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OUR ANTI-*KOREMATSU*

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I.

A pandemic is not a war, but in 2020, more than three hundred seventy-five thousand Americans died from the COVID-19 pandemic. By contrast, there were about two hundred ninety-one thousand combat deaths in World War II and about forty-seven thousand such deaths in the Vietnam War. As in wartime, a pandemic produces a series of mandates and restrictions, some of which raise serious constitutional issues.

In the United States, some of the resulting questions involve liberty: Have restrictions invaded some protected sphere? Are they too draconian? Unconstitutionally so? Others involve equality: Have similarly situated people been treated differently? The equality questions have proved especially challenging in the context of restrictions on attendance at religious services.

Suppose, for example, that a state imposes a general restriction on gatherings of certain kinds and that the restriction includes churches, synagogues, and mosques. Is the restriction constitutional? Or suppose that a state imposes a general restriction on certain kinds of gatherings but that it includes exemptions for "essential" businesses, including drugstores and grocery stores—but that places of worship are not deemed "essential." Is that constitutional?

In approaching such questions, two propositions are clear. First, an unambiguously discriminatory restriction would be highly likely to offend the Free Exercise Clause. If a particular state imposed pandemic-related restrictions on houses of worship but at the same time exempted comparable institutions, it would be acting unconstitutionally—unless that state could give some compelling justification for its selectivity. Second, a nondiscriminatory restriction would not offend the Free Exercise Clause (although it could

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raise questions under the Due Process Clause).[1] But these two propositions leave open questions. When, exactly, is a restriction discriminatory? And with what level of deference, or instead skepticism, ought courts to answer that question?

The U.S. Supreme Court gave partial answers to these questions in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[2] Its answer to the first question was that a restriction would be deemed discriminatory whenever a state burdens places of worship while also exempting institutions that are relevantly similar to them.[3] Taken as such, that answer should not be controversial, although as we shall see, it is far from easy to apply (which is why the issue in *Roman Catholic Diocese* divided the Justices). The Court's answer to the second question was clear and of potentially enduring importance: with very little deference.[4] For obvious reasons, that answer should be controversial, and its scope remains to be clarified.

I offer two arguments here. The first is that because of the serious health effects of the pandemic, and because of the plausibility of a plea for judicial respect for complex choices by elected officials, *Roman Catholic Diocese* can reasonably be seen as a kind of anti-*Korematsu*[5]—as a strong signal of judicial solicitude for constitutional rights and of judicial willingness to protect against discrimination, even under emergency circumstances in which life is on the line. The second argument is that *Roman Catholic Diocese* can also and equally be seen as a vindication of Justice Robert Jackson's argument in *Railway Express*,[6] in which he called for relatively ready invocation of antidiscrimination principles, as opposed to liberty principles, on the ground that the former, unlike the latter, trigger political safeguards against unjustified actions.[7]

The two claims are not meant to offer a final judgment about whether *Roman Catholic Diocese* was rightly decided on its particular facts (although I will have something to say about that question). And notwithstanding those claims, *Roman Catholic Diocese* leaves some important questions open. The first is large: in deciding whether religious institutions are subject to discrimination, how shall we identify the comparison cases in the complex context of a pandemic? A claim of discrimination requires a comparator, and in *Roman Catholic Diocese*, and in other cases of arguable discrimination in the context of the pandemic, identification of the comparator is not straightforward. The second is even larger: is *Roman Catholic Diocese* best taken as a general repudiation of the idea of judicial

1 *See* Emp. Div. v. Smith, 494 U.S. 872 (1990).

2 141 S. Ct. 63 (2020) (per curiam).

3 *See id.* at 66–67.

4 *See id.* at 68. ("Members of this Court are not public health experts. . . . But even in a pandemic, the Constitution cannot be put away and forgotten.")

5 Korematsu v. United States, 323 U.S. 214 (1944).

6 Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 111–17 (1949) (Jackson, J., concurring).

7 *Id.* at 111–12 (Jackson, J., concurring).

deference to officials in emergency conditions,[8] or is it instead best taken as a reflection of solicitude for religious institutions in particular? The answers to both questions remain unclear.

II.

Roman Catholic Diocese arose in response to an executive order from New York Governor Andrew Cuomo, which was designed to control the spread of the pandemic. In some ways, Cuomo took a standard approach to the problem. He divided the state into various zones: red, orange, yellow, and green.[9] The zones were defined by reference to infection rates. Red zones were those in which infection rates had spiked.[10] The immediately surrounding areas were designated as orange, and the outlying areas were deemed yellow.[11] The severity of the restrictions followed directly from the designation. In red zones, for example, the number of people allowed to assemble would be the lesser of (a) ten or (b) twenty-five percent of maximum capacity.[12] In orange zones, the corresponding number would be the lesser of (a) twenty-five or (b) thirty-three percent of maximum capacity.[13] In yellow zones, the restriction was fifty-five percent of capacity.[14]

In October 2020, Governor Cuomo designated parts of Brooklyn and Queens as red, orange, and yellow.[15] The Roman Catholic Diocese of Brooklyn and Agudath Israel of America brought suit, contending that the restrictions in red zones and orange zones were discriminatory and unduly strict and thus were in violation of the Free Exercise Clause.[16] The district court rejected that argument. On the basis of evidence and testimony, it concluded that the restrictions had been "crafted based on science and for epidemiological purposes."[17] It explicitly recognized the difficulty of identifying the comparable institutions with which to test the claim of discrimination. For example, the regulations treated religious gatherings *more* favorably than public lectures, concerts, and theatrical performances.[18] At the same time, they treated such gatherings *less* favorably than "essential businesses," which included banks and grocery stores.[19] In terms of the relevant health

8 On the general question, see Geoffrey Stone, Perilous Times (2005).

9 Roman Catholic Diocese of Brooklyn v. Cuomo, 493 F. Supp. 3d 118, 121 (E.D.N.Y. 2020).

10 *Id.*

11 *Id.* at 122.

12 *Id.*

13 *Id.*

14 *Id.*

15 Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 76 (2020) (Breyer. J., dissenting).

16 *See id.* at 76–78.

17 *Id.* at 76 (quoting *Roman Catholic Diocese*, 495 F. Supp. 3d at 131).

18 *Id.*

19 *Id.*

risks, however, the court concluded that essential businesses were distinