

Closing-Conversation.mp4

[00:00:00] **James Loeffler** Good afternoon.

[00:00:04] **James Loeffler** My name is Professor James Loeffler. I want to welcome you back to the conference. How the law treats hate, antisemitism and anti-discrimination reconsidered. If you've been with us today, you've known that we have worked through electrical storms to engage some key questions about the nature of antisemitism and how lawyers have thought about it past and present, the history of how it's been addressed in the United States and the questions of Jewish identity, groupness, and the legal frameworks that Jews have encountered and worked through to try and address discrimination that they and others confront. So we finish our day with a very exciting closing session, and to do so, we want to turn outwards to the pulse of the moment. And many of the issues as they're live inside the courts, particularly the Supreme Court, that many of us think about and hear about and want to know where we are and what is going on. So it's my pleasure at this point to introduce the two speakers who will be discussing it in a public conversation for this closing session. This whole event is a co-production of the Religion, Race, Democracy Lab at the University of Virginia and the Jewish Studies Program, at the University of Virginia. And our third partner is the Karsh Center for Law and Democracy at the UVA Law School. Its director, Micah Schwartzman, is the Harbi Cross Dillard, professor of law, and Martha Lubin Karsh and Bruce A Karsh bicentennial professor of law at the University of Virginia Law School. And he will be speaking together with Dahlia Lithwick, who is, as you will know, a renowned legal correspondent and commentator and journalist with Slate dot com. And what we've asked them to come together to do today is to reflect on some of the immediate questions and recent history of how the court has addressed discrimination. The First Amendment, many of the cases that have dramatically changed some of the legal landscape in the United States and which Jews are confronted, as are others, with new opportunities and challenges. I want to just alert everyone that what the way we're running this in terms of the housekeeping is that I'm going to encourage you to participate by sending through questions and you can use the Q&A feature to do that. And that will allow you to push questions through as well as to vote them up. So if you see something that you would love to have addressed, that's what we're doing. We've disabled the chat and the raised hand functions just to focus on the exchange that you'll hear. But to allow people to feed their thoughts and questions into it. Today's speakers have a tight timeframe and a lot to discuss. But we will do our best to try and get some of your queries also into the mix. And with that, I want to invite into the conversation Professor Schwartzman and Miss Lithwick.

[00:03:04] **James Loeffler** Hi there.

[00:03:06] **James Loeffler** Now that you're both here, my role is really to get things rolling as a moderator. And I'd like to turn to Micah and ask you just to frame for us. We've heard a lot of talk today about the presidential executive order, about legislation and the state level, about historical issues of civil rights and discrimination. But there's a lot that has happened recently, right, involving religion discrimination and the First Amendment. That is key to this picture we're trying to draw where we are in this moment. So I ask you to sort of lay the land out for us a little bit.

[00:03:44] **Micah Schwartzman** Thanks, Jim. And I just want to say on behalf of the Karsh Center that we're so happy to be participating in this program, which has, I think, been wonderful to listen to throughout the day. Let me answer your question by saying that the Supreme Court has been very busy in the context of making decisions under the First

