beliefs.[142]

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[129] Reynolds v. United States, 98 U.S. 145, 166–67 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

[130] Locke v. Davey, 540 U.S. 712, 725 (2004).

[131] Trinity Lutheran Church of Colom., Inc. v. Comer, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring).

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (Gorsuch, J., concurring).

[136] Such provisions, often described as Blaine Amendments, have their origins in anti-Roman Catholic discrimination and prejudice in the 19th century, as Justice Alito demonstrated in *Espinoza*, 140 S. Ct. at 2267–68.

[137] *Espinoza*, 140 S. Ct. at 2256 (majority opinion).

[138] *Id.* at 2255.

[139] *Id.*

[140] *Id.* at 2274–78.

[141] *Espinoza*, 140 S. Ct. at 2275 (majority opinion).

[142] *Id.*

Gorsuch argued that "any jurisprudence grounded on a status-use distinction seems destined to yield more questions than answers," devolving into subjective jurisprudence that fails to actually consider the religious claims of the parties.[143] Ultimately, a distinction between religious status and use is arbitrary and does not provide sufficient protection for the religious conscience.[144] "Maybe it's possible to describe what happened here as status-based discrimination. But it seems equally, and maybe more, natural to say that the State's discrimination focused on what religious parents and schools *do*—teach religion."[145]

In addition to being complicated and capricious, this arbitrary line drawing ultimately exceeds the courts' constitutional authority and responsibility.[146] "The Constitution . . . protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly."[147] Religious actions must be protected with just as firm a commitment as religious mental beliefs because the Constitution itself protects both rights with vigilance.[148] Courts have a duty to carefully protect religious actions, not merely preserving people's right to have a religious status.[149]

Gorsuch highlighted the impossibility of protecting religious beliefs while disfavoring religious practice.[150] "The right to *be* religious without the right to *do* religious things would hardly amount to a right at all."[151] If the government may intrude into religious practice, those with deep faith resulting in unpopular actions cannot carry out "lives true to their religious convictions."[152] Ultimately, focusing on religious status obscures the constitutional violations at the heart of the no-aid provisions.[153] "Calling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same."[154]

Gorsuch highlights how the Court's precedents are united in recognizing the importance of free exercise in both belief and practice, without limitation merely to internal belief.[155] For example, in *McDaniel*

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[143] *Id.*
[144] *Espinoza*, 140 S. Ct. at 2275.
[145] *Id.* (emphasis in original).
[146] *Id.* at 2276 (Gorsuch, J., concurring).
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Espinoza*, 140 S. Ct. at 2276.
[151] *Id.* at 2277 (Gorsuch, J., concurring) (emphasis in original).
[152] *Id.* at 2278 (Gorsuch, J., concurring).
[153] *Id.*
[154] *Id.*
[155] *Id.* at 2277 (Gorsuch, J., concurring).

v. Paty,[156] the Court struck down a state law banning clergy from serving in the legislature because the law discriminated based on "status, acts, and conduct."[157] The Court's analysis in *McDaniel* did not center on some nebulous distinction between religious use and practice but on the need to robustly protect religious practice in all its forms.[158]

Any attempt to protect religious practice while prohibiting specific religious uses is sure to end in disaster.[159] "The right to *be* religious without the right to *do* religious things would hardly amount to a right at all."[160] If the courts are only required to protect the religious status of an individual but are free to curtail the religious manner in which he uses generally available benefits, there are few constitutional protections for religion left.[161]

E. Covid-19 and Religious Liberty

The Covid–19 health crisis has brought issues of religious freedom to the center of the national consciousness. Justice Gorsuch's work in these cases has highlighted the dangers of a philosophy of "Judicial Modesty" that fails to fully protect constitutional liberties and the paramount importance of Free Exercise in times of crisis.[162] During Covid-19, Gorsuch has demonstrated his fundamental interpretative commitment to the protection of religious liberty and enumerated rights.

