

On Religion, the Supreme Court Protects the Right to Be Different

Recent decisions are about safeguarding pluralism, not taking sides in the culture wars.

By MICHAEL W. McCONNELL | July 9, 2020

Some U.S. Supreme Court watchers have been quick to interpret recent decisions as skirmishes in American “culture wars” — with some decisions (on abortion and sexual orientation) siding with the cultural left and others (on religion) siding with the cultural right.

There is another way to look at them. Viewing the decisions as a whole, rather than one by one, they can be seen not as advancing left or right but instead as protecting pluralism — the right of individuals and institutions to be different, to teach different doctrines, to dissent from dominant cultural norms and to practice what they preach.

One indication is that most of these decisions broke 7-2 or 6-3, instead of along the predictable 5-4 conservative/liberal split. At a time when American politics is toxically polarized, it is a welcome relief that members of the court, which by constitutional design is supposed to be the least political of the three branches of government, can still find common ground across ideological divides.

In two of the religion cases, Justices Stephen Breyer and Elena Kagan, both Democratic appointees, joined the Republican appointees in upholding the rights of religious institutions to set and follow their own doctrine. Two Republican appointees joined the decision treating discrimination on the basis of sexual orientation or transgender status as “sex discrimination” — and Justice Neil Gorsuch, a Trump appointee, wrote the opinion. If law were only politics, those cases would not have come out that way.

The pattern of results is not merely random, as if the court were awarding wins and losses haphazardly to each side. Very roughly speaking, the court seems to side with the



Anti-abortion demonstrators praying in front of the Supreme Court building in Washington on Wednesday. CREDIT...CHIP SOMODEVILLA/ GETTY IMAGES

party defending the right to live in accordance with one's identity: whether that is the right of a gay person to be free from discrimination in the workplace, or the right of a religious order to refuse to provide employees with coverage for contraceptive drugs that violate its teachings, or the right of religious schools to be free of government interference with their choice of people to teach religious doctrine or practice to their children.

Moreover, the court seems to reach results that very likely would carry the day in Congress on many of these issues, if Republicans and Democrats were inclined to talk to one another and compromise. Just a few years ago, Congress came close to amending the employment discrimination laws to add sexual orientation as a protected category and at the same time to exempt religious institutions whose good faith beliefs are to the contrary. And Congress came close to amending the immigration laws to protect the so-called Dreamers, presumably in combination with stepped-up enforcement at the border. These compromises and others might have been popular with the American people, but they were unachievable because of the heightened polarization of our politics.

Justices are not charged with crafting legislative compromises. Their job is to interpret the law as it is written. But if we are criticizing the court for being political, we should at least describe its politics accurately. Neither those on the right who are screeching that Chief Justice John Roberts has become a liberal nor those on the left who bewail a lock-step conservative majority are paying enough attention. The court may be political, but its politics is of the middle, and of a particular kind of middle, one that is committed to pluralism and difference rather than to the advancement of particular moral stances.

The court decided three religious freedom cases in the last week. The most important, [Espinoza v. Montana Department of Revenue](#), held that states may not deny financial benefits to parents who send their children to accredited private schools just because they are religious. States do not have to subsidize private schools at all, but if they do, they must be evenhanded between secular and religious schools.

The vote was 5 to 4, but it should be surprising that this was ever in dispute. As Chief Justice Roberts explained in his majority opinion, early aid to education went to religious as well as secular schools, and it was not until the anti-Catholic, anti-immigrant agitation in the late 19th century that religious schools were treated differently. And it was not until 1971 that the Supreme Court first held that aid to religious schools was unconstitutional. The court has backed away from that idea since 1985 — first holding that states *may* extend aid on a neutral basis to religious schools, and now holding that neutrality is not merely permitted but required. School choice is actually the opposite of the establishment of religion by the government; it allows pluralism and diversity in education, as an alternative to the homogeneity of public schools.

The importance goes beyond freedom of religion. The inferior quality of many American public schools, especially those serving inner-city minority populations, is a primary reason for this country's outrageous economic and social inequality. Private schools, including religious schools, bring needed competition and offer poorly served families an alternative.

Espinoza is particularly significant because increasing numbers of state legislatures wish to experiment with various kinds of school choice, but state courts often stand in the way, invoking 19th-century state constitutional provisions passed in the days of anti-Catholic, anti-ethnic prejudice. The court's decision does not require state legislatures to enact school choice programs, but it enables them to do so without the impediment of hostile state court decisions.

Wednesday's decision in [Our Lady of Guadalupe v. Morrissey-Berru](#) likewise protects pluralism in education. Building on a unanimous decision eight years ago, a 7-2 majority held that religious schools may choose those who teach religion classes without governmental interference, even in the face of discrimination claims. This helps guarantee the autonomy of religious teaching from government control, and from intrusive inquiries into whether a school's judgment about religious considerations is not the real reason for the termination of a teacher.

The [Little Sisters of the Poor](#) decision, also handed down Wednesday in a 7-2 vote, ensures that religious orders will not be required to provide health insurance for contraceptive coverage in violation of their beliefs. For now. As a legal matter, the decision merely holds that the executive branch has discretion to determine the contours of any obligations to provide contraceptive coverage — discretion that could be exercised the opposite way by the next administration.

Taking the long view, this Supreme Court has been consistently supportive of religious liberty. In the last 12 cases involving religion, the religious side prevailed, sometimes by lopsided majorities. Out in the culture wars, religious freedom may be a contested proposition, but in the Supreme Court it is the most consistent part of a jurisprudence of pluralism.

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