Amendment religion clauses, you know, rendering decisions involving church and state. Over the past few years, we've seen more decisions, more action in this context than we have in many, many years prior to. There were more than a half dozen cases under consideration last term. We got three important decisions from the court, any of which could have been blockbusters in other terms to get them all at once. It can feel a little bit overwhelming. But let me start by drawing a couple distinctions. And we're getting decisions from the court in roughly three areas. So not this past year, but the year before, we had a decision in a case called American Legion, which involved the Bladensburg Cross, a 40 foot tall cross that you might have noticed if you live around Maryland or Washington, D.C., there was an establishment clause challenge brought to say that the state can't sponsor a cross like this, that it's an endorsement of Christianity in violation of the First Amendment's establishment clause. And the Supreme Court, in a seven-two decision, affirmed the state sponsorship of that cross as a war memorial, giving wide latitude, I think, to the state, at least with respect to historical monuments to authorize state religious symbols. Another set of cases involves state funding of religion. And this term we have a really important case called Espinosa, which came out of the state of Montana involving a school finance program, the tax credit in which the state had tried to exclude religious schools from receiving funding. This, the state at Montana relied on a state constitutional provision. Many states have constitutional provisions that restrict funding to religious institutions. The Supreme Court said that it violated the free exercise rights of religious individuals to exclude religious schools from receiving funds. We had two other. Sorry. There's a lot. We had two other really important decisions from the last term involving religious accommodation. So if you're keeping track, we've got a decision two terms ago on state support of religious symbols, this term on state funding of religious institutions. And now the question, to what extent does the state have to exempt religious people who object to complying with federal or state laws in various ways? So the two big cases here are Little Sisters of the Poor, which involves the coverage of contraception. And this is sort of a tail end of the Hobby Lobby litigation. But again, a seven-two decision. Justice Kagan, Justice Breyer joining a conservative majority here, as they did in the cross case. So a little puzzling. We have two Jewish justices joining conservatives on the court and wondering what's going on here. And Justice Sotomayor, Justice Ginsburg dissenting in what's become a fairly common pattern of seven-two decisions in the religion context. The last case that's of note from this last term is Our Lady of Guadalupe. Involving what's sometimes called the ministerial exception. That is that churches have an immunity from anti-discrimination law. This case involved school teachers who were hired by religious schools, Catholic schools out in California and the Ninth Circuit. They were fired for various reasons and raised discrimination claims and their claims were rejected again on seven-two grounds, with Justices Kagan and Breyer joining the court's conservative majority for lopsided victories. I think it's fair to say that what we're seeing across the board in these decisions is a very strong push toward aggressive religious exemptions for religious institutions, especially those with a conservative religious bent and a significant weakening of establishment clause protections against state support of religious symbols and state support of funding. Very strong free exercise. Very weak establishment.

[00:08:06] **James Loeffler** Thank you so much, Micah. So, Dahlia, what's going on? Why are we seeing all of this?

[00:08:11] **Dahlia Lithwick** Well, first of all, I want to just say how good it is to be back at UVA. And I also feel that I really have to apologize. It is very befitting this conference that my zoom has been glitchy today. And so I am both podcasting from and talking to you now from my stacked up Passover dishes in the basement. And I wish I had a fabulous background, but I think if ever your background were to be stacked up Passover dishes,

this seems that place. I mean, I think that and I think this goes to the heart of what your last panel talked about, Jim. The court is trying to reconcile two trends. One is that the United States is changing and growing and that civil rights and civil liberties are complicated in ways that they did not used to be.

[00:09:03] **Dahlia Lithwick** And at the same time, there is a very well organized, robust set of free exercise claims that would have been unheard of, by the way, 10 years ago at the Supreme Court. And so the court is doing this rather amazing thing, which is the court giveth and the court taketh away.

[00:09:20] **Dahlia Lithwick** And so, you know what doesn't kind of get clocked when we talked about the fact that Neal Gorsuch himself, writes what I think is one of the single most important guarantees of employment protection for LGBTQ workers in America. There can be no question it's a landmark piece of litigation. But as Micah just pointed out, really, religious exemptions and the ministerial exemption will actually be used.

[00:09:53] **Dahlia Lithwick** I don't think there's any dispute will be used when schools fire gay workers in the future for religious reasons and then say, like, that's our ministerial exemption. And so I think it's just maybe a useful beginning to the frame of this conversation to say that the court is also trying very hard to both live in a complicated America with lots of clamoring claims for civil rights and civil liberties, and also very, very much hollowing out some of those claims.

[00:10:24] **Dahlia Lithwick** The same way we saw Obergefell (?) in some sense, hollowed out by cakebaker's making valid religious claims that they could not be conscripted into doing something that violated their religious freedom and religious expression. And I think we're going to really see that tension strikes me as the seminal tension that we're going to see play out in the religious sort of wars that the Supreme Court than the lower courts for the foreseeable future. There will be lots of giving and lots of taking away.

[00:11:04] **James Loeffler** So and let me ask you both, and in light of that, as you've described it, diversity versus the religious freedom development.

