The Supreme Court is leading a Christian conservative revolution

Almost as soon as Justice Barrett was confirmed, the Court handed down a revolutionary "religious liberty" decision. It hasn't slowed down since.

By Ian Millhiser | Jan 30, 2022, 8:00am EST

Anti-abortion activists pray outside the US Supreme Court in Washington, DC, on October 2, 2021. | Andrew Caballero-Reynolds/AFP via Getty Images

Justice Amy Coney Barrett had been a member of the Supreme Court for less than a month when she cast the key vote in **one of the most consequential religion cases of the past century**.

Months earlier, when the seat she would fill was still held by Justice Ruth Bader Ginsburg, the Court had handed down a series of 5-4 decisions establishing that churches and other houses of worship must **comply with state occupancy limits** and other rules imposed upon them to slow the spread of Covid-19.

As Chief Justice John Roberts, the only Republican appointee to join these decisions, explained in ***South Bay United Pentecostal Church v. Newsom*** (2020), "our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States." And these officials' decisions "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."

But this sort of judicial humility no longer enjoyed majority support on the Court once Barrett's confirmation gave GOP justices a 6-3 supermajority. Twenty-nine days after Barrett became Justice Barrett, she united with her fellow Trump appointees and two other hardline conservative justices in ***Roman Catholic Diocese of Brooklyn v. Cuomo*** (2020), a decision striking down the very sort of occupancy limits that the Court permitted in *South Bay*. The upshot of this decision is that the public's interest in controlling a deadly disease must give way to the wishes of certain religious litigants.

Just as significantly, *Roman Catholic Diocese* **revolutionized** the Court's approach to lawsuits where a plaintiff who objects to a state law on religious grounds seeks an exemption from that law.

Before *Roman Catholic Diocese*, religious objectors typically had to follow a "neutral law of general applicability" — meaning that these objectors must obey the same laws that everyone else must follow. *Roman Catholic Diocese* technically did not abolish this rule, but it redefined what constitutes a "neutral law of general applicability" so narrowly that nearly any religious conservative with a clever lawyer can expect to prevail in a lawsuit.

That decision is part of a much bigger pattern. Since the Court's Republican majority became a supermajority, the Court has treated religion cases as its highest priority.

It's made historic changes to the law governing religion even before it moved on to other major priorities for the conservative movement, such as restricting abortion or expanding gun rights. The Court has also taken on new religion-related cases at a breakneck pace. In the eight years of the Obama presidency, the Court decided just seven religious liberty cases, or fewer than one per year. By contrast, by the second anniversary of Barrett's confirmation as a justice, the Court most likely

will have decided at least seven — and arguably as many as 10 — religious liberty cases with Barrett on the Court.

In fairness, many factors contribute to this uptick in religion cases being head by the Court, and at least some of these factors emerged while Barrett was still an obscure law professor. The Court's decision in ***Burwell v. Hobby Lobby*** (2014), for example, opened the door to new kinds of lawsuits that would have failed before that decision was handed down. And lawyers for Christian conservative litigants have no doubt responded to *Hobby Lobby* by filing more — and more aggressive — lawsuits.

This piece did not attempt to quantify the number of times the Court has been asked to decide religious liberty cases, only the number of times it decided to take the case.

But the bottom line is that the federal judiciary is fast transforming into a forum to hear the grievances of religious conservatives. And the Supreme Court is rapidly changing the rules of the game to benefit those conservatives.

The Court's new interest in religion cases, by the numbers

As mentioned above, the Supreme Court heard fewer than one religious liberty case every year during the eight years of the Obama presidency.

In deriving this number, I had to make some judgment calls regarding what counts as a "religious liberty" case. For the purposes of this article, I'm defining that term as any Supreme Court decision that is binding on lower courts, and that interprets the First Amendment's free exercise or establishment clause. I also include decisions interpreting two federal statutes — the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act — both of which limit the government's ability to enforce its policies against people who object to them on religious grounds.

I focused on these two constitutional provisions and these two federal laws because they deal directly with the obligations the government owes to people of faith and its ability to involve itself in matters of religion.

My definition of a "religious liberty" case excludes some Supreme Court cases involving religious institutions that applied general laws or constitutional provisions. Shortly after Obama became president, for example, the Court **denied** a religious group's request to erect a monument in a public park. Yet, while this case involved a religious organization, the specific legal issue involved the First Amendment's free speech clause, not any religion-specific clause. So I did not classify that case as a religious liberty case.

In any event, using this metric, I identified seven religious liberty cases decided during Obama's presidency,[1] the most consequential of which was ***Burwell v. Hobby Lobby***.

Interestingly, the Court did not decide significantly more religious liberty cases in the three years that Donald Trump was president prior to the pandemic, just four in total.[2] The Court then did decide a rush of pandemic-related religious liberty cases in 2020, including *South Bay* and *Roman Catholic Diocese.*

THERE'S NO DOUBT THAT THE COURT'S NEW MAJORITY IS EAGER BREAK THINGS AND MOVE QUICKLY

But things really took off once Justice Barrett was confirmed in the week before the 2020 election. As noted above, the Court handed down *Roman Catholic Diocese*, a hugely consequential case that **reimagined the Court's approach to the Free Exercise Clause**, less than a month after Barrett took office. Just a few months later, the Court handed down ***Tandon v. Newsom*** (2021), which clarified that all lower courts are required to follow the new rule laid out in *Roman Catholic Diocese*.

Then-President Donald Trump watches as US Supreme Court Associate Justice Amy Coney Barrett is sworn in by fellow Associate Justice Clarence Thomas as Barrett's husband, Jesse Barrett, holds a Bible on the South Lawn of the White House on October 26, 2020. | Alex Wong/Getty Images

Notably, both *Roman Catholic Diocese* and *Tandon* were decided on the Court's "**shadow docket**," a mix of emergency decisions and other expedited matters that the Court typically decided in brief orders that offered little analysis. In the Trump years, however, the Court started frequently using the shadow docket to **hand down decisions that upended existing law**.

On the merits docket, the ordinary mix of cases that receive full briefing and oral argument, the Court decided two religious liberty cases during Barrett's first term on the Court, *Tanzin v. Tanvir* (2020) and ***Fulton v. City of Philadelphia*** (2021) — though Barrett was recused in *Tanzin* and the Court announced it would hear *Fulton* before Barrett joined the Court. Three other religious liberty cases (***Ramirez v. Collier***, ***Carson v. Makin***, and ***Kennedy v. Bremerton School District***) are still awaiting a decision on the Court's merits docket.

Meanwhile, three other shadow docket cases arguably belong on the list of important religious liberty cases decided since Barrett joined the Court, although these cases produced no majority opinion and thus did not announce a legal rule that lower courts must follow. In ***Does v. Mills*** (2021) and ***Dr. A v. Hochul*** (2021), the Court rejected claims by health care workers who sought a religious exemption from a Covid vaccination mandate. And, in ***Dunn v. Smith*** (2021), the Court appeared to back away from a **gratuitously cruel decision** involving the religious liberties of death row inmates that it handed down in 2019.

So, to summarize, by the time the Court's current term wraps up in June, the Court will likely hand down decisions in three merits docket cases — *Ramirez*, *Carson*, and *Kennedy,* although it is possible that *Kennedy* will not be scheduled for argument until next fall. Add in the two merits docket decisions from last term and the landmark shadow docket decisions in *Roman Catholic Diocese* and *Tandon*, and that's seven religious liberty decisions the Court is likely to hand down before Barrett celebrates her second anniversary as a justice.

Meanwhile, the Court only handed down seven religious liberty cases during all eight years of the Obama presidency.

So what do all of these religion cases actually say?

As the *Does* and *Dr. A* cases indicate, the Court's 6-3 Republican majority still hands occasional defeats to conservative religious parties. It also sometimes hands them very small victories. *Fulton*, for example, could have overruled a seminal precedent from 1990, and given religious conservatives a sweeping right to discriminate against LGBTQ people. Instead, the ***Fulton*** **opinion was very narrow** and is unlikely to have much impact beyond that particular case.

But, for the most part, the Court's most recent religion cases have been extraordinarily favorable to the Christian right, and to conservative religious causes generally. Many of the Court's most recent decisions build on earlier cases, such as *Hobby Lobby*, which started to move its religious

jurisprudence to the right even before Trump's justices arrived. But the pace of this rightward march accelerated significantly once Trump made his third appointment to the Court.

Broadly speaking, three themes emerge from these cases.

Exceptions for conservative religious objectors

First, the Court nearly always sides with religious conservatives who seek an exemption from the law, even when granting such an exemption is likely to injure others.

The *Hobby Lobby* decision, which held that many employers with religious objections to birth control could defy a federal regulation requiring them to include contraceptive care in their employees' health plans, was an important turning point in the Court's approach to religious objectors. Prior to *Hobby Lobby*, religious exemptions **were not granted if they would undermine the rights of third parties**. As the Court suggested in ***United States v. Lee*** (1982), an exemption that "operates to impose the employer's religious faith on the employees" should not be granted. (Indeed, *Lee* held that exemptions typically should not be granted at all in the business context.)

Initially, the new rule announced in *Hobby Lobby*, which permits religious objectors to diminish the rights of others, only applied to rights established by federal law. Under the federal RFRA statute, religious objectors are entitled to some exemptions from federal laws that they would not be entitled to if their state enacted an identical law. As mentioned above, religious objectors must comply with state laws so long as they are **"neutral" and have "general applicability"** — meaning that they apply with equal force to religious and secular actors.

That brings us to *Roman Catholic Diocese* and *Tandon,* which redefined what qualifies as a neutral law of general applicability so narrowly that hardly any laws will qualify. (A more detailed explanation of this redefinition can be found **here** and **here**.)

Indeed, *Roman Catholic Diocese* and *Tandon* permitted religious objectors to defy state public health rules intended to slow the spread of a deadly disease. If the Court is willing to place the narrow interests of religious conservatives ahead of society's broader interest in protecting human life, it seems likely that the Court will be very generous in doling out exemptions to such conservatives in the future.

Fewer rights for disfavored groups

While the Court has been highly solicitous toward conservative Christian groups, it's been less sympathetic to religious liberty claims brought by groups that are not part of the Republican Party's core supporters.

The most glaring example of this double standard is ***Trump v. Hawaii*** (2018), in which the Court's Republican appointees upheld then-President Trump's policy banning most people from several

Muslim-majority nations from entering the United States. The Court did so, moreover, despite the fact that Trump repeatedly bragged about his plans to implement a "**total and complete shutdown of Muslims entering the United States** until our country's representatives can figure out what is going on."

Protesters demonstrate against then-President Trump's Muslim travel ban as protesters gather outside the US Supreme Court following a court-issued immigration ruling on June 26, 2018. The 5-4 ruling upheld Trump's policy imposing limits on travel from several primarily Muslim nations. | Win McNamee/Getty Images

The Trump administration claimed that its travel plan was justified by national security concerns, and the Court held that it typically should defer to the president on such matters. But that does not change the fact that singling out Muslims for inferior treatment solely because they are Muslim violates the First Amendment. And, in any event, it's hard to imagine the Supreme Court would have shown similar deference if Trump had **attempted a shutdown of Roman Catholics** entering the United States.

Similarly, in ***Dunn v. Ray*** (2019), the Court's Republican appointees ruled against a Muslim death row inmate who sought to have his imam present at his execution, even though the state permitted Christian inmates to have a spiritual adviser present. As Justice Elena Kagan wrote in dissent, "the clearest command of the Establishment Clause … is that one religious denomination cannot be officially preferred over another."

In fairness, the Court does not always reject religious liberty claims brought by Muslims, even if those claims prevail less often than in similar cases brought by conservative Christians. In ***Holt v.***

Hobbs (2015), for example, the Court sided with an incarcerated Muslim man who wished to grow a short beard as an act of religious devotion.

After *Dunn* triggered a bipartisan backlash, moreover, the Court **appeared to back away for a while**. Nevertheless, during November's oral argument in another prison-religion case, this one brought by a Christian inmate who wishes to have a pastor lay hands on him during his execution, several justices appeared less concerned with whether ruling against this inmate would violate the Constitution — and more concerned with whether permitting such suits would **create too much work for the justices themselves**.

Thus, while the Court typically sides with conservative Christians in religious liberty cases, people of different faiths (or even Christians pursuing causes that aren't aligned with political conservatism) may be less likely to earn the Court's favor.

The wall of separation between church and state is in deep trouble

Several of the justices are openly hostile to the very idea that the Constitution imposes limits on the government's ability to advance one faith over others. At a recent oral argument, for example, Justice Neil Gorsuch derisively referred to the "**so-called separation of . . . church and state**."

Indeed, it appears likely that the Court may even require the government to subsidize religion, at least in certain circumstances.

At December's oral arguments in ***Carson v. Makin***, for example, the Court considered a Maine program that provides tuition vouchers to some students, which they can use to pay for education at a secular private school when there's no public school nearby. Though the state says it wishes to remain "neutral and silent" on matters of religion and not allow its vouchers to go to private religious schools, many of the justices appeared to view this kind of neutrality as unlawful. "Discriminating against all religions," Justice Brett Kavanaugh suggested, is itself a form of anti-religious discrimination that violates his conception of the Constitution.

For many decades, the Court held the opposite view. As the Court held in ***Everson v. Board of Education*** (1947), "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

But *Everson*'s rule is **now dead**. And the Court appears likely to require secular taxpayers to pay for religious education, at least under some circumstances.

Why is the Court hearing so many religion cases?

There are several possible explanations for why the Court is hearing so many more religion cases than it used to, and only some of these explanations stem from the Court's new 6-3 Republican majority.

The most significant non-political explanation for the uptick in cases is the pandemic, which triggered a raft of public health orders that religious groups sought exemptions from in the Supreme Court. Though a less ideological Court would not have used one of these cases to revolutionize its approach to the free exercise clause, as it did in *Roman Catholic Diocese*, the Court likely would have weighed in on many of these cases even if it had a Democratic majority.

Similarly, some explanations for the uptick in cases predate the confirmation of Justice Barrett. The *Hobby Lobby* decision, for example, sent a loud signal that the Court would give serious consideration to religious liberty claims that once would have been turned away as meritless. That decision undoubtedly inspired lawyers for conservative religious litigants to file lawsuits that they otherwise would not have brought in the first place.

The Court also started frequently using the shadow docket to hand down highly consequential decisions well before Barrett joined the Court. Justice Sonia Sotomayor warned that the Court was **using shadow docket cases to grant "extraordinary" favors to Trump** as recently as 2019.

But there's no doubt that the Court's new majority is eager to break things and move quickly. Ordinarily, for example, if the Court were going to fundamentally rethink its approach to an important provision of the Constitution, it would insist upon full briefing, conduct an oral argument, and spend months deliberating over any proposed changes. Instead, *Roman Catholic Diocese* was handed down less than a month after the Court had the votes it needed to rewrite its approach to the free exercise clause.

There are also worrisome signs that the Court's new majority **cares much less than its predecessors about stare decisis**, the doctrine that courts should typically follow past precedents. Just look at **how the Court has treated *Roe v. Wade*** if you want a particularly glaring example of the new majority's approach to precedents it does not like.

Roman Catholic Diocese was handed down just six months after the Court's contrary ruling in *South Bay.* And there's no plausible argument that the cases reached different outcomes because of material distinctions between the two cases. The only real difference between the two cases was that Justice Ruth Bader Ginsburg sat on the Court in May 2020, and Amy Coney Barrett held Ginsburg's seat by November. That was enough reason to convince this Court to abandon decades of precedent establishing that religious institutions typically have to follow the same laws as everyone else.

The Court's current majority, in other words, is itching for a fight over religion. And it holds little regard for established law. That means that a whole lot is likely to change, and very quickly.

---

[1] The seven Obama-era religious liberty cases that I identified are ***Salazar v. Buono*** (2010), ***Christian Legal Society v. Martinez*** (2010), ***Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*** (2012), ***Town of Greece v. Galloway*** (2014), ***Burwell v. Hobby Lobby*** (2014), ***Holt v. Hobbs*** (2015), and ***Zubik v. Burwell*** (2016).

[2] The four religious liberty cases from Trump's pre-pandemic presidency are ***Trinity Lutheran Church of Columbia v. Comer*** (2017), ***Masterpiece Cakeshop v. Colorado Civil Rights Commission*** (2018), ***Trump v. Hawaii*** (2018), and ***American Legion v. American Humanist Association*** (2019).
