

## Religious Crusaders at the Supreme Court's Gates

Conservative justices appear eager to take on a subject at the heart of the country's culture wars.

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By LINDA GREENHOUSE | Sept. 12, 2019



The Supreme Court's decision in last term's big religion case, on the constitutionality of a Latin cross that stands 40 feet tall on public land in Bladensburg, Md., left both sides in the religion wars unsatisfied. The court's several opinions, adding up to seven votes to keep the cross in place, disappointed the secularists who brought the lawsuit seeking to have it removed. But the narrow holding, based on the history of this particular monument, was even more frustrating to those who hoped that the court, already tilting noticeably in favor of religion in

particular contexts, would go further and adopt new rules for lowering the barrier between church and state across the board.

It seemed to me then that the court was just biding its time. Newly configured with the arrivals of Justices Neil Gorsuch and Brett Kavanaugh and the departure of Justice Anthony Kennedy, the court used this case as a warm-up exercise while the justices took one another's measure on the subject that lies at the very heart of the country's culture wars. The court would have plenty of opportunity to make its next move.

Sooner than I expected, that time has arrived. In late June, a week after issuing the decision in the cross case, the court placed another important religion case, this one ostensibly concerning the channeling of public money to religious schools, on its docket for the term that begins in October. Other cases are rapidly filling the queue of new appeals seeking the justices' attention. None has received much notice outside the conservative religious networks propelling these cases to a court that shows every sign of being receptive. In this column, I explore some of these cases and call attention to an unusual dialogue emerging between the court's most conservative justices and the religious right that has good reason to suppose that its moment is finally at hand.

The new case, to be argued in December, presents this question: "Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?"

It's an interesting question, but an odd one in the context of this case, *Espinoza v. Montana Department of Revenue*, brought to the court by the Institute for Justice, a libertarian litigating group that has been a leader in the school choice movement. The reason the question is odd is that if the answer is yes, the logical consequence is that a state that once had a program offering financial support to religious and nonreligious schools alike (in this case, in the form of a tax credit to tuition-paying parents) and that subsequently shut down the program entirely can be deemed to have violated a principle of religious neutrality.

Can that possibly be the law? The Montana Supreme Court found the tax-credit program, in its entirety, to violate the state Constitution's "stringent prohibition on aid to sectarian schools." The state court didn't address the federal

Constitution. Usually, the justices view a state court decision that relies on “independent and adequate state grounds” as inappropriate for Supreme Court review.

This case reminds me of an old Supreme Court decision that, not surprisingly, the Institute for Justice doesn’t cite in its petition: *Palmer v. Thompson*, a case from the height of the civil rights movement. Rather than integrate its public swimming pools, the city of Jackson, Miss., simply closed them. The Supreme Court, in an opinion by Justice Hugo Black, rejected the argument that the city, having deprived both white and black residents of a place to swim, had violated the equal-protection right of its black citizens.

There are differences between the two cases, of course, but the question remains: Why did the Supreme Court agree to hear the Montana case? I think the reason lies with a case from Missouri that the court decided two years ago, a case that the Institute for Justice cites throughout its 36-page petition. In *Trinity Lutheran Church of Columbia v. Comer*, the court held that the state could not exclude a church from eligibility to compete for a state grant to resurface its school playground. Chief Justice John Roberts wrote that the exclusion manifested a religious discrimination “odious to our Constitution.”

Strong words, but the chief justice’s opinion contained an unusual footnote: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.” Say what? While five other justices signed the chief justice’s opinion, two of those, Clarence Thomas and Neil Gorsuch, dissented from the footnote, thus depriving it of majority status. When the Supreme Court rules, Justice Gorsuch wrote, it does so on the basis of “general principles.” He added: “General principles here do not permit discrimination against religious exercise — whether on the playground or not.”

Chief Justice Roberts knows that as well as Justice Gorsuch. His footnote has all the earmarks of having been designed to secure the agreement of Justice Kennedy, whose position at the ideological center of the court over many years exacted a high degree of deference from colleagues seeking to get or hold his vote. The frequent result was that his colleagues signed on to opinions more narrow than they would have preferred. f In granting review of this unlikely case, the court’s new majority hopes to move the ball forward.

Among the other new cases now vying for the court's attention is one that seeks to push the boundaries of another opinion by Chief Justice Roberts. In 2012, the court for the first time recognized a "ministerial exception" to laws that prohibit various kinds of discrimination in employment. This allows religious institutions to choose or dismiss their ministers, even if federal laws are violated. The question the court addressed in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission* is more difficult than it might appear. Clearly, no court would recognize a Catholic nun's claim to sex discrimination for the church's refusal to ordain her as a priest. But what about a parochial school teacher? The court upheld a Lutheran church's right to fire a teacher who threatened to sue the church for violating the Americans With Disabilities Act. The teacher, Cheryl Perich, was not ordained. But in Lutheran practice, she was "called" and deemed qualified to lead religious services and perform other religious functions in the church school.

The chief justice's unanimous opinion was a cautious one, with a lengthy discussion of the teacher's training and duties. The question quickly arose: What about other teachers, ordinary teachers whom no one would regard as quasi-ministers? Did the ministerial exception also shield their church-connected employers from claims of discrimination? An appeal filed two weeks ago by a Catholic school in Los Angeles offers the court a chance to answer that question. The United States Court of Appeals for the Ninth Circuit, observing that a teacher, Agnes Morrissey-Berru, did not have any particular religious credentials, training or title, ruled that she had a right to pursue her lawsuit against Our Lady of Guadalupe School under the federal Age Discrimination in Employment Act. The school's petition, noting that "this court left many of the exact contours of the ministerial exception for a later day," is arguing that the Ninth Circuit's insistence on credentials and title is unduly rigid and would deprive religious groups of discretion to define the roles of their employees.

The school is represented by the Becket Fund for Religious Liberty, a highly effective religious-rights law firm that commands a great deal of respect at the Supreme Court. Becket entered the case after the Ninth Circuit's ruling to handle the school's Supreme Court appeal. It also plans to file a Supreme Court appeal of another recent Ninth Circuit ruling that refused to grant a ministerial exception to a Catholic school that fired a fifth-grade teacher after she developed breast cancer and requested time off for treatment. She sued under the Americans With Disabilities Act.

The most intriguing new appeal waiting for the justices' review is another Becket Fund case, filed in July. The case, *Ricks v. State of Idaho Contractors Board*, presents a single straightforward question: whether the Supreme Court should overturn a 29-year-old decision, *Employment Division v. Smith*. That was the case in which the court refused to grant a religious exemption to two members of the Native American Church who had been denied unemployment benefits after being fired as counselors for a private drug rehabilitation group for their ritual use of peyote, an illegal hallucinogen. The First Amendment's Free Exercise Clause does not provide religious exemptions from neutral laws of general applicability, the court ruled. The decision set off a bipartisan, multireligious uproar that led to the swift enactment of the Religious Freedom Restoration Act, requiring a "compelling justification" to "substantially burden religious exercise," and designed, as the law's title suggests, to overturn the court's decision. The court subsequently ruled that Congress lacked authority to apply this law to the states, where *Employment Division v. Smith* remains the law unless a state has enacted its own Religious Freedom Restoration Act.

*Ricks v. State of Idaho Contractors Board* was filed on behalf of a man who says he believes that a Social Security number is a link to the devil. In 1996, Congress passed a law called the Personal Responsibility and Work Opportunity Reconciliation Act, aimed in part at making it easier to track down taxpayers who were behind on child support payments. In exchange for a federal grant, states had to agree to require Social Security numbers on applications for professional licenses. When George Ricks refused to provide his number, the state denied him a contractor's license.

Idaho has its own version of a Religious Freedom Restoration Act, but the state's Court of Appeals found that the state law was unenforceable in such a case because it was pre-empted by the federal law that imposed the Social Security number requirement. The state court treated Mr. Ricks's religious objection as sincere, but held that under *Employment Division v. Smith*, he couldn't prevail. The Idaho Supreme Court declined to review the appeals court's decision.

The petition argues that *Employment Division v. Smith* was wrongly decided, "contrary to the text and historical meaning of the Free Exercise Clause," and is now "ripe for revisiting." Conspicuously absent from the petition is a quotation from the majority opinion in that case, written by Justice Antonin Scalia, a secular saint, if there ever was one, in the eyes of judicial conservatives. Justice Scalia's opinion is worth quoting nonetheless. He explained that Oregon, the

state involved in that case, might well have chosen on its own to carve out a religious exemption from its unemployment law, which refused benefits to people who lost their job because of criminal behavior. Then he continued:

“But to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”

I thought Justice Scalia had it right 19 years ago, and I think his opinion is even more relevant today, when claims for conscience-based carve-outs from legal requirements are rampant and are being granted by the courts and the executive branch with little regard for the harm these exemptions cause to third parties — for example, to employees who don’t share their bosses’ objection to birth control, as in the Hobby Lobby case five years ago. For those determined to see *Employment Division v. Smith* overturned, Mr. Ricks’s case is a perfect vehicle. His religious belief is benignly eccentric, and granting him an exemption would cause no third-party harm — except to the principle that Justice Scalia invoked.

The chance that the court will take up the Ricks case has to be seen as better than fair. Idaho at first waived its right to respond to the petition, a strategic choice that is quite common at the court, made in the knowledge that the justices will never grant a petition that lacks a response. But last Friday, in a little-noticed order, the court ordered the state to respond and gave it 30 days to do so.

At the beginning of this column, I said the court had entered into an unusual dialogue with the religious right. Here’s what I had in mind. Last January, the court denied a petition brought on behalf of a public high school football coach in Bremerton, Wash., who lost his job after refusing the school system’s order to stop praying on the 50-yard line at the end of every game. The coach, Joseph Kennedy, brought his case as a First Amendment free-speech claim, not as a claim about the free exercise of religion.

The free speech rights of public employees are complex, and the record in this case was unclear as to the school system's motivation for the coach's dismissal. The court spent three months wrestling with the petition before finally denying it. Justices Alito, Thomas, Gorsuch, and Kavanaugh published a statement explaining why they agreed that the case was procedurally flawed. (The agreement among the four was significant, because it takes the votes of only four justices to grant a case.) In a final paragraph at the end of their six-page statement, the four did a remarkable thing, pivoting abruptly from the speech issue, which the petition presented, to the religion issue, which it didn't. They offered a blunt criticism of *Employment Division v. Smith*, writing that "the court drastically cut back on the protection provided by the Free Exercise Clause." They went on to criticize a 1977 decision that limited religious exemptions under the Civil Rights Act of 1964. They made it obvious that they wanted to overturn both. "In this case, however," they concluded, "we have not been asked to revisit those decisions."

Translation: Bring us a case, the right case. Less than six months later, the Ricks appeal arrived. By the end of the court's new term, nine months from now, the shadow cast by the 40-foot cross in Bladensburg that loomed so large not so long ago may disappear into the new church-state landscape now emerging before our eyes.

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