[00:11:17] **James Loeffler** So where is antisemitism fit into it? And I'd love to hear you both reflect on, I guess, both the question of where you see the claims and the alliances happening in terms of people who are bringing tests and looking for new ways to make the court dress things as well as the court itself, right. And and the Jewish justices who, as Micah pointed out, took positions, some of them that were surprising to many people who would have expected a different action.

[00:11:48] **Dahlia Lithwick** I want Micah to speak too. Micah actually has done this phenomenal roundup of justices referencing Jews in doctrine, which I think is eye opening. And Micah, I maybe I don't know if there's a way to throw it into the chat or something, but it's as if I want you to have a moment to talk about it.

[00:12:10] **Dahlia Lithwick** But I will say, you know, Micah mentioned that one of the surprising justices is Elena Kagan, who has become, I think, one of the people who really, Micah's word is appeasement, I'll let him explain why that is. But who has has pretty single mindedly sided with the conservative majority in every one of these 7-2 cases. Kagan is there. And I would just say it's interesting because she started her career at the Supreme Court with this blistering dissent in the town of Greece case where she, I think, spoke for

every Jew who had ever been forced to sit through any supposedly secular, utterly not secular, solemnization or secular prayer. And she really came out guns blazing, talking about what that was like. And I actually think deeply personal terms. So I think for a lot of us, we anticipated she was going to finally give voice, Jim, to some of those concerns, at least that you're speaking about.

[00:13:19] **Dahlia Lithwick** And certainly the concerns that, you know, arise when you talk about Judeo-Christian values but only promote half of that. She is not, I think, proven to be anything like that. And Micah, I think can talk about it a little more, but I do think that Jews and Judaism were used in really interesting ways to make claims about not Jews and not Judaism.

[00:13:45] **James Loeffler** Micah, please. What's going on?

[00:13:47] **Micah Schwartzman** There are a couple of questions here. You know, it's interesting that most of the cases that we're seeing now are not brought by Jews in the way that we did see cases, active litigation, especially in the 50s and 60s, and trying to dismantle blue laws involving school prayer. You know, there were Jewish groups and Jewish litigators who were very heavily involved in those early cases. I think there are still Jewish groups involved. And you see you see this kind of there's a sort of polarization even within the Jewish world in terms of filing amicus briefs in these cases. So in *Fulton*, which has been mentioned in your prior panel, you know, where you have a challenge from Catholic Social Services coming up to the court, which we heard just after the election. If you look at the amicus briefs that are filed in the court, you see Jewish groups on both sides. There are Orthodox groups that are lining up with Catholic Social Services. And you see a range of conservative reform reconstructionist groups lining up with the state to protect anti-discrimination laws. There is some division, I think, with respect to exemption cases, accommodations inside the Jewish world, which may which may have been exacerbated over the last several years. But, you know, there is a strange pattern emerging with the justices, Dahlia's touchstone. We've mentioned in these seven-two decisions whether it has to do with government religious speech, government funding of religious organizations or exemptions across all these cases. We see the seven-two pattern for Justices Kagan and Breyer joined the conservative majority. And we sort of know what's going on here. And in an article with a scholar, named Nelson Teddy, who's at Cornell, I've argued that Kagan and Breyer might be engaged in what we call an appeasement strategy. Now, appeasement obviously is loaded term for historical reasons, but we think that it's hard to find another term that describes the dynamic where you've got what seemed to be unilateral concessions for trying to keep the peace, but not getting very much in response. The conservative majority is going to do what it's going to do. And it's obvious that Kagan and Breyer are getting anything in exchange for their votes or in exchange for conceding some of the reasoning in these cases. And the cases are important. You know, one of the cases is *Masterpiece Cake Shop*, the wedding vendor case where Justice Kagan and Justice Breyer agree with the court that state officials were hostile to the baker. That's really surprising. It's hard to think that, for example, if there had been a Justice Garland and they'd have another vote instead of Justice Gorsuch, that they would have voted in the same way. I really doubt it. Maybe in some of these cases you could you could think that. But in some of them, seems like they're joining the conservative majority strategically. And we might worry that that strategy is not a particularly good one. Maybe we shouldn't second guess Justice Kagan. She's brilliant and she's on the court. Maybe she knows best. But from the outside, those of us who are watching are wondering, is this is this a good strategy? Is it going to work? I think that still is a question. About what's the role of antisemitism in all of us. But maybe I'll stop and let Dahlia pick up.

[00:16:53] **Dahlia Lithwick** Well, I would just say, you know, I think one could if one wanted to write volumes about Justice Breyer and, you know, Micah started with the cross case, the weird and perplexing Breyer thinking about old crosses bad, you know, new crosses or old crosses good new crosses bad. You know, this is not all that.

[00:17:23] **Dahlia Lithwick** Easy to differentiate from his two ten commandment cases where he's like some Ten Commandments, but some Ten Commandments. Good. And I find myself I said to Micah and Jim right before the panel. I've been trying to construct a unified theory of why Elena Kagan and Stephen Breyer. It's possible. It's entirely strategic. In other words, there's an easy psychological answer to this question just because they're trying to do deals. But what it is about, the way they look at the world that allows them to split off from Sotomayor and Ginsburg in these cases.

[00:18:04] **Dahlia Lithwick** And I think Breyer really has a kind of very mid century kind of country, clubby view of religion. That is, you know, he's not different that much in terms of age from Justice Ginsburg. But his world view is so uniquely American in the way he thinks about particularly, I think, these public displays then also Micah notes across the different religion cases. He's just got a very sort of sweet, civilizing view of all religion that I think is in the best I can do to try to understand. I don't want to say it's a San Francisco thing because I'll offend the San Franciscan. But I can't quite ascertain the root of it.

[00:19:00] **James Loeffler** It's interesting because as you're circling around this, what you've both described, it's what from a historical perspective, one could say it's about feeling so comfortable, as you suggested, Dahlia, so secure in Americanness and an older version of America's perhaps or maybe not an older one. But this, you know, a certain type of American public life that it doesn't seem offensive. Or you could say that it's as I think Micah is suggesting, for reasons that we may not really understand in a capitulation, you know, basically being sort of outmaneuvered by a certain majority framework. Let me shift us. And before I do that, I want to invite people. There's a lot of people listening. Please do shoot through questions so that we can bring them into the mix in the Q&A. Just type them in.

[00:19:51] **James Loeffler** So we can't do this without talking about COVID. And COVID's an interesting thing because of some of the free exercise issues that have come up which have cut in somewhat, well, I won't say anything about how I think they've cut. I'd rather hear how both of you think they've cut in terms of how the court has dealt with them and then some of the Jewish voices and Jewish symbolism in these things and how it works with, you know, claims about religious freedom for Christians. So what is going on with that? Micah, would you want to start?

[00:20:24] **Micah Schwartzman** So we had a lot of litigation starting in March and April. Lots of opinions in the lower courts, district court circuit, appellate courts. And then over the summer. We had two Supreme Court cases in which the court basically refused to hear decisions from lower courts and left in place social distancing rules.

[00:20:46] **Micah Schwartzman** A case out of California went up and the court responded with some of the justices offering opinions, including, unusually, Chief Justice Roberts giving an account of why the court shouldn't hear this case. Case was called South Bay. And then the chief had a pretty perfunctory short opinion, said basically, we don't think there's discrimination happening here and we're not going to get involved.

[00:21:14] **Micah Schwartzman** Fast local state decisions involving COVID. We're going to leave these social distancing rules in place and churches that are regulated by them have to follow those regulations. And then in another case called Calvary Chapel, the court was tested again. This case in Nevada, where you've got casinos that are operating in. The leaders of churches are saying, well, casinos are open, how can we can't be open? And the conservatives on the court now are nearly apoplectic. I mean, they're really upset. There are a lot of separate dissenting opinions from Kavanaugh, from Gorsuch, from Justice Alito. They want explanations from the court about why there seems to be disparate treatment. Sometimes businesses don't have to follow these rules. But churches do. They think they're being victimized by state officials.

[00:22:01] **Micah Schwartzman** You know, this I think those decisions effectively put an end to early challenges. But they'll still be litigated until these regulations are lifted. There's a very strong sentiment out there that these social distancing rules infringe on religious liberty. But Chief Justice Roberts is not interested in hearing these cases.

[00:22:23] **Dahlia Lithwick** I mean, I would add two things, one is that it's it's really interesting, you know, we were talking about Fulton, the the Philadelphia case. And I think when you read the amicus briefs in Fulton, it's just really fascinating to watch, particularly Jewish groups try to locate themselves in this question of am I being singled out for abuse and discrimination because I can't perform my mission or do I identify myself with, you know, the larger secular community that is trying to make sure that there is no discrimination afoot in using government funds to make determinations about foster care. And that same, Who am I like? Is very much at work, I think, in these COVID cases. And so it's really easy if you read Justice Alito or Justice Kavanaugh in these cases, just going off the notion that a church could be compared to a casino is in and of itself a religious affront. And so it's really you know, you have I think in the earlier case, as Micah noted, you know, Chief Justice Roberts makes two very, I think, noncontroversial moves. He's not trying to single out churches. He's simply saying, one, churches are not like, you know, stores where you can go. He likens it to the bucket of things that it's being likened to and says churches are just not like that. You don't go into a corner store in California and sing for two and a half hours and leave. You go in and you get your milk and you get your coke and you leave. And so for him, that's a simple move. It's just it's a category error to say that churches are like corner stores. Therefore, they're being singled out for abuse. And so I think to me, it dovetails so nicely with the prior panel, Jim, where we're trying to figure out is there some animus at work here? And there is no question that if you read these dissents and we can have a conversation about how these cases are not being briefed properly or argued properly, and they're not I mean, they are really emblematic of what happens when you make decisions at midnight on a Friday. But I think that there is a really good. Frame for these, that is, are churches being singled out and synagogues presumably for abuse? And is the mere comparator here, which is casinos, the affront or is there something else? The second move that John Roberts makes, which again should be uncontroversial, is but science, right? He says, I'm not a doctor, not a public health official. Gonna just go with what they're telling me, which is that, you know, churches are different. And even that, I think is experienced, as you know. But how can you apply but science to religious liberty? And so I see these as micro versions of really big thematic confusion around categories and how we think about these and maybe how Jews look at themselves in those in those conversations.

[00:25:56] **Micah Schwartzman** Can I have one quick point, which is, if you look at the religion cases that lead up to these two COVID cases from the South or South Bay Calvary Chapel in the last dozen or so cases, religious claimants win all of them except the

travel ban case, right. Except Trump's ban on traveling from Muslim countries. But they went all the other ones. And John Roberts is strongly supportive of religious liberty in all of these other cases, or at least the conception of religious liberty that that's being pressed, especially from from the right. And here he meets his limit. And it may just be that he was pushed too far and with a whole stream of cases that would have followed in the wake of any other decision than the one he made. And with some bad cases, I think being bad arguments, being pushed from earlier decisions where he might have just thought, this is crying wolf. And, you know, I don't think there's discrimination here. But but it may be that the conservatives pushed too hard, pressed too far in those cases and just wasn't willing to go as far as they wanted them to go.

[00:27:06] **Dahlia Lithwick** Can I. Can I add a note to Micah's note, which is related to absolutely nothing we've just discussed. But worth like throwing into the mix here? I think we can't have this conversation without talking about Donald Trump's list of Supreme Court nominees, which is the additional 20 that's added to the 30. Like there's this is 4.0.

[00:27:27] **Dahlia Lithwick** And like you say, Paul Clement finally made the list. But I think it's worth saying that in Donald Trump's recitation of the evils that would befall America if he didn't get to see, he says he's got four seats coming up. And one wonders, maybe Gorsuch needs to be moved along. But I don't know where his four seats are. But but I do know that his recitation of what he's worried about, someone that was doing, signaling in the White House about and clearly this is all about John Roberts, right. That's why Josh Holley is on the list. That's why Naomi Roe is not on the list.

