



Jeffrey Rosen: [00:00:00] I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit, chartered by Congress, to increase awareness and understanding of the constitution among the American people.

Just before Thanksgiving, the Supreme Court blocked New York's coronavirus restrictions on attendance at houses of worship. The court sided with the Roman Catholic Diocese of Brooklyn, and two Orthodox Jewish synagogues. They argued that the restrictions violated the free exercise of religion guaranteed by the First Amendment.

To understand the decision and its implication for future cases, I'm joined by two of America's leading constitutional scholars and two great friends of We the People. Michael Dorf is Robert S. Stevens Professor of Law at Cornell Law School. He writes a bi-weekly column for Justia's web magazine, Verdict, and posts on his own blog, Dorf on Law. Michael, it is wonderful to have you back.

Michael Dorf: [00:01:04] I'm delighted to be here. Thank you.

Jeffrey Rosen: [00:01:06] And David French is a senior editor for The Dispatch, and was formerly a senior writer for National Review. David is a New York Times bestselling author, and author of the new book, Divided We Fall. David, it is wonderful to have you back on the show.

David French: [00:01:20] Thanks so much for having me. I appreciate it.

Jeffrey Rosen: [00:01:23] Let us begin, as Professor Kingsfield said, with the facts. Michael, tell us what restrictions New York Governor Cuomo had imposed, and what the court held in its procuring opinion.

Michael Dorf: [00:01:37] So you'll recall back in March and April, when the pandemic was raging in New York City, and other parts of the state, the state went to, virtually, a complete shutdown for a period. And then restrictions loosened. As cases began to tick up Governor Andrew Cuomo adopted a color-coded system, whereby, eh, they were trying to target neighborhoods rather than whole regions as a means of avoiding unnecessary shutdowns.

And this had different kinds of restrictions, for all sorts of activities, based on whether one was in a green zone, an orange zone, a red zone. For our purposes, the key restrictions were that in an orange zone, which was the sort of penultimate level of severity houses of worship were limited to 25 people. And in a red zone, to only 10 people at a time. Now, these restrictions were actually less restrictive than some comparable secular activities like lectures and concerts, but more restrictive than others, like indoor dining, and shopping at grocery stores and bike shops, and so forth.

And so the restrictions were challenged by a Catholic group and an Orthodox Jewish group saying that they violated the free exercise of religion. In particular, that it was discrimination against religion, because New York deemed essential services and did not impose these numerical limits for grocery stores, et cetera. And they won. The Supreme Court sided with the religious plaintiffs, saying that uh, the public health justification for these severe



restrictions was equally applicable to some of the activities that were being permitted. And therefore that was discrimination on the basis of religion in violation of the First Amendment.

I- in so doing, they parted with two earlier decisions from the spring and summer, one out of California, and one from Nevada. The court thought that those cases were a little different, although it's notable that the justices who dissented in those cases were in the majority, in this case. So it could signal that the current court following Justice Ginsburg's death and the appointment of Justice Barrett, the court is more open to claims of religious discrimination.

Jeffrey Rosen: [00:03:50] Thank you very much for that helpful introduction. David, what would you like to add, if anything, to Michael's statement of the facts? And then tell us more about what he identified as the core of the court's procuring and holding. Namely that a challenge restrictions violates the minimum requirement of neutrality to religion, and that requirement the court attributed to a case called Church of Lukumi Babalu Aye versus Hialeah. Tell us about that case and how it was applied here.

David French: [00:04:18] Yeah. So this is a case that I... I'm trying to think of how is the best way to phrase the way it was quite unusual and, and actually h-, what would be the right word to describe some of the exchanges between the justices quite spicy? There was a really, a sharp, by judicial standards, exchange between justice court, where Justice Gorsuch fired some volleys at the Chief. The Chief responded rather tartly.

Sort of the... sort of the Judicial... the Supreme Court version of two talking heads yelling at each other, [laughs], on a primetime hit, but in very polite judicial language. It was a fascinating case, because I would describe it as, as the battle over Jacobson versus Massachusetts. So, there's a 1905 Supreme Court case involving mandatory inoculations in the face of a spreading smallpox at epidemic, where the Supreme Court granted wide deference to state officials on matters of public health.

And so for a while, there has been sort of... Especially at the Supre-... eh, the Supreme Court has, eh, going all the way back to South Bay United Pentecostal Church versus Newsom. This is a California case from May. Essentially, what the ju-, the justices did or what the majority did, in that case, is it cited Jacobson versus Massachusetts. And it essentially said when officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad.

And so, the question at hand was, in the atmosphere of the pandemic... And one of the key questions in the case is, in the atmosphere of the pandemic, do some of the normal judicial tests fall by the wayside, or are we going to s-, continue to apply kind of the, what you might call the normal tests, like the Smith test?

Or you know, as you're... as you were talking about in Church of Lukumi Babalu Aye, it's, it's that... That's the best way I know how to pronounce it, [laughs]. Do we apply these normal tests and... or do we sort of have a specific test, a different test during a pandemic, where we're gonna grant broader discretion than we would ordinarily grant?



And the majority in in the most recent case, in the Cuomo case said, "Essentially, we're not gonna go by Jacobson. Jacobson does not control here the normal free exercise jurisprudence controls." Now, that doesn't mean that a church will win automatically. That doesn't mean that pandemic regulations are always gonna be struck down when they restrict the activities of churches. But in this case, it violated the rule of the minimum requirement of neutrality.

And also one of the thing I would... And so, and so applying this normal test, the Supreme Court struck down their restriction. One other thing that I would note here, I think that's very, very important to the outcome, because there have been different church challenges brought in the course of the pandemic. Some of the church challenges... Many of the church challenges has been brought by churches who engage in masking and social distancing.

So, they c-, they have limited maximum occupancy. They social distance, they mask, or in some cases they, they meet outside, and distance, and mask. And some have been brought by churches who do none of those things. There's a case winding up th-, in California State Court, involving a very large church where people aren't social distancing or masking at all.

But in this circumstance, you had the religious institutions had limited their occupancy to 25 or 33% capacity, engaged in precautionary measures. And it was uncontradicted evidence that they hadn't had a single outbreak for months. And so, I think those facts were very important to the court's final determination. But the bottom line is, I, I look at this case as a, as a very interesting example of the, the, the dispute on how much will a pandemic not just affect the outcome, but affect the, the test the court applies to reach its outcome.

Jeffrey Rosen: [00:08:26] Thank you very much for that. Michael, David very interestingly suggests that the dispute between the majority in the Senate was over to apply the ordinary rules. And Chief Justice Roberts took issue with that characterization. And replying to Justice Gorsuch's emphasis on the Jacobson cases having been at the center of the court's California ruling, Chief Justice Roberts said, "While Jacobson occupies three pages, today's concurrence, eh, warranted exactly one sentence in the California case."

What did that one sentence say? Only that our constitution principally entrusts the safety and health of the people to the politically accountable officials of the state to guard and protect. It's not clear what part of this lone quotation today's concurrence finds so discomfoting. So, desegregate this exchange. Do you agree with David, that, eh, Jacobson was uh, sort of an exception to the constitution during pandemics, and here are the ordinary rules were being applied? Or, or, or with Roberts, that that Gorsuch was putting too much weight on, on Jacobson?

Michael Dorf: [00:09:26] Yeah, it's interesting. So I do wanna disagree slightly with David, and with Justice Gorsuch in the following sense. I do not think that the notion of judges deferring to political actors with respect to medical determinations is an emergency only propositions. Lemme give you a two cases to show you that this is something that happens relatively routinely in the court's jurisprudence, and doesn't have a clear ideological valence.



So, one is the 2007 case of *Gonzalez against Carhartt*, in which the Supreme Court upheld the federal Partial-Birth Abortion Ban Act, partly on the ground that, as Justice Kennedy put it in his majority opinion, there was medical uncertainty about whether a particular method of abortion was ever medically necessary. And in such circumstances, they would defer to Congress's judgment.

Another example is a 1979 case in co-... called *United States against Rutherford*, which technically wasn't a constitutional challenge, but had constitutional overtones. In which doctors and patients wanted to be able to prescribe and take an experimental medicine for cancer, called *Laetrile*, that had not been approved by the FDA.

And the Supreme Court in an opinion by Justice Thurgood Marshall, sided with the government in saying that, "The, there is a strong government interest in only having people take approved medicines. We have an administrative system set up to deal with that. It's not... We, as judges, are not especially competent to second guess their judgment."

Now you might say, well, that's a case in which the FDA is exercising a kind of expertise that it has, but that both judges and elected officials lack. And I think that's true. But what elected officials have is a kind of responsiveness to public opinion, that courts also lack.

And I see Chief Justice Roberts in these cases in deferring to elected officials, as saying, "We're not experts in medicine, and we're not experts in how to balance the very strong public interest in economic activity, in religion, and all the other activities that could be balanced against public health. We're going to therefore leave it to the elected officials." To me, that is not an extraordinary proposition only for emergencies, but a kind of background principle of constitutional law.

Jeffrey Rosen: [00:11:52] David, your response to, to M- Michael's suggestion. And, and also give us a sense of how you imagine the justices would balance the public health concerns against the liberty concerns, if they were to decide the case on the merits. Are there other cases that would guide them in that balancing act? And, and what would they do?

David French: [00:12:11] Well, you know, I think that let's say... let's, let's say for example rather than dealing with the minimum requirement of neutrality, le- let's say, for example, you are applying strict scrutiny to a governmental restriction related to the pandemic.

Many of these restrictions will pass strict scrutiny. There's a compelling governmental interest, for example, in the limiting the spread of a deadly disease. Many of these restrictions especially for example social distancing, masking are the least restrictive means of advancing this compelling interest.

And so, I think one thing that needs to be stated clearly is that in the... contrary to a lot of the commentary you saw online is that this was not a sanction. This case did not create precedence for a sanction for super spreader events. What it was saying is that the specific regulations here were not neutral. It was not saying that a pandemic related regulation, if it limits religious activity is going to always be struck down. It didn't... doesn't say that at all.



I think one of the problems you have, if you're talking about pandemic related regulations and deference, it seems to me hard to argue that there hasn't been an extraordinary level of deference. For example, when you talk about the case that came out of Nevada, where you had limits on church attendance, that didn't apply to, for example, being in a casino, [laughs].

And so, in a normal non-pandemic kind of situation that case is a winner every time, on the part of in a free exercise change.... I- in a free exercise claim. In the pandemic, it was that there is in fact something about this pandemic that was increasing deference for a time. For a time.

And I think one of the things that Gorsuch says in his, in his concurrence is as we learn more about a pan-... the pandemic, courts are then able to start to apply the kinds of normal scrutiny that they apply to, you know, even to health-related restrictions. There isn't a doctrine that just sort of says, "If there's a health justification, we wash our hands off the case." They'll be subjected to scrutiny. There will be some judicial there will be some judicial analysis of this.

And I think that that's one of the... Think that's the, the... sort of the key aspect of this case. Is that if you're a public official and you're going to be limiting, not just houses of worship, but First Amendment protected expressive activity, if you're going to create glaring inconsistencies in your application of various rules and regulations, that on their face do not appear to have an epidemiological basis, you're going to be subjected to some very real First Amendment scrutiny.

And that sort of the days prior where, you know... And, and Roberts is being a little bit clever, [laughs]. Because if you go back and you look at the opinion in *South Bay United Pentecostal Church*, where he cites *Jacobson*, in the, in the body of the opinion, he... there's, I believe, it looks like there's three cases, total, cited.

This was an extremely short opinion. And *Jacobson* was sort of the co-... was the core of the opinion. So, it's entirely fair for Gorsuch to take aim at *Jacobson*. I think he did it in a s-, excessively snarky way. But I, I just do think that this was passing of the sort of doctrinal torch away from *Jacobson*, maximum *Jacobson* deference, and back towards conventional legal analysis.

Jeffrey Rosen: [00:15:42] Michael, David suggests that the court was applying a version of strict scrutiny, or a heightened scrutiny, or these normal free exercise analysis. Justice Gorsuch did indeed say, famously or memorably, "Even if the constitution has taken a holiday during this pandemic, it cannot become a sabbatical."

Whe- where does strict scrutiny come from? Is it from the *Hialeah* case, the *Lukumi Babalu Aye* uh, case, or from some other case? Is it premised on the judgment that the regulation isn't neutral, or, or is it regulation isn't neutral a result of strict scrutiny? And then, tell us something that you've written extensively about why you believe the court was wrong to conclude that the regulation wasn't neutral.



Michael Dorf: [00:16:22] So, the background to the Lukumi case is an earlier case called *Employment Division against Smith*, which involved the ritual use of peyote by two native Americans in Oregon. Wh-, and the Supreme Court in that case said that Oregon could apply its general prohibition on peyote use to everybody, even those who wanted to use it for religious purposes. Because the free exercise clause does not entitle to people... that it doesn't help people who are engaged in religious exercises to exceptions from neutral, generally applicable laws.

In the Lukumi case, the City of Hialeah had adopted a series of ordinances that targeted specifically the practitioners of Santa Raya. And so, it was a case of discrimination. And so, the rule coming out of the combination of *Smith* and *Lukumi* is that neutral laws of general applicability, meaning just general laws that don't single out religion, are only subject to rational basis scrutiny, the minimal scrutiny that applies, even if in a particular case they burden somebody's religion. But that laws that discriminate on the basis of religion are subject to strict scrutiny.

So, that's the origin of this, this rule. The court has not overruled *Smith*, although it's been asked to, and some justices have expressed a willingness to do so. And I should say, maybe we'll get into this a little bit later I have some sympathy for the proposition that *Smith* is wrongly decided. So, I'm not hostile to the notion of religious exceptions, but so long as *Smith* is the rule one would think the question is, is there discrimination against religion here and not just a burden on religion?

Because there's undoubtedly a burden. I think everybody reasonable, we can see that there's a, a substantial burden in limiting the number of congregants. The reason why the majority in the *Archdiocese* case said that this was discriminatory was because they applied a principle that professor Doug Laycock has advocated, that is sometimes analogize to most favored nation status.

The idea is that even if you have a law that treats some non-religious, and that is to say secular activities that are comparable to the religious activities, exactly the same, or even worse, you treat as discriminatory the entire regime, if you can find even a single comparable secular activity that's treated better. Justice Kavanaugh, in the Nevada case, I think spelled this out quite nicely in saying that, "Well, their casinos pose a greater risk of spread and their secular activities, therefore the law that ge-... that treats churches better than some lectures, et cetera, is still discriminatory, because it treats them worse than casinos."

I think I would say that if the most favorite nation principle is the right way to understand non-neutrality, then that's correct. Certainly on public health grounds, it was obscene that Nevada was allowing a gigantic field con-... casinos at the time regardless of what you think about the free exercise question. But as to the question, whether the most favored nation principle is part of the, the existing law, I think you could make it the law, but that would be a rather anomalous conception of discrimination. It's not the way we define discrimination in other contexts, either for equal protection purposes or under a freedom of speech.



Generally, you ask, is the government targeting the discriminated against activity? And here, that's not true. That is to say the... there are some exceptions, and you could make an argument that there aren't good public health justifications for some of the other exceptions. But it's very hard for me to imagine that there was an effort here to go after churches, synagogues, mosques, and the like. And so, to my mind, this isn't discrimination in a, a conventional sense. If you think the result is right... And I don't think it's obviously wrong, but if you think it's right, it seems to me the way to get there is to say that Smith is wrongly decided and the free exercise clause requires religious exceptions.

Jeffrey Rosen: [00:20:26] David, what do you think of Michael's interesting suggestion, that generally the question is, as he just said, is the government targeting religious activity that wasn't taking place here, but instead the court was adopting without saying so? A version of Professor Laycock's most favored nation status, treating the entire regime as discriminatory, because they identified a few secular activities that were treated better, including, as Justice Gorsuch said liquor stores and acupuncture clinics.

David French: [00:20:52] I agree with the analysis. I think what's happening is that the Supreme Court is hollowing... has been hollowing out Smith for a while without overruling Smith, [laughs], at least yet. It's, Smith, eh, reminds me increasingly of like the, the lemon test. Sort of a zombie doctrine that still exists lurching about the land, but, you know, it's easy to avoid and outrun.

So I think what's happened is that there has been a hollowing out of Smith. The Supreme Court is considering a case this term, *Fulton vs City of Philadelphia*, one of the questions presented is whether Smith should remain, whether Smith should be overruled? And what often happens when you see the court hollowing out a doctrine without overturning a doctrine, is you see an a-... Anomalies in the way in which it decides cases and analyzes facts.

And I would- you know, what Professor Dorf just said, what I thought was a very uh, clear, easy understand... easy to understand anomaly that is existing s-, with the sort of most favored nation status, which is a lot l- like a back door hollowing out a, a backdoor way to sort of, to overrule Smith without overruling Smith, at least not yet.

One other, just c-... And the second thing is, just as a tangent I think it would be fascinating, [laughs], to explore the extent to which the war on drugs has impacted the First Amendment, because I really wonder if Smith would have come out the same way if it didn't involve a hallucinogen.

And, and similarly, one of the very rare Supreme Court cases in the last few decades, that def-... that turned back a First Amendment claim, *Morse V Frederick*, school free speech claim in which a student unfurled a banner outside of school that said, "Bong hits for Jesus."

And I think as soon as the banner said, "Bong hits," he'd lost, [laughs], in the, in the Supreme Court, because there's this interesting sort of war on drugs, kind of distortion that hovers over the entire bill of rights often. But that's, I just took us into way, into a tangent.



Jeffrey Rosen: [00:22:58] Thank you so much for that. And you also took us into a welcome tangent by recalling Justice Scalia's famous concurrence in the case where he said of the lemon test, "Like some ghoul in a late-night horror movie that repeatedly, [laughs], sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys,"

David French: [00:23:21] [laughs].

Jeffrey Rosen: [00:23:21] ... at the Center Moriches Union Free School District, which was the advocates. Okay, Michael, so you- you've convinced David by your analysis, that the court is sort of moving forward, overturning Smith without saying so here. I, I want to... I want you to squarely analyze for our listeners, how an originalist justice could overrule Smith. And I understand that you're open to it.

But based on our podcast on the Pennsylvania Fuller case, I, it wasn't clear that Smith, written by Justice Scalia was itself uh, justified by original understanding nor the alternative to Smith name of the Sherbert and Verner Test, which would require that all laws that burden religion are justified by compelling interest, that that was justified by original understanding either.

So, if, if you were arguing to Justice Gorsuch, say as an originalist Justice, what argument would you make about why Smith should be overturned and the, and the Verner Test resurrected?

Michael Dorf: [00:24:14] So, to be clear I, myself, eh, I'm ambivalent about whether Smith ought to be overturned. I thought it was wrongly decided as an initial matter. I'm not sure whether there is enough of the sort of secret sauce when needs to overcome the requirements of starry decisio to overturn it.

The reason I... I'm a little bit cautious is I worry a fair bit that in the hands of this court, going back to the Sherbet regime, which, to be clear for our listeners, is the rule that says that even a neutral law of general applicability is subject to strict scrutiny where it burdens free exercise.

To go back to that rule these days, I think could potentially threaten anti-discrimination law, especially with respect to gender identity discrimination and sexual orientation discrimination. And there are lots of cases in the pipeline that suggest that. I think there is a compelling government interest in eradicating such forms of discrimination.

I don't think that compelling government interests extends all the way to, you know, requiring the ordination of female priests, for example, even notwithstanding the so-called ministerial exception. So I think there are... there ought to be some limits to the extent of anti-discrimination law that a, a post Smith regime would apply, but I worry that this court would not stop where I would stop. So that's my main hesitancy in sort of getting on board the, "Let's overrule Smith," bandwagon.



But if I were hired as an attorney, a hired gun to make the argument, well, sure here, this is, is a, a case in which the original understanding is I think fairly contested. So the, the leading scholarly argument for reading the original understanding contrary to Smith appears in a pair of articles by a Stanford law professor, former federal appeals court judge, Michael McConnell in the university of Chicago Law Review and the Harvard Law Review, both before and after Smith.

In which he argued that best understood at the founding free exercise meant that you got religious exceptions. There is some pushback against that. You see some of the pushback playing out in the Supreme Court cases. Justice Souter, who I think was the strongest champion of McConnell's view, 'cause he didn't much like the, the Smith decision but Justice Scalia himself pushed, pushed back as did some others.

I think the... You know, my best reading of the historical evidence is that, that that was not the primary concern of the framers with respect to free exercise. They were concerned about things like established churches in the literal sense. And so you know, you can look to the early hit... early period, but I think the evidence is going to be a- ambiguous. Of course, if I were hired to argue the case, I would do a much deeper dive and try to come up with evidence on one side or the other.

There's also the question of when you look, right? These are cases coming out of the States, the First Amendment by its terms doesn't apply to the States only applies to Congress. Even if you say, "Well, it applies to the whole of the federal government." Under *Baron* against city of Baltimore, the bill of rights doesn't apply to the States. What makes the First Amendment applicable to the States is incorporation via the 14th amendment.

And so you might want to look not to the state of free exercise, thinking in 1791, when the First Amendment was adopted, but in 1868, when the 14th amendment was adopted and see why people fought. It was that they were incorporating to the extent that we think it's the 14th amendment that does the work of incorporating the First Amendment as against the States. I should say that Justice Scalia doesn't do much of any of that in the Smith case itself.

What he mostly argues is on sort of judicial competence grounds, that it would be, you know, not consistent with the role of the court to apply strict scrutiny to laws of general applicability and thus they ought to do so. And there, I think the best response to that argument is that the court hasn't seemed to had a problem doing exactly that thing in construing the religious freedom restoration act.

Which, while not valid as a limit on the States is valid as a limit on the federal government and has been applied by this court as recently as the past term to limit federal action. And so, the judicial competence argument kind of fades away. And as I say, the historical argument is at best, uncertain. So I think there, you know, again, if you're hiring me as a hired gun, I think I can do a pretty good job of making an argument to overrule Smith.

Jeffrey Rosen: [00:28:51] Thank you so much for explaining about trying to debate so well. David, if you were arguing for the courts to overturn Smith on originalist grounds, what



would you say? And w- why do you think it is important that neutral laws of general applicability should be subject to strict scrutiny when they burden religion? And if the court would overturn, would you accept that test? What would the implications be?

David French: [00:29:19] So well, the first thing I would do is if I had any spare money lying around, I'd hire Professor Dorf as my hired gun-

Jeffrey Rosen: [00:29:25] [laughs].

David French: [00:29:26] ... to make, [laughs], the arguments that, many of the arguments he just made. Without repeating you know his arguments, w-... there's a couple of things to acknowledge, I think, or one thing to c-, acknowledge about much originalist... many originalist arguments about the First Amendment.

And that is, there's not a huge amount of literature that you can draw on to... that's really helpful in explaining an originalist application of the First Amendment to... For example an expansive large administrative state. I mean, we have a lot of free speech doctrine.

We have layer after layer, after layer of free speech doctrine, that both progressive, both judges nominated by more progressive politicians, presidents and judges nominated by more conservative politicians tend to agree with. Viewpoint neutrality requirements time, place, and doctrine surrounding time, place and manner restrictions.

If you look at a lot of First Amendment jurisprudence over the last 10, 15, 20 years, you're gonna see a lot of cases that are 72, you're gonna see some 90s. And there you're gonna see a lot of consensus brought on, on the part of justices who have different political philosophies.

And part of the reason for, I think for some of that consensus across these different political philosophies is it isn't as if there is a very s-, very clear originalist roadmap for all the sub-parts of the First Amendment, as opposed to a very clear roadmap under a competing judicial philosophies.

That the reality is, there sort of has to... there has to be some judicial tests making in the course of adjudicating these disputes. And one thing that I would say about the free exercise clause, and why I dislike Employment Division V Smith strongly.

I mean, I, I, I got to law school the year after it was decided. And when like all nine members of the religious liberty bar were up in arms, [laughs], about... Eh, religious liberty was a much less culturally contentious issue at that time than it is now.

But I've strongly disliked Smith in part, because is, one of the... If you're talking about original understanding of the First Amendment, and, and original public meaning of the First Amendment, I think it would be rather surprising to the drafters of the first... and, eh, eh, those who ratified the First Amendment and those who were understanding its meaning in the time.



Of course, it was only applied to the federal government not the States, but that religious free exercise would be so subordinate to the free speech clause. So impotent compared to the free speech clause, post-Employment Division V Smith. It was as if Employment Division V Smith just demoted free exercise.

So, that, in, in, in a kind of a fundamental conceptual way, in my view, was contrary to the original public meaning of the First Amendment. Which is that... Which was placing free exercise in the absolute sort of hierarchy of individual liberties. And so, what Employment Division V Smith did was, it just demoted it. It drained it of much of its potency.

And, you know, it's, it's interesting as these issues have been working their way through the court system, that you can see the parameters of an emerging judicial, I'm not gonna say consensus 'cause there's still sharp divisions. I mean, emerging judicial determination of a lot of culture war disputes be-... and the conflict between say free exercise and non-discrimination law, or free speech and non-discrimination law.

And it's the dichotomy between Bostock and the ministerial exception cases. In Bostock, there was six by six, three margin Justice Gorsuch writing the opinion, extended protections on the basis of sexual orientation and gender identity under employment non-discrimination protections on the basis of sexual orientation, and gender identity into Title VII and construing them as discrimination on the basis of sex. At the same time, the court just really widened the scope of the ministerial exception.

So, essentially, what seems to be happening is the court is creating a secular and sacred distinction in the application of non-discrimination law. So that se-... in the secular context, say a workplace, secular workplace, non-discrimination law is going to have broad purchase. In a religious environment, like a church or a ministry, non-discrimination laws can have much less purchase. And I f-, I f-, and I feel like that's the overarching doctrine that is developing right now.

Jeffrey Rosen: [00:33:56] Thank you so much for that very interesting observation. There is indeed a multi partisan consensus of the kind you describe, applying anti-discrimination norms in the workplace but not outside of it. Michael, your response to David's interesting suggestion? And then I'd like to put on your other hired gun happens they argue the other side. And if you were arguing against the overruling of Smith to the originalist justices what would you say?

Michael Dorf: [00:34:22] So, I, I, I think David's insight is, is quite interesting. I, I mostly agree with it. It, it almost seems that at least for the justices who are in the majority, in both of these sorts of cases, which is Justice Gorsuch, Chief Justice Roberts, sometimes Justice Brier he's sort of the most accommodationist of the remaining liberal justices, that it might be that the price of extending anti-discrimination law, as far as they're willing to, is the withholding of this exception.

But that does have this potential to then sort of bifurcate the society into, as David says, the secular and the sacred spheres. There's nothing inherently wrong with that. I mean, distinctions between the secular and the sacred are quite familiar. My worry would be that



that is a de facto victory for the sacred, because increasingly, the only people who are going to really want exceptions to anti-discrimination law will be religious.

That is to say, you don't really need prohibitions on discrimination against people who would be... not be inclined to discriminate on those grounds, to begin with. There will, of course, be some people who want to discriminate on the basis of gender identity or sexual orientation on secular or non-religious grounds. But I think they're going to increasingly be a, a small number of people. So that, that would be my, my concern. But I think as an observation, it's, it's very astute.

Second point I would make before moving on to accepting my newly... my new appointment I'd have to get a waiver from my prior client. [

but the... You know, one other thing that I- another place I want to agree with David is not only were these cases sort of not ideological originally, but to the extent that they were, the ideological valence has flipped.

So Smith is decided in 1990, it is mostly the liberals, with the exception of Justice Stevens, who dissent and say, "We want free exercise exceptions." And it's mostly the conservatives in the majority.

And you fast forward to the current era, even going back a few years with the application of how s-, how strictly one a- applies referral, like in the Hobby Lobby case from a few years ago, and it's the conservatives who want to weaken Smith, to broadly construe exceptions under RIFRA and under the ministerial exception. And it's the liberals who want to say, "Slow down, Smith is the rule."

I think what's happened is that each side has recognized that Smith was a highly anomalous case in which the religious claimant was also an ethnic minority, native Americans. But that in the more common case it's going to be a religious traditionalist, mostly Christian, but not exclusively, as we see in the Brooklyn case, who are making the claims.

That's not to justify the flip on either side. I don't think that's a good reason for anybody to s-, choose their principles based on who's going to win or lose. But I think it does explain what's happened. Okay, let me accept my assignment now, and try to make the argument.

So the first thing I'd say is modern day originalism is not based on the intentions and expectations of the framers and ratifiers, it's based on the original public meaning of the words. The words of the free exercise clause are embedded in the same First Amendment that protects freedom of speech, right?

Congress shall make no law respecting the establishment of religion, or restricting the free exercise thereof, or restricting... Or et cetera, et cetera. Right? The premise of the free speech doctrine is that a neutral law of general applicability that happens to be applied in a way that infringes somebody's ability to speak as effectively as they want, doesn't infringe their right of freedom of speech.



Let me give you an example, a case called, from a hypothetical that was raised in a case called *Arcara against Cloud Bookstores* many years ago. Suppose that a, back in the days when people had the evening news and people watch that an anchorman is speeding down the highway, 'cause he's late to get to the studio for his broadcast.

He's pulled over and given a ticket by the cop. He says to the cop, "You gotta let me go. I gotta get to the studio. Otherwise, you're infringing my right to freedom of speech." That would be laughed out of court. Why? Because the speeding law has nothing to do with freedom of speech. That's a general characteristic of free speech.

Or another example, suppose that in *Texas against Johnson*, the flag burning case, instead of being prosecuted under, under a law that made it a, a crime to physically desecrate the United States flag, Mr. Johnson had been prosecuted under a law that was neutrally applied, that made it a crime to light a public fire except on, you know... in a barbecue pit or something. That would also be unproblematic, so long as there wasn't evidence that he was targeted specifically because of his message. Right?

So, as a general matter, we accept in the free speech context, but a law does not infringe freedom of speech simply because it happens to make speech more difficult for some, some people, the law has to target free speech. And since it's the same First Amendment, I would say, on original public meaning grounds, the same rule auto apply. At least if we're going to be semantic originalists with respect to free exercise.

Jeffrey Rosen: [00:39:22] Bravo, thank you very much. And your waiver is now renewed-

Michael Dorf: [00:39:26] [laughs].

Jeffrey Rosen: [00:39:26] ... when you think about your previous assignment. D- David, this has been a great doctrinal debate. I do want to ask you about the implications of this ruling for future COVID restrictions in churches.

You've emphasized that here, the church has worked, behaving responsibly, and we're being discriminated against your... Religious worship was being singled out for different and worst streaming. Do you imagine this court will and should create bars to COVID-based restrictions on religious worship for the duration of the pandemic?

And then, more broadly, I, I hear you arguing that I'm free uh, so I shouldn't be treated as a second class, right? It's something closer to strict scrutiny would apply. Different conservatives and libertarians would take this in different directions. What are the kind of exceptions that you believe the court should and, and may well recognize under this higher scrutiny in the future?

David French: [00:40:20] So on, on, on the first point, I think that if there was a c-... I... It would be hard for me to even see the court taking a case like this, unless a circuit court had allowed a church to meet without social distancing and without masking. If you, if you had a circuit court case where that was the...



You know, that, that basic social distancing and masking requirements were struck down as applied to churches, which would be... would really surprise me but if that occurred, I could easily see... I could, I could see the Supreme Court upholding masking requirements, social distancing requirements. Percentage attendance caps that are consistent with our other kinds of similar activities.

I... So, in, in that circumstance, I... that's where I think that the, the Supreme Court, even if it applied strict scrutiny, much less this, the, the lower Smith test, even if it applied strict scrutiny would uphold restrictions, pandemic related restrictions that are the conventional restrictions that we all live under. Or most of us, depending on where, where we are in the country. Of the masking and social dis- distancing and, and present attendance caps based... that are very based on the size of the building and the number, the capacity of the building.

I think that something where a religious institution tries to seek exemption from that, even strict scrutiny, they would lose. And I, and I think that strict scrutiny I know there's this f-, this saying, strict in theory fatal in fact it is not always fatal. And, and I, I do think it's what Professor Dorf said about a compelling governmental interest in eliminating discrimination, particularly in the secular workplace. Even if the discriminator in the secular workplace is a religious individual, say a religious... a person of religious faith who runs a secular workplace such as... Let's say it's somebody who's quite strictly religious, who runs an insurance agency, for example.

I would... It would be very interesting to me, and I would think highly likely that the Supreme Court would say that that a non-discrimination provision that would permit somebody to, say fire someone because they're gay, but from an insurance agency that, that regulation would survive even strict scrutiny. I think that would be quite likely. Not inevitable, not inevitable, but I think it would be quite likely.

I think what you're likely to see in a more... and a tension between non-dis-... and, and between non-discrimination law and, and the First Amendment is more like the Masterpiece Cakeshop case where you had... And that argument was not that the owner of the bakery can refuse to serve LGBT folks. It was that the owner of the bakery can refuse to use his artistic talent to create a specific work of art to celebrate an event that he did not agree with. It was much more of a compelled speech case than it was a seeking an exemption, a blanket exempt-... religious exemption from the application of non-discrimination laws.

In fact, I would say, you know, in, in, in many ways, some of the... even the most aggressive of the religious liberty organizations are very reluctant to bring a case on behalf of a secular employer that seeks a blanket exemption from non-discrimination laws on the, on the part of the religious employer. I mean, now, we, we actually have what was the P Park case. Where the Supreme Court in the civil rights era, back when the strict scrutiny standard applied to religious liberty essentially laughed out of court, the idea that race discrimination could be justified as a religious free exercise in a private business establishment.

So I think your, the, the, sort of the ability of a religious person to say, in a secular workplace, to say, "I have a discriminate for free card." I don't see, even in a strict scrutiny environment, the court being all that hospitable to the claims. I think that it would be much



more... it's w-, gonna be much more hospitable, as we've already seen, quite frankly, when a non-discrimination law collides with a religious institution, as opposed to a religious individual who's running a secular institution.

Jeffrey Rosen: [00:44:34] Michael, do you agree with David or not? That the implications of this heightened scrutiny for religion will not be the secular employers will seek and the court will grant blanket exemptions from anti-discrimination laws, but instead more targeted refusals to compelled speech, as in the Masterpiece Cake case. Or do you think that we're heading down a road that could lead to broader exemptions from anti-discrimination laws? And if so, what kind of exemptions do you envision?

Michael Dorf: [00:45:02] So I, I generally agree. I mean, I hope, I hope he's right. Because I think that the vision David lays out is, is fairly attractive. Lemme say one thing that troubles me about the current trend as I see it, and then I'll say a word about Masterpiece Cakeshop. So one of the things that I think we've seen increasingly is the court has indulged what I regard as fairly extravagant conceptions of complicity. All right.

So, let me give uh, an example. So, if there's a... If an employee at a public hospital says that... A doctor or a nurse says, "I have a uh, a profound religious objection to uh, abortion." I think we would all say that in a Sherbert, that is to say anti Smith sort of regime, that person has a very, very strong claim to say they don't have to participate in performing abortions, right? That's, they'd be physically engaged in doing something that they find to be against their religious principles.

There are intermediate cases, but at the other extreme, you have cases like The Little Sisters of the Poor, which was not decided on the exact... on this exact issue, was decided on complicated administrative grounds. But the objection that The Little Sisters of the Poor had was that they didn't want... So, back up, under regulations, implementing the Affordable Care Act employers must provide health insurance for their employees or pay a very steep fine. And that insurance must cover contraception.

Certain forms of contraception are regarded at... by certain people as forms of abortion and they object to having to do that. But The Little Sisters of the Poor were exempt from the regulation but they objected to signing the form saying that they wanted to get the exemption from the regulation. Now, I don't doubt that they sincerely believed that that signing the form would implicate them somehow in the subsequent chain of events.

But to me, that's a little bit like somebody saying, they're, you know... "You can't send me a draft notice because I object to a war. I'm a conscientious objector." And I object to even asking for my conscientious objection, because if I ask for it, you're gonna then give it to me, and then you're gonna draft somebody else. And that person's gonna participate in the war, and then I'm gonna be complicit in it.

It seems to me that in a complex and you know, divided society, like the one in which we live in, if we're going to get along with one another, we need to be able to regard some things that people with whom we interact do, that we don't approve of as their business, right? I



don't want to live in a world in which every business is either a Chick-fil-A or a Ben & Jerry's. Never mind that I don't patronize either, 'cause I'm a vegan.

But the, the, right, the idea that, you know, all of your interactions in the commercial sphere implicate you in whatever it is that the people to whom you are, you know with whom you're exchanging goods and money and services uh, are going to do. It seems to me the whole notion of dual commerce, right? Is that we can have exchanges in the marketplace, or in the social sphere, and yet each retain our own principles.

So, th-... So, one thing I worry about very much is that the court in this emerging regime is going to be too indulgent of the notions of complicity that I think are incompatible, ultimately, with having a society in which people hold fundamentally different views.

One small thing I'll say about Masterpiece Cakeshop is that, put aside how the court actually decided the case, and I think it, it raises this interesting question about whether baking a cake is a sufficiently articulate act to count as a... as freedom of speech. There are, nonetheless, examples that are much more difficult whether they involve religion or not, and just speech. And, and the best example, I just can't help but mention this, because I find it so interesting, is in the most recent Borat movie. [

Jeffrey Rosen: [00:49:05] laughs].

Michael Dorf: [00:49:05] ... Sasha Baron Cohen disguised as Borat, goes to a Baker and asks for a cake on which he asks her to emblazon the phrase, "Jews will not replace us." Now, the Baker says she's gonna comply, which is, you know, horrifying, unless maybe she thinks he's a nut, and he's gonna threaten her otherwise. But you could well imagine a baker who doesn't want to do that.

And if they lived in a state, and there are a few of these, that forbid discrimination based on viewpoint in public accommodations they would have to. And that, to me, is a serious free speech issue. So, I think there are real clashes out there. Not all of them exactly like that, but, you know, who knows what's coming down the pipeline? And some of it probably should come down the pipeline.

Jeffrey Rosen: [00:49:46] Th- thank you very much for that thoughtful intervention. And for the first mention of the Borat movie in the We the People podcast, [laughing]. David, your response to, to Michael's comments? And then your argument to We the People listeners about why you believe that uh, religious freedom in the constitution require that individuals be protected against expressing speech with which they disagree. Why strict scrutiny for religion, you think would lead to a freer society?

David French: [00:50:13] You know one of the things I, I think that religious people, especially white evangelicals are reckoning with right now is there is a difference between religious power and religious liberty. Okay. And what evangelicals have lost is religious power. What they have gained is religious liberty, and they don't necessarily like the trade, [laughs]. Okay. So this is a lot of what's distorting American politics right now.



So, what, what do I mean about the difference between religious power and religious liberty? When you're, when you're powerful, you feel free, right? I mean, you, you have the freedom that your power affords you when... The difference between power and liberty is, liberty is what you exercise against power. So when you are powerless, relative to, you know... a majoritarian consensus, that's when you need liberty. That's when you need these legal doctrines that protect you from majoritarianism.

And an awful lot of white evangelicals have been used to being, and they've come from generations before where there was a lot of religious power and not as much religious liberty. Perhaps the apex example of this is prohibition. So, prohibition is sort of, you know, the apex of w- of that Protestant religious power in the U.S. And you would think, "Well, look, look at how much Christianity respect Christianity had in the culture." But at the same time as prohibition is being argued for, and ultimately happening, these pernicious things called Blaine Amendments were just blazing their way through state constitutions.

And Blaine Amendments were these highly, extremely hostile specifically anti-Catholic state constitutional amendments that were designed to very explicitly target Catholic education. And so, that's a difference between, you had a large f... religious power in the U.S., and not so much religious liberty. Because if you didn't have the power, you didn't have much liberty to exercise to restrain that power.

And so, I think what we've seen is, in the last 40, 50, 60 years, and really accelerating since Employment Division V. Smith, and the flipping of the dynamic, as Professor Dorf articulated, is that an awful lot... There's been a big expansion of religious liberty at the same time, that even though, you know, white evangelicals will say the most powerful faction of one of our two parties in the U.S. have perceived that they've lost a lot of political power and cultural power, et cetera.

And so, that's created a lot of internal friction within the religious community. And a lot of divide about how to deal with that, how to accommodate that. And that's part of what's happening, and, and all of that des- despair over the loss of power and lack of full appreciation of the gain of liberty is distorting our politics. I just wanted to put that, [laughs], out there, because I think that that is a very important part of the dynamic of what's happening now.

Let me make my case for liberty. America is an increasingly diverse country. It's increasingly diverse by every... It's probably gonna g-... It's going to get diverse by virtually every meaningful measure from now through the foreseeable future. We're gonna have increasing religious diversity. It's not that America's gonna ever, in our lifetimes, become an entirely secular country. It's gonna have a big secular population. It's gonna have a big religious population. We're gonna be diverse on ethnicity, on sexual orientation, on gender identity, on race, on, you know, you name it.

And in that circumstance, it, it was going to become increasingly necessary for us to re-, to embrace pluralism. And, you know, pluralism, in, in my view, what pluralism essentially does... I like the moral framework of it coming from Lin-Manuel Miranda, quoting George



Washington, quoting the Prophet Micah, [laughs]. And this is "Every man shall sit under his own vine and his own fig tree, and no one shall make him afraid."

That was a phra-... That was... That, that, that was a biblical verse that Washington used almost 50 times in his writing. Including very famously to the Hebrew congregation of Rhode Island, telling this terribly persecuted religious minority that, "You, we aspire to you having a home in this land."

And so, like, when you default towards liberty, and you default towards freedom of association, free exercise of religion, free speech, in many ways what you're doing is you're giving meat on the bones of that transcendent moral vision. Of people with different viewpoints different faiths and, and different lifestyles can live together in this pluralistic land.

Now, that doesn't mean... The thing about pluralism is it's not utopianism. Pluralism is not utopianism. Why? Because there's always gonna be friction at the edges. And Professor Dorf is very... Outlined extremely well, some of these frictions. And so, there's always gonna be friction between competing communities, or communities of different ideas and ideals.

But the protection, strong protections for free exercise, strong protections for free speech, and freedom of association, in my view, are the... they put the meat on the bones of the aspiration of American pluralism. They say to different communities that, "You can have a home in this land."

And that even large expansions of the administrative state say to deal with things like climate change, or to deal with healthcare and pandemics. At the end of the day, still cannot violate that sort of core commitment to America's diverse populations that you can live and advance your values in this community.

Jeffrey Rosen: [00:55:44] Thank you very much for that eloquent statement about religious pluralism. Thank you for quoting Washington's letter to the Hebrew congregation of Newport. Our friends at the National Museum of Jewish American History had the original a few years ago, right around the corner from the Constitution Center, and it was inspiring to see. Just as this discussion has been inspiring, and civil, and illuminating.

And it's now time for closing arguments. Eh, Councilor Dorf eh, briefly, in just a few sentences, tell our We the People listeners why you believe that the Supreme Court's recent decision, Roman Catholic Diocese of Brooklyn versus Andrew Cuomo was wrongly decided.

Michael Dorf: [00:56:26] So, first of all I... I'll apologize for the fact that Mr. French and I have disagreed on so little. [

Jeffrey Rosen: [00:56:31] laughs].

Michael Dorf: [00:56:31] ... It makes it... it makes for a less interesting debate, but, eh, but an enjoyable conversation. So I don't want to say that the case is wrongly decided. I think that if the court had overruled Smith and said, "We're applying strict scrutiny," that there was a good case to be made, that the restrictions here were both over and under inclusive.



Now, part of what the court did, I think, was just silly. That is, they said that less strict restrictions apply to people going to liquor stores or bike shops. You don't stay in a liquor store or a bike shop for more than a few minutes. You don't stay there for an hour and sing, for example.

But a better rationale was suggested in an Op-Ed by Michael McConnell and his co-author, I for-... Max Raskin, I believe, who's a... are both, are both law professors. In which they said, "Well, that's true. It's not an apples to apples comparison, to compare worshipers to shoppers, but what about the workers in the bike shop? What about the workers in the liquor store who are there for potentially eight hours shifts exposed to many people coming in? They're less protected than are people uh, uh, in the worship services."

And I think there's a real point there. And so, I would have been much less concerned about an opinion that said, "Hey, Smith is wrong, we're going back to Sherbert." And now this law is not narrowly tailored. There was also a mootness issue that I thought that they could have decided a little differently. But the main... my main objection is to how the opinion was written. And also there are some pot shots that Justice Gorsuch took unnecessarily at un-enumerated rights that weren't a... really an issue in the case.

Jeffrey Rosen: [00:58:07] David, the last word in this wonderful discussion is to you, tell our We the People listeners why you believe that the Roman Catholic Diocese versus Cuomo decision was correct?

David French: [00:58:21] Well, I think that as a, as an initial matter, as a conceptual matter, I think that one of the... when we talk about the word essential, and we talk about essential services both constitutionally and pragmatically in the... in other words, in the way that people live their lives and religious worship is an essential service. Religious ministry is an essential service.

And so the, the constitutional, as well as political and moral imperative of the government should be to accommodate the existence of that essential service as much as, as reasonably possible, consistent with public health. And I think that at the end result of the case is consistent with that view.

Now, I completely agree, [laughs], with Professor Dorf about the pot shots, [laughs], to Justice Robert's, I found that surprising coming from Justice Gorsuch, to be honest. I mean, we've sort of seen uh, we've seen some of that from Justice Alito. Last, last term, he was again, to use this term, quite spicy, [laughs], in a lot of his opinions.

And I also would prefer to see the doctrine developed through the... oh, the reversal of Smith. I think that that is a clearer cleaner way of bringing First Amendment do-... free exercise doctrine back into harmony with the intent to the founders. It's a clear, cleaner way of analyzing- a clear and cleaner way of dealing with challenges to statutes. I would have preferred that.

I don't like it when the Supreme Court just sort of chips and chips and chips and chips away at doctrine over year after year after year. Which leads to often a lot of confusion, leads to



sort of the zombie doctrine phenomenon. And so, I'm hopeful, although I don't think it ends up that the case is gonna be this great a vehicle for this lots of folks' thought, but in *Fulton V Philadelphia*, that the court will just go ahead and reverse *Smith*.

But I do think the case, the ultimate outcome of the case is consistent with a proper understanding of the role of free exercise in the American constitution. I think the way it got there is a little bit suboptimal. But at the end of the day it reached the right result for perhaps some of the... some suboptimal reasoning.

Jeffrey Rosen: [01:00:23] Thank you so much, Michael Dorf and David French, for a civil illuminating debate that was neither tangy nor bland, but fragrant with the sweet fruit of reason, I would say, [laughing], reaching the achievements. Uh, and that's the goal of this podcast, and we don't always achieve it, but we have today. Thanks to your thoughtful and illuminating contributions. Michael, David, thank you so much for joining.

Michael Dorf: [01:00:50] Thank you.

David French: [01:00:50] Thanks for having us.

Jeffrey Rosen: [01:00:53] Today's show was engineered by David Stotz, and produced by Jackie McDermott. Research was provided by Mac Taylor, Ashley Kemper, and Lana Ulrich. Thank you so much friends for rating, reviewing, and subscribing to *We the People* on Apple podcasts. We so appreciate the reviews, please keep them coming. They help other people to learn about our wonderful work together.

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It's been so meaningful that many of you have been giving donations of \$1, or \$5 online, at the constitutioncenter.org/donate or membership. Please keep those coming. It is a signal of our shared devotion to the enterprise of constitutional self-education, and constitutional education as well. On behalf of the National Constitution Center, I'm Jeffrey Rosen.