In *Calvary Chapel Dayton Valley v. Sisolak*,[163] Justice Gorsuch joined a lengthy dissent by Justice Alito, highlighting how the Nevada Covid-19 restrictions targeted places of worship.[164] Justice Gorsuch also authored his own brief dissent, emphasizing the clarity of the Constitution.[165] In this dissent, he highlighted the way the executive order revealed the priorities of the State of Nevada, which contrast sharply with the priorities of the Constitution.[166]

> In Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new. But the First

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[156] McDaniel v. Paty, 435 U.S. 618 (1978).
[157] *Id.* at 627.
[158] *Espinoza*, 140 S. Ct. at 2278 (Gorsuch, J., concurring).
[159] *Id.*
[160] *Id.* at 2277 (Gorsuch, J., concurring).
[161] *Id.*
[162] *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020); Roman Cath. Diocese, 141 S. Ct. 63, 69 (2020); Fulton v. City of Phila., 141 S. Ct. 1868, 1926 (2021).
[163] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).
[164] *Id.* at 2604 (Alito, J., joined by Gorsuch & Kavanaugh, JJ., dissenting).
[165] *Id.* at 2609 (Gorsuch, J., dissenting).
[166] *Id.*

> Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.[167]

Likewise, when the Court denied injunctive relief to California churches facing similar restrictions, Justice Gorsuch joined in the dissent written by Justice Kavanaugh, which objected to California's twenty–five percent occupancy cap for places of worship that did not apply to any other businesses.[168]

These coronavirus cases culminated in *Roman Catholic Diocese v. Cuomo.*[169] The Court issued a per curium opinion prohibiting the Governor of New York from enforcing ten and twenty–five–person occupancy limits on religious worship, when the ban was not proportionate to restrictions in place on similarly situated businesses.[170] Justice Gorsuch wrote a separate concurrence to underscore the importance of active commitment to the Free Exercise Clause in times of crisis.[171]

Gorsuch stressed the incompatibility of allowing gatherings for all purposes except religious practices with the Free Exercise Clause, particularly when religious gatherings comply entirely with safety precautions.[172] "The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces."[173] Such a disfavoring and dismissal of religion is never constitutionally permissible.[174] While a pandemic may justify some limitations upon religious practice, it cannot allow for a dismissal of religious practice as "unessential."[175] "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."[176]

Gorsuch accentuated the need for an active commitment to enumerated rights, particularly the Free Exercise Clause.[177] The enumerated rights of the Constitution require more vigilant protection than the nonexplicit rights developed beyond the Constitution.[178] "Even if

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[167] *Id.*
[168] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020).
[169] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63 (2020).
[170] *Id.* at 68.
[171] *Id.* at 69 (Gorsuch, J., concurring).
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Roman Cath. Diocese*, 141 S. Ct. at 69.
[176] *Id.* at 70 (Gorsuch, J., concurring).
[177] *Id.*
[178] *Id.*

judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise."[179]

Justice Gorsuch also critiqued the impulse towards judicial restraint that leads Courts to stay out of matters that are the courts' responsibility.[180] There is "a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do."[181] There must not be any "sacrifice of fundamental rights in the name of judicial modesty."[182] Judges must not use judicial modesty as an excuse to avoid maintaining the protections offered by the Constitution, even in times of social crisis.[183]

F. Employment Division v. Smith and Solicitation for Religious Freedom

One impulse demonstrated throughout all of Gorsuch's opinions is the inclination to overrule *Employment Division v. Smith.*[184] The argument for overruling *Smith,* a case which held that the Free Exercise Clause does not apply to neutral and generally applicable laws,[185] is not a new one and was made extensively throughout *Fulton v. City of Philadelphia.*[186] Members of the Supreme Court have extensively critiqued *Smith* ever since the holding was reached.[187] The scholarly

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[179] *Id.* at 70–71.

[180] *Id.* at 71 (Gorsuch, J., concurring).

[181] *Roman Cath. Diocese*, 141 S. Ct. at 71.

[182] *Id.* at 72.

[183] *Id.*

[184] Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 887–90 (1990).

[185] *Id.* at 878.

[186] *See generally* Brief for the Robertson Constitutional Center as Amicus Curiae Supporting Petitioners, Fulton v. Phila., 141 S. Ct. 1868 (2021) (No. 19-123). This Article was originally written before *Fulton* was released in anticipation of that decision, but no analysis needed to be changed as a result of the outcome in that case, as Justice Gorsuch's concurrence in *Fulton* was in full agreement with the rest of his free exercise jurisprudence.

[187] City of Boerne v. Flores, 521 U.S. 507, 544–45 (O'Connor, J., joined by Blackmun, J., dissenting) ("I remain of the view that Smith was wrongly decided, and I would use this case to reexamine the Court's holding there. . . . If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in Smith, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that Smith improperly restricted religious liberty.").

community has also extensively critiqued the Court's decision.[188] It would exceed the scope of this Article to reiterate all the critiques against *Smith.* Rather, Justice Gorsuch's response to *Smith* provides a window into his jurisprudence, emphasizing the importance of robust protections for religious conscience. His attack on *Smith* in *Fulton* is but the culmination of a principled opposition to that approach visible throughout his jurisprudence.[189]

The general tone of Justice Gorsuch's jurisprudence calls *Smith* and any narrow view of the Free Exercise Clause into question. Gorsuch emphasized in *Masterpiece Cakeshop* that "it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive."[190] This language contrasts with the Court's fear in *Smith* of making the "professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[191] In contrast with *Smith*'s skepticism of religious claims, Gorsuch has emphasized respect for sincere religious exercise, whether popular or "offensive."[192] "When a sincere religious claimant draws a line ruling in or out a particular religious exercise, 'it is not for us to say that the line he drew was an unreasonable one.'"[193] For Gorsuch, unlike the Court in *Smith*, the freedom to determine religious actions based on religious conscience is a feature of our constitutional system to be celebrated, not something to be feared.[194]

Justice Gorsuch has also critiqued the dangers of an unhealthy judicial restraint, calling *Smith*'s reasoning into question. The Court's holding in *Smith* was premised on a concern to avoid excessive judicial entanglement with religious affairs.[195] *Smith* warned that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[196] While *Smith's* solution to dangerous interference with the scope of religious beliefs was to order that courts step out of religious claims, Justice Gorsuch has instead emphasized the need to have restraint even in our

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[188] *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 629 (2003); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1115 (1990).

[189] Fulton v. City of Phila., 141 S. Ct. 1868, 1926 (2021) (Gorsuch, J., concurring).

[190] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

[191] Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 879 (1990) (citing Reynolds, 98 U.S. at 145).

[192] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

[193] Yellowbear v. Lampert, 741 F.3d 48, 55 (10th Cir. 2014).

[194] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

[195] *Emp. Div.,* 494 U.S. at 889 n.5.

[196] *Id.*

judicial restraint.[197] There is "a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack."[198] While Justice Gorsuch has highlighted the critical importance of judicial modesty in terms of reading statutory texts as they are written,[199] he has just as strongly warned against the "sacrifice of fundamental rights in the name of judicial modesty."[200] His jurisprudence emphasizes that judges must be willing to actively protect constitutional rights and not shirk from their constitutional duties.

Justice Gorsuch's examination of *Smith* itself is critical to any understanding of his opinion on the case. He acknowledged the controversy and critique of *Smith* in *Masterpiece Cakeshop,* stressing the fact that "*Smith* remains controversial in many quarters."[201] Although he went on to highlight the manner the Colorado Commission's actions in *Masterpiece Cakeshop* violated even *Smith,*[202] no one who believes *Smith* to be firm precedent would describe a decision in this manner. Justice Gorsuch also joined in a concurrence in *Kennedy v. Bremerton School District*, in which Justice Alito argued that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause."[203]

Perhaps Gorsuch's most extensive discussion of *Smith* before *Fulton* came while he served on the 10th Circuit Court of Appeals. He summarized the history of free exercise in *Yellowbear* while applying RLUIPA, arguing that *Smith* stands for the proposition that "[t]he devout must obey the law even if doing so violates every article of their faith."[204] This summary's tone is hardly favorable to *Smith's* holding. He went to argue that "[w]hat protections *Sherbert* appeared to afford religious observances, *Smith* appeared ready to abandon."[205] While, as Circuit Judge, Gorsuch did not have the authority to overrule the Court's precedents, this summary demonstrates a belief that *Smith* erred.[206] Gorsuch's negative opinion of the holding's reduction of religious liberty is

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[197] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring).

[198] *Id.*

[199] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738–39 (2020).

[200] *Roman Cath. Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring).

[201] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

[202] *Id.*

[203] Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Gorsuch, Kavanaugh, and Thomas, JJ., concurring).

[204] Yellowbear v. Lampert, 741 F.3d 48, 52 (10th Cir. 2014).

[205] *Id.*

[206] *Id.*

apparent, as his preference for robust protections for religious observances.

Also, Gorsuch has relied upon the cases which *Smith* rejected or recontextualized. In contrast with *Smith,* which treated earlier cases like *Wisconsin v. Yoder* as mere footnotes to history, involving "not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections,"[207] Gorsuch has emphasized, especially in *Espinoza*, that in *Yoder* "the Court held that Amish parents could not be compelled to send their children to a public high school if doing so would conflict with the dictates of their faith."[208] In other words, rather than accepting the hybrid rights theory put forward by *Smith* to explain away cases like *Yoder*,[209] Gorsuch takes *Yoder* on face value as involving the principles of faith.[210] Likewise, in contrast to *Smith's* recontextualization of *Sherbert v. Verner*, in *Espinoza,* Gorsuch looked to *Sherbert* to "illustrate the point" with "terms that speak equally to our case."[211] While *Smith* explicitly limited *Sherbert* to unemployment contexts,[212] Gorsuch argued that *Sherbert* had general relevance to free exercise issues.[213]

In the 2020–2021 term, the Supreme Court decided *Fulton v. Philadelphia,* a case concerning Philadelphia's ban of a Catholic adoption agency because of its religious refusal to place children with homosexual couples, and whether *Smith* should be overruled.[214] In oral arguments, Justice Gorsuch pointed out the challenge in applying *Smith* is determining whether a law is sufficiently generally neutral. [215] His concurrence highlights his critique of *Smith* and attacks it directly.[216] Gorsuch particularly critiqued the majority's finding that Philadelphia's policy is not generally applicable, arguing that the Court was sidestepping the real issues in the case.[217] He argued that the majority utilized arguments and laws not actually addressed in the briefs, ignoring the adversarial process.[218] In particular, Gorsuch attacks the majority for

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[207] Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

[208] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2776 (2020) (Gorsuch, J., concurring).

[209] *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 2 (2016); *see also* William J. Haun, *A Standard for Salvation: Evaluating "Hybrid-Rights" Free-Exercise Claims*, 61 CATH. U. L. REV.1, 2 (2011)..

[210] *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring).

[211] *Id.* at 2277.

[212] *Emp. Div.*, 494 U.S. at 873.

[213] *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring).

[214] Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

[215] Transcript of Oral Argument at 106, Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (No. 19-123).

[216] *Fulton*, 141 S. Ct. at 1926 (Gorsuch, J., concurring).

[217] *Id.* at 1926–27.

[218] *Id.* at 1927.

utilizing the state's definition of public accommodation, rather than the broad definition of the city, the actual subject of the suit.[219] The majority then found that foster agencies are not places of public accommodation, a question of state law, despite the lack of Pennsylvania law establishing this rule. Gorsuch reiterates again and again his critique of the "majority's circumnavigation of *Smith*."[220] "Given all the maneuvering, it's hard not to wonder if the majority is so anxious to say nothing about *Smith's* fate that it is willing to say pretty much anything about municipal law and the parties' briefs."[221] For Gorsuch, these circumnavigations and convoluted rules only heighten the need to directly and immediately protect religious liberty.[222] Under the majority's approach, there are so many loopholes that "this litigation is only getting started."[223] Gorsuch emphasized:

> *Smith* has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution. . . . The Court granted certiorari in this case to resolve its fate. The parties and *amici* responded with over 80 thoughtful briefs addressing every angle of the problem. Justice ALITO has offered a comprehensive opinion explaining why *Smith* should be overruled. And not a single Justice has lifted a pen to defend the decision. So what are we waiting for?[224]

For Gorsuch, the majority's position is "studious indecision" that fails to actually address the problems of *Smith*.[225] The majority wishes to avoid picking a side on controversial matters. "But refusing to give CSS the benefit of what we know to be the correct interpretation of the Constitution *is* picking a side."[226]

Justice Gorsuch's concern with an overly restrained judiciary, unwilling to take Constitutional rights seriously, was clearly articulated in *Fulton v. Philadelphia*.[227] He described the majority's goal as trying "to turn a big dispute of constitutional law into a small one."[228] Throughout his opinion, while wholeheartedly rejecting Smith, he critiqued the

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[219] *Id.*
[220] *Id.* at 1928.
[221] *Id.* at 1929.
[222] *See generally Fulton*, 141 S. Ct. at 1929–31.
[223] *Id.* at 1930.
[224] *Id.* at 1931.
[225] *Id.*
[226] *Id.*
[227] *Id.* at 1926.
[228] *Fulton*, 141 S. Ct. at 1926–27.

majority for its "studious indecision" in being unwilling to do the same.[229] Justice Barrett expressed concern about the various disputes that would arise as a result.[230] Gorsuch acknowledged that challenging questions may arise.[231]

> But that's no excuse for refusing to apply the original public meaning in the dispute actually before us. Rather than adhere to Smith until we settle on some "grand unified theory" of the Free Exercise Clause for all future cases until the end of time, the Court should overrule it now, set us back on the correct course, and address each case as it comes.[232]

In a way, Justice Gorsuch is expressing as vigorous a view of stare decisis as Justice Thomas, at least in the context of Free Exercise Clause. Perhaps most strikingly, Justice Gorsuch expresses the need to overturn Smith as a moral commitment, and not merely a legal one.[233] "We owe it to the parties, to religious believers, and to our colleagues on the lower courts to cure the problem this Court created."[234] Sometimes religious freedom matters are portrayed as individuals going to the courts, pleading for largesse. For Gorsuch, it is the exact opposite, and it is the Court who has a fundamental obligation, perhaps even a sacred obligation to return to the Constitutional text and overturn Smith.[235]

Smith leaves religious liberty protections to the majority, and in so doing leaves religious liberty undervalued.[236] As Justice Gorsuch emphasized in *Masterpiece Cakeshop*, "[p]opular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."[237] As traditionally widespread beliefs become more disfavored in society, protection of unpopular religious beliefs becomes ever more critical. Justice Gorsuch has emphasized the need to take religious claims seriously and robustly in both belief and practice.[238]

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[229] *Id.* at 1931.

[230] *Id.* at 1883 (Barret, J., concurring).

[231] *Id.* at 1931 (Gorsuch, J., concurring).

[232] *Id.* (citation omitted).

[233] *Id.*

[234] *Fulton*, 141 S. Ct. at 1931.

[235] *Id.*

[236] *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1115 (1990).

[237] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

[238] *Id.*

Rather than tacitly assuming the appropriateness of laws that are "generally applicable," Gorsuch has stressed the need to always protect the sincere claims of religious conscience.[239] "Smith committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow."[240] After *Fulton*, it is clear that Gorsuch not only believes that *Smith* should be overturned. He believes that overturning *Smith* is an urgent mandate and an absolute requirement when "the costs are so many."[241] Refusing to give the people "the benefit of what we know to be the correct interpretation of the Constitution is picking a side," and Gorsuch has made very clear that this is not the side he has chosen.[242]

CONCLUSION

Justice Gorsuch has cautioned against partisan views of the nature of the judiciary. "It is a warning sign that our judiciary is losing its legitimacy when trial and circuit-court judges are viewed and treated as little more than politicians with robes."[243] We have developed a culture that has become addicted to utilizing judges and lawyers to affect social change.[244] Rather than neatly aligning with one particular party or another, judges must commit to fairly and justly decide the case that comes before them.[245] The "responsibility in picking judges is to help the nation find objectively excellent public servants, not to turn the process into an ideological food fight."[246] "Ideological Food Fight" is a term that could aptly apply to any of the Supreme Court nominations, and most of the Circuit Court nominations, of recent memory. Both political parties would be wise to heed this warning. For Gorsuch, judges should be defined by their constitutional duties to such first-order principles as religious liberty, not preferred public policies.

In our constitutional republic, judges and citizens will disagree on textual interpretation and have a wide variety of public policy opinions. But certain principles are fundamental issues that we should unite on, regardless of our disagreement on other matters. A recognition of the necessity and importance of religious liberty is one such matter, a foundational constitutional commitment. As Justice Gorsuch has shown,

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[239] *Id.*

[240] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring).

[241] *Id.*

[242] *Id.*

[243] Neil Gorsuch, *Liberals'N'Lawsuits*, NAT'L REV. (Feb. 7, 2005, 12:42 PM), https://www.nationalreview.com/2005/02/liberalsnlawsuits-joseph-6/.

[244] *Id.*

[245] *Id.*

[246] *Id.*

we must be "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."[247]

Judicial restraint is often praised as a restraint upon judicial activism's excesses, particularly by legal conservatives.[248] There are certainly many circumstances where a claim is beyond the Court's scope and is better left to the discussions of civil society. Free exercise is not one of those areas, particularly as certain religious beliefs grow more and more unpopular. "Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."[249] Unlike non-judicial political concerns, "the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[250]

One of the courts' primary roles is to vigilantly protect the enumerated rights laid out in the Constitution.[251] While all the enumerated rights are in crucial need of defending, the Free Exercise Clause is at the core of our constitutional system. The courts cannot surrender the responsibility to protect it in the face of cultural pressures.[252] "[W]e may not shelter in place when the Constitution is under attack. Things never go well when we do."[253]

Gorsuch has concentrated on the importance of the courts taking every religious believer as they find them, recognizing the significance to the individual of the claims of religious conscience. Justice Gorsuch has critiqued a distinction drawn between discrimination based on religious status and discrimination based on religious use, pointing to the effect of religious identity on all of life.[254] He has emphasized the critical necessity of a robust understanding of religious liberty in American public life, that is not regulated to the shadows of the public sphere but is embraced as critical to functioning civil discourse.[255]

The Court did not overrule *Smith* in *Fulton*, and it may not officially end the status-use distinction in some other future case. But for

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[247] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2020).

[248] *See, e.g.*, Wash. State Grange v. Wash. State Rep. Party, 552 U.S. 442 (2008).

[249] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

[250] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[251] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 69–71 (2020) (Gorsuch, J., concurring).

[252] *Id.* at 70–71.

[253] *Id.* at 71.

[254] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring).

[255] *Id.* at 2026.

it to maintain its role as the defender of liberties in our republic, it should heed Justice Gorsuch's jurisprudence, particularly his emphasis on taking religious beliefs seriously. Courts lack the freedom to reinterpret people's religious beliefs whenever they deem those beliefs offensive. They also do not have this discretion for religious claims regarding the new sexual liberties recognized by cases like *Bostock*. Any concerns regarding *Bostock* should be mitigated by an acknowledgment that Gorsuch only could allow that result upon the basis of a focus on the protection of religious convictions amid changing social norms. If and when the Court does take the necessary step of overturning *Smith*, Justice Gorsuch will certainly show himself to be forefront in that effort and in his commitment to robust religious protection for all. As he emphasized in *Fulton*, "[t]hese cases will keep coming until the Court musters the fortitude to supply an answer."[256]

It is easy to praise religious freedom in the abstract, but it is far harder to robustly protect those claims when raised in practice. Nonetheless, protecting these claims is our constitutional responsibility. "Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."[257] For Gorsuch, judges, particularly the Justices of the Supreme Court, have a fundamental duty and obligation to give people "the benefit of what we know to be the correct interpretation of the Constitution."[258]

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[256] Fulton v. City of Phila., 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring).

[257] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

[258] *Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring).