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Essay

Fulton's Missing Question: Religious Adoption Agencies and the Establishment Clause

Zalman Rothschild†

Introduction

The Supreme Court recently decided one of the most anticipated free exercise cases in recent decades. In *Fulton v. City of Philadelphia*,[1] the Court held that the City of Philadelphia could not cancel its contract with a Catholic adoption agency over the agency's refusal to work with same-sex couples wishing to foster children.[2] Specifically, the Court deemed it unconstitutional for the government to contractually stipulate that religious adoption agencies must be nondiscriminatory in their certifications of foster parents as long as the government retains the right to grant exemptions from that stipulation.[3]

† Nonresident fellow at the Stanford Constitutional Law Center; Adjunct Professor of Law at New York University School of Law; J.D., magna cum laude, Harvard Law School; Ph.D., New York University; M.A., Yeshiva University. Many thanks to Zachary David, Noah Feldman, Jake Gersen, Jeannie Suk Gersen, Linda Greenhouse, Michael Helfand, Laura Lane-Steele, Sandy Levinson, Joshua Matz, Martha Minow, Rachel Moran, Micah Schwartzman, Chad Squitieri, Nomi Stolzenberg, Mark Tushnet, Eugene Volokh, Lael Weinberger, and the Texas Law Review Online editors for very helpful comments.

1. 141 S. Ct. 1868 (2021).
2. *Id.* at 1882.
3. *Id*. at 1881–82.

In other words, so long as the city *can* exempt an agency from the requirement that agencies must not discriminate on the basis of sexual orientation, it *must* do so for those agencies that object on religious grounds to the anti-discrimination requirement.[4]

The decision has been hailed as a monumental victory for religious freedom by some—to others, it is a narrow and temporary triumph that leaves religion vulnerable.[5] But one critique that is missing in the heated debate over the merits of the decision is that the Court wholly ignored the other of the two religion clauses of the First Amendment—the Establishment Clause—in its analysis. The Court's embrace of the adoption agency's religious status—a necessary premise of the Free Exercise violation—gives rise to the possibility that the scheme endorsed by the Court violates an overlooked aspect of the Establishment Clause: its prohibition against delegating government functions to religious entities.

I. *Fulton v. City of Philadelphia*

While the precise meaning and implications of the Free Exercise Clause are hotly debated,[6] all agree that, at a minimum, it prevents the government from discriminating against religion.[7] In *Fulton*, Catholic Social Services

4. *See id*. at 1882.

5. *See, e.g.*, Jim Oleske, *Fulton Quiets Tandon's Thunder: A Free Exercise Puzzle*, SCOTUSBLOG (Jun. 18, 2021, 4:20 PM), https://www.scotusblog.com/2021/06/fulton-quiets-tandons-thunder-a-free-exercise-puzzle/ [https://perma.cc/W5X3-XBT7]; Ryan T. Anderson, *EPPC President Ryan T. Anderson on* Fulton v. Philadelphia*: "Big Win for Religious Liberty,"* ETHICS AND PUB. POL'Y CTR. (June 17, 2021), https://eppc.org/news/eppc-president-ryan-t-anderson-on-fulton-v-philadelphia-big-win-for-religious-liberty/ [https://perma.cc/3DVG-2R6B]; Elizabeth Sepper & James D. Nelson, Fulton v. Philadelphia*: A Masterpiece of an Opinion?*, ACSBLOG (June 18, 2021), https://www.acslaw.org/expertforum/fulton-v-philadelphia-a-masterpiece-of-an-opinion/ [https://perma.cc/3G6F-W5UJ].

6. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1411 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1109–11 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J. L. & RELIGION 99, 99–100 (1990); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 915 (1992); Gerard V. Bradley, *Beguilded: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 245–48 (1991); Wesley J. Campbell, *A New Approach to Nineteenth-Century Religious Exemption Cases*, 63 STAN. L. REV. 973, 976 (2011).

7. Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 819–20 (1998). What "discrimination against religion" means exactly—and whether the doctrine on that score is clear—is a different question. *See generally* Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282 (2020), https://www.californialawreview.org/free-exercises-lingering-ambiguity [https://perma.cc/L4VE-2XAJ].

(CSS) of Philadelphia argued that the Free Exercise Clause should be interpreted to provide far more protection to religious activity than merely the right to be free from discrimination. CSS asked the Court to reverse *Employment Division v. Smith*[8]—the 1990 decision in which the Court held that free exercise means only that government cannot discriminate against religious individuals or institutions[9]—and affirmatively rule that it is presumptively unconstitutional for the government to burden religion, regardless of whether it is being treated differently than others.[10] But the Court opted to avoid addressing that bigger question, punting it for a later day.[11]

The agency also asked the Court to strike down Philadelphia's anti-discrimination requirement on the ground that Philadelphia discriminated against religion.[12] According to CSS—and the Court agreed—because Philadelphia stipulated that it *could* exempt agencies from its anti-discrimination (on the basis of sexual orientation) requirement, the city violated CSS's free exercise rights by not exempting CSS (even though the city did not grant any exemptions to any other agencies either[13]), which constituted discrimination against religion.[14]

To seek relief under its free exercise theory, CSS had to establish as a threshold matter that it is a religious institution. To demonstrate the basic premise that it qualified as a religious institution, CSS asserted not only that it operates according to religious beliefs and values but also that it is an arm of the Archdiocese of Philadelphia. The more CSS emphasized its religious identity, religious values, and status as a corporate branch of the Catholic Church—all of which supported its free exercise claim—the more it laid the foundation for a separate constitutional challenge, not against the city's anti-discrimination law, but against the city allowing CSS to operate as a foster agency in the first place.

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8. Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

9. *See id.* at 877–79.

10. *See* Brief for Petitioner at 50, *Fulton*, 141 S. Ct. 1868 (No. 19-123); *Fulton*, 141 S. Ct. at 1876.

11. *Id.* at 1876–77. In other words, ostensibly at least, the Court did not answer the larger question—whether religious individuals and entities must be exempt from all general anti-discrimination laws—which it once again dodged. *See* Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 25–29), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707248. Justice Alito, however, did not miss the opportunity to detail in a 77-page concurrence his view that free exercise must be understood to provide much broader protection than the *Smith* Court recognized. *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring).

12. *See Fulton*, 141 S. Ct. at 1876–77.

13. *Id.* at 1879; *see also id.* at 1887 (Alito, J., concurring) (referring to the city's "never-used exemption power").

14. *Id.* at 1878–79.

II. Nondelegation and Religious Adoption Agencies

Like the meaning of free exercise of religion, the Establishment Clause is also mired in controversy, and various drastically different interpretations compete with one another.[15] But one thing is clear under all interpretations: The government (some, such as Justice Thomas, would say only the federal government, but most would agree also state and city governments[16]) may not formally establish a state religion.[17] A principle stemming from this doctrine is that the government cannot delegate governmental power to religious institutions.

This principle was laid down by the Supreme Court in *Larkin v. Grendel's Den, Inc.* fifty years ago.[18] Harvard Law School's Professor Laurence Tribe was sitting in Grendel's Den—a Harvard Square restaurant frequented by actor Ben Affleck—and ordered a beer. He was told that the restaurant did not serve alcoholic beverages. The reason: Massachusetts's blue law afforded churches the right to veto the granting of liquor licenses to any entity within 500 feet of them, and a nearby church had done exactly that. Professor Tribe took the State of Massachusetts to court, and the case went all the way to the Supreme Court, which held that permitting churches to decide who will and will not be granted a liquor license violates the Establishment Clause because it "enmeshes the churches in the exercise of substantial governmental power." According to the Court, such "'fusion of governmental and religious functions'" is never permissible.[19] Grendel's Den got its liquor license, and, as Professor Tribe likes to share, he got lifelong unlimited free drinks.[20]

The Supreme Court affirmed *Larkin*'s sweeping nondelegation rule roughly a decade later in *Board of Education of Kiryas Joel Village School District v. Grumet*.[21] There, a plurality of the Court determined that, although "more subtle," a New York statute creating a special school district for the Hasidic enclave in Kiryas Joel violated the Establishment Clause because "[a]uthority over public schools . . . cannot be delegated to a local school district defined by the State in order to grant political control to a religious

15. *Compare* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117 (1992), *with* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197–99 (1992).

16. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

17. *See, e.g.*, Richard F. Duncan, *The "Clearest Command" of the Establishment Clause: Denominational Preferences, Religious Liberty, and Public Scholarships that Classify Religions*, 55 S.D. L. REV. 390, 390 (2010).

18. 459 U.S. 116, 126–27 (1982).

19. *Id.* (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963)).

20. As told by Professor Tribe to his Fall, 2016 "Constitutional Silences" seminar students, of which I was one.

21. 512 U.S. 687 (1994).

group."[22] The plurality went on to say that "[i]f New York were to delegate civic authority to 'the Grand Rebbe,' *Larkin* would obviously require invalidation."[23]

While the precise contours of the delegation prohibition have not been drawn,[24] the facts underlying *Fulton* at the very least raise the question whether extending authority to religious adoption agencies to certify foster parents—essentially, to license them to foster—constitutes a delegation of government power to religion.[25] Adoption agencies are responsible for conducting "home studies" to assess whether individuals satisfy state-defined

22. *Id.* at 698 (plurality opinion).

23. *Id.* at 699 (plurality opinion).

24. *Larkin* and *Kiryas Joel* did not provide extensive guidance beyond their holdings, and the question what constitutes a delegation to religion under the Establishment Clause has received little scholarly attention. As a result, many questions remain unanswered. For example, would the nondelegation rule apply when states require that in order to become a lawyer one must have graduated from an ABA-approved law school when some ABA-approved law schools identify as religious (and may even require chapel attendance, abstention from sexual activity outside of heterosexual marriage, and the list goes on)? Would the rule apply when a court requires as a condition of probation a completion certificate from a support group such as Alcoholics Anonymous, which is founded on and is permeated with religious values and ideas? Ultimately, the nondelegation doctrine is undeveloped and ill-equipped to answer thorny questions such as these. *See generally* Jun Xiang, Note, *The Confusion of Fusion: Inconsistent Application of the Establishment Clause Nondelegation Rule in State Courts*, 113 COLUM. L. REV. 777 (2013).

But it seems reasonable to assume that delegation operates on a spectrum. The facts of *Larkin*, where a church was entrusted with absolute power to make final decisions regarding liquor licenses, represent a clear-cut delegation of unqualified power, thus putting *Larkin* at one end of the spectrum. *Fulton*, by contrast, would be closer to the middle of the spectrum because CSS did not have absolute power—if an applicant were dissatisfied with CSS's certification decision, for instance, she could appeal the decision to a state agency and then to state court, where it would be reviewed. 55 PA. CODE § 3700.72(a)–(b) (2008); 2 PA. C.S. §§ 501–508, 701–704 (1978). But the religious agencies were also charged with full responsibility for certifying applicants, meaning those who were certified were certified by virtue of the agencies themselves without state input. *See* 55 PA. CODE § 3700.61. And these religious agencies, as passionately argued by CSS in *Fulton*, make their certification determinations in part on the basis of religious principles and beliefs. In future work, I hope to develop a fuller account of this thus far undeveloped proposed "spectrum-based" theory of nondelegation, suggest a framework for identifying when delegation to religion has occurred, and explore how and why some jurists and scholars are alarmed about nondelegation to executive agencies but seemingly not about delegation to religion and whether such selectivity is justified.

25. Understandably, the City of Philadelphia did not make this argument. Making the argument would have constituted a challenge to *itself* regarding the very fact that it delegates certification to religious adoption agencies in the first place. One amicus brief, though, by Professor Lawrence Sager, did make a nondelegation argument of sorts. Professor Sager argued that the government would be abdicating its equal protection responsibilities under *Obergefell* if the Court allowed agencies to discriminate on the basis of sexual orientation. *See* Brief of Amicus Curiae Lawrence G. Sager Supporting Respondents at 8, Fulton, 140 S. Ct. 1104 (No. 19-123). This argument bears some resemblance to an argument made in a Stanford Law Review student note that enforcement (or more pointedly, *non*-enforcement) of anti-discrimination laws cannot be delegated to religious institutions. *See* Adam K. Hersh, Note, *Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since* Obergefell, 70 STAN. L. REV. 265, 305–

criteria to serve as foster parents and for issuing "certifications" when parents meet those requirements.[26] When an agency inspects and certifies foster parents, it exercises a share of delegated government power.[27] For example, the Pennsylvania state law that was at issue in *Fulton* "delegates" the state's "authority . . . to inspect and approve foster families" to "approved" agencies.[28] To be sure, religious adoption agencies are typically not the only adoption agencies in town, and potential foster parents can likely go to a different agency should they want. But the more CSS emphasized that it is a *religious* entity and an *arm* of the Archdiocese—an argument that buttressed its free exercise claim—the more granting governmental licensing power to it or other religious adoption agencies presents a potential Establishment Clause problem.

Conclusion

There are self-evident reasons not to render religious adoption agencies unconstitutional. Adoption agencies of all stripes provide a much-needed social service.[29] And it is arguable that discontinuing contracting with religious

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08 (2018). Yet, though the Establishment Clause argument was not raised by the parties, the Supreme Court still should have addressed it considering that Establishment Clause violations are structural; they put into question the constitutional validity of the government action at issue—here delegating a governmental function to a religious institution and "fusing" government with religion—and thereby the constitutional validity of the government itself. And, when deemed necessary, the Justices call for supplemental briefing. *See, e.g.*, Citizens United v. Federal Election Com'n, 558 U.S. 310, 322 (2010) ("The case was reargued in this Court after the Court asked the parties to file supplemental briefs addressing whether we should overrule [Court precedent]."); Jennings v. Rodriguez, 137 S. Ct. 471, 472 (2020) (ordering supplemental briefs on a constitutional issue not raised by either party).

26. *See, e.g.*, 55 PA. CODE § 3700.64, 3700.72(a) (1987).

27. Indeed, the state's responsibility for caring for foster children dates back to colonial time. *See* JOINT STATE GOVERNMENT COMMISSION, CHILD PLACEMENT AND ADOPTION 5 (1951) [https:// perma.cc/63ZP-8REC] ("The problem of dependent children has been a matter of public concern in Pennsylvania since colonial days."); *see also, e.g.*, Wilder v. Sugarman, 385 F. Supp. 1013, 1019 (S.D.N.Y. 1974) (per curiam) (noting New York's commitment to "child welfare and placement practices since early colonial days").

28. 55 PA. CODE § 3700.61 (1987).

29. *See, e.g.*, Emily Wax-Thibodeaux, *'We Are Just Destroying These Kids': The Foster Children Growing Up Inside Detention Centers*, WASH. POST (Dec. 30, 2019), https://www.washingtonpost.com/national/we-are-just-destroying-these-kids-the-foster-children-growing-up-inside-detention-centers/2019/12/30/97f65f3a-eaa2-11e9-9c6d-436a0df4f31d_story.html [https://perma.cc/XLU9-TX3G] (describing the placement of foster children in emergency shelters and juvenile detention centers); Julia Terruso, *Philly Puts Out "Urgent" Call—300 Families Needed for Fostering*, PHIL. INQUIRER (Mar. 8, 2018), https://www.inquirer.com/philly/news/foster-parents-dhs-philly-child-welfare-adoptions-20180308.html [https://perma.cc/6J44-TK4H]; Ron Haskins, Jeremy Kohomban, & Jennifer Rodriguez, *Keeping Up With the Caseload: How To Recruit and Retain Foster Parents*, BROOKINGS INSTITUTION (Apr. 24, 2019), https://www.brookings.edu/blog/upfront/2019/04/24/keeping-up-with-the-caseload-how-to-recruit-and-retain-foster-

adoption agencies would violate the Free Exercise Clause. Because cities permit a number of non-religious adoption agencies to certify foster parents, one could argue, and the current Supreme Court would almost definitely agree, it would be discriminatory against religion to single out religious adoption agencies as not permitted to handle the government function of certifying foster parents just because they follow religious convictions when doing so.[30]

Still, as long as *Larkin* and *Kiryas Joel* remain good law, litigants can reasonably contend that the system endorsed by the Supreme Court in *Fulton*—in which the government function of certifying foster parents is handed off to an arm of the Catholic Church that makes determinations according to religious beliefs—unconstitutionally "fuses" government and religion. The current Supreme Court would almost certainly reject the notion that this system violates the Establishment Clause.[31] But if, as expected, the Court continues to expand the scope of the Free Exercise Clause, it will need to grapple with this long-simmering tension and, at a minimum, clarify when and under what conditions delegation of government functions to religious entities violates the Establishment Clause.

parents/ [https://perma.cc/22DA-PYCM] (explaining that "[t]he number of children in foster care ha[d] risen for the fifth consecutive year" to nearly 443,000 in 2017 and noting that "between 30 to 50 percent of foster families step down each year"); Char Adams, *Foster Care Crisis: More Kids Are Entering, but Fewer Families Are Willing To Take Them In*, NBC NEWS (Dec. 30, 2020), https://www.nbcnews.com/news/nbcblk/foster-care-crisis-more-kids-are-entering-fewer-families-are-n1252450 [https://perma.cc/3CYJ-63XE] (explaining how the COVID–19 pandemic has overwhelmed the United States' foster care system).

30. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2015 (2017). The free exercise argument that it is discriminatory against religion to single out religious agencies as not allowed to handle certifying foster parents just because they follow religious convictions would be predicated on the conclusion that there is no *Larkin* delegation afoot, since, crucially, the free exercise holdings in *Espinoza* and *Trinity Lutheran* rested on the Court's preliminary conclusion that granting funds for church preschool playgrounds and providing tax exemptions for donations to a non-profit that assists religious private schools do *not* violate the Establishment Clause. If they did violate the Establishment Clause, the government would have been permitted to "discriminate" against them. Thus, and put differently, a finding that *Fulton* is different than *Espinoza* and *Trinity Lutheran* would be predicated on a more preliminary conclusion that delegating governmental authority to religious adoption agencies violates the Establishment Clause under *Larkin* and *Kiryas Joel*.

31. *See* Debra C. Weiss, *Supreme Court's Most Pro-religion Justices Since WWII Sit On The Current Court, New Study Says*, ABAJOURNAL, (Apr. 6, 2021 9:33 AM), https://www.abajournal.com/news/article/the-supreme-courts-most-pro-religion-justices-since-wwii-sit-on-the-current-court [https://perma.cc/NJ2F-2H9V].