[00:28:05] **Dahlia Lithwick** But it is really interesting that the thing that he cites in his list of American carnage that is going to come if he doesn't get to fix the Supreme Court is the Pledge of Allegiance that under God comes out. And I thought that was a really. Again, one doesn't want to read too much into whoever is writing his speeches. But the idea that under God, in the midst of all the religious sort of warfare that Micah laid out at the beginning, that the pledge is emblematic of something I thought was really, really interesting and really removed it from kind of the last few terms and put it in a really different kind of world.

[00:28:49] **James Loeffler** So so tell me. You've mentioned a couple of times the question of who's making these arguments and whether they're, you know, ill advised and ill conceived and poorly argued. You know, a lot of people who are listening to both of you lay out for us so cleanly these issues wonder where, quote unquote, the Jews are on this. Right.

[00:29:13] **James Loeffler** And it's we've seen throughout the day, we've talked about it. Jews are split. Right. And Jews have multiple opinions about these things. And no one speaks for the Jews. But I want to ask you both to demystify a little bit for us, because I think for many who are listening to this conversation, they wonder actually who tries to speak for the Jews. Right. When it comes to amicus briefs, we know there's this long history of Jewish organizations involved, but we know also there seem to be other actors popping up on the scene and, you know, different legal entrepreneurs. So what is that looking like today?

[00:29:46] **James Loeffler** Is it is that is the landscape just chaotic and diverse about who is petitioning the court and getting involved? Are there still familiar faces there, just as Dahlia mentioned to us, kind of confused about exactly where they should fit themselves in? What what does it look like with with Jews in the court?

[00:30:07] **Micah Schwartzman** Dahlia, you wanna go first

[00:30:10] **Dahlia Lithwick** Yeah, no, I mean, I would simply say that it's it's. And I think Micah Micah said this map's really well on to the amicus briefs in Fulton. I think Jews are on both sides. Jews are on, you know, I think there is no doubt, and Micah can talk more about this, a very well organized, very focused, and I would say probably asymmetrically focused Orthodox Jewish community that is weighing in in these cases and aligning itself overwhelmingly with kind of conservative Christian groups. And then there are, you know, the conservative movement and the reform movement are sort of on the team of the ADL and they're on the team of the the liberal, whatever that means arguments.

[00:31:10] **Dahlia Lithwick** But I think it's been really interesting to see the same kind of fissure that you see when, you know, the Baptist groups who are, you know, very, very opposed to what Micah describe, you know, in Espinosa, you know, very, very vocal that, know, sort of splinter off from Catholic groups or evangelical groups.

[00:31:39] **Dahlia Lithwick** I think maybe the beauty of having my god a third of the court is Jews. It would have been four if Merrick Garland had been seated. And that's unprecedented to be describing, which is how come they're not doing all the same thing? I used to be one Jewish seat for a very long time. And you knew what that Jew was going to do. And maybe it's kind of an embarrassment of riches that we have so many Jews that they don't all do the same thing. And by the same token, I think Jews are so powerful in the amicus industrial complex that they are on both sides.

[00:32:15] **Micah Schwartzman** Yeah. Well, I would say if you read the amicus briefs, you might think that there are as many Orthodox Jews as there are reform and reconstructionist and conservative Jews in this country. And although they're Orthodox Jews, they may be growing, it's not the case, in terms of just sheer population. And the amicus briefs don't, I think, don't reflect the size of the community. And the way that it's split proportionally, there's a there's a significant representation on the orthodox side from the Orthodox Union, from the National Jewish Commission and Public Affairs Koltai (?), which has a long history of filing amicus briefs in the court. Aghada (?) Israel on one side and some other Jewish organizations and some new ones that have come in over the last several years.

[00:33:01] **Micah Schwartzman** And on the other side you have the CCAR and the URJ and National Council of Jewish Women, the United Synagogue of Conservative Judaism and other groups. But this is just I'm just describing the landscape in Fulton, but I think it characterizes the exemption cases where more generally. The other thing to say here is there's and this has been true for a long time. There's a difference within the Jewish world on whether the state should support Jewish institutions with money, with funding, through vouchers or through other kinds of programs. And here I'll just say that debate at the level of the court is mostly over. And even though the practical level of Jewish institutions receiving funds, I think under code that we've seen a major shift. Right. The CARES Act in response to code that included a lot of money for nonprofits, including religious organizations, and hundreds and hundreds of Jewish organizations throughout the country received an enormous amount of money over the last six months under that program.

[00:34:03] **Micah Schwartzman** And there was some debate, not only within Jewish groups, but others, too, about whether it was appropriate for the state to fund those groups. But that debate was short and really not that controversial. And it's over. And the

money went out and it's been received. And I don't think we fully appreciated the collapse of separation of church and state with respect to funding. Maybe not with respect to some other issues, but at least with respect to funding. We live in a different world than we did a year ago in terms of state funding of religious organizations. And that will be true going forward. It's facilitated by the Supreme Court's decisions in cases like *Espinosa*. But the federal government has driven a huge truck down that lane and to the tune of billions upon billions of dollars. And, you know, I think in the mid 20th century, there was sort of a settlement on the liberal side of Judaism, you know, going to send our kids to public schools. We're not going to have day schools. We are opposed to public funding of religion or separationists. Jews were the most separationist of the separationists when it came to church and state and the ground has shifted. And I don't know that liberal Jews have quite caught up to what's happened either in the core or in terms of the structure of government funding.

[00:35:18] **Dahlia Lithwick** Can I just one tiny coda to that or at least to that I think the first thing that Micah said, which is it's really important to realize the asymmetry at work here, because I think if you did read amicus briefs, you would believe that ninety five percent of American Jews are Orthodox. And by the same token, I think you would believe that ninety five percent of Americans, you know, Christians are Catholics or evangelical. I think there is a real, it goes to, you know, what's kind of known by the pollsters is the enthusiasm gap around the court and just the ways in which orthodox religionists, regardless of the religion, have absolutely settled upon this Supreme Court as the issue. And that is not the case for secular Americans or for sort of religious Americans of any sort of, well, what to call it. But that isn't orthodox. But I do think that some of what Micah was describing in that enthusiasm gap and he even I think in the sort of how do we get here when COVID happen is simply that orthodox religionists have very, very much prioritized making change by way of the courts in ways that I think non-religious Americans have not. And it explains in part why Donald Trump has a list and Joe Biden does not have a list. That explains why, you know, days of the RNC went to the court. And I think four minutes of the DNC, maybe two minutes went to the court. I mean, I just think there's an asymmetry around organizing around the courts that maps both onto party and on to religious enthusiasm, enthusiasm is not the correct word.

[00:37:25] **James Loeffler** It's interesting to think about this in light of what you said at the beginning of our conversation, Dahlia, about the court, give it caretaker if emits this moment of what everyone understands is change. Right. So do you think the motivation, enthusiasm there is because these are groups who think they are going to be outnumbered. You know, and a few years time and they want to solidify their position and hold on? Or do you think it's groups that are emboldened by all the changes and saying, no, we can. We can. We've realized this is a strategy for us. We can get what we want.

[00:38:01] **James Loeffler** Is it, you know, we began by talking about emotions. Is it, as some people have said, fear and anxiety driving this? Or is it confidence, you know? As people have talked about Orthodox Jewish lawyering, they've said, well, there's also an assertiveness that comes with that. We can make these claims to, you know, that they like us and we can make these claims. And why not play a big ball? What do you think when you read through the lines of how people are framing their arguments? Do you see? Can you characterize that as an orientation towards the future?

[00:38:36] **Dahlia Lithwick** I think it's yes and yes. I think it's both. Jim, I know that's the most Jewish answer I can give, but I think it's also, you know, it's very much and you see it

again, you know, in the amicus briefs. There is a simultaneous framing that is, you know, we are a beleaguered victims.

[00:38:54] **Dahlia Lithwick** We come from a long tradition and a long history. And I loved in the last panel that, you know, you all talked about how history is sort of shot through these historical arguments are shot through on both sides. And to say, you know, that that we are historically victims and also we're historically powerful. And I think that those claims rest very easily with being emboldened, you know, with saying we won, we won again.

[00:39:25] **Dahlia Lithwick** You know, the last ministerial exemption case was nine-nothing. Let's go for broke this time. And so I think that they're, both of those things can be happening. Maybe Mica has a more sophisticated or nuanced reading, but I think we're very, very good as religious minorities in this country at being simultaneous, tenuously terrified and simultaneously hutzpah day.

[00:39:55] **Micah Schwartzman** I think that's wonderfully put. I guess I would only say that, there's some question about who were terrified of and who emboldens us, and I think, you know, on the right, you've got groups that are concerned. You know, they have some anxiety about regulation at the local level, maybe even regulation at the federal level. But they're pretty confident about winning in the court. And the court is a place where, as Dahlia said, they can go and expect to be heard and to be successful. And I don't think they've found the outer limits of that yet. And we're in the process of exploring it. It might hit a wall in the COVID cases, but I suspect in Fulton we're gonna see a high watermark in terms of religious exemptions. I mean, at them at this point, I think we've never seen a court more solicitous of religious accommodations than the current one. And I don't think we're finished there yet.

[00:40:54] **James Loeffler** We're coming to the end here. We just have two minutes left. So I want to just ask if either of you has a closing thought or if you know me still to put to two important questions. The second one is, will Lemon be overturned? Do you think? Do you think that to be in court will overturn Lemon? Maybe you could take that one in 30 seconds.

[00:41:16] **Dahlia Lithwick** And my very quick answer is that much like Roe, well, you don't have to write the word Lemon is overturned for a Lemon to be dead. And I think it is. It is. We have moved on from Lemon. Whether or not it's overturned, maybe Micah things.

[00:41:30] **Micah Schwartzman** I mean, on the funding side, I think it's basically a dead letter. The only question left from Lemon this is going to be really hard is the first part of the lemon test said that the federal government or the government states, do they have to have a secular purpose for their laws? Lemon is a bar toward legislating for religious purposes. And the court, the court's conservatives have long chafed at this. Justice Scalia used to have all kinds of not nice things to say about this aspect of Lemon. But it's been really important, especially in the gay rights cases or Berghofer (?) all respects this principle. You don't see religious arguments, for example, opposing gay marriage. The court does not take them into consideration. It is a backbone of religious pluralism and secularism, political secularism, the United States, that our governments don't make decisions on overtly religious grounds. If Lemon goes in, that sense takes that, we'll have, I think, changes that we can't even fully contemplate. I hope that won't be the case. Don't expect it. But as Dahlia said, you don't have to reverse the name to effectively do away with much of it.

[00:42:38] **James Loeffler** Well, I want to thank you both. We could keep going, but I think we reached a good point and we've reached the end of our time is even more important. I want to thank everyone also for joining us. To hear Micah Schwartzmann and Dahlia Lithwick close out this conference and help us by thinking out loud about where we have been and what is going on and what the broader framework looks like. Our goal has been to bring together people who take different perspectives on how to study these problems. And I want to thank those who've come together to make this happen. That's the religion lab here, who is part of a larger initiative at the University of Virginia, the democracy initiative, to really try and bring us scholars into deep engagement with current issues in ways that don't simply conscript us to the politics of the moment, but allow us to give perspectives and resources for thinking through these hard questions. I want to thank the law school and Micah that directs the Karsh center, which is really trying to give informed comment about the rule of law and these issues. And I want to thank colleagues from the program. I represent the Jewish Studies Program who've beginning three years ago struggle to figure out what we can contribute to help address antisemitism, as well as the other related and larger challenges that we all of us face as we think about what law can do to stop hate. Next week, if you want to revisit anything said, this will be up on the website. You can get it through the conference website. More programs related to this we hope will be forthcoming. And we really want to thank all of you and wish you a good rest of your day and of your week. Thank you for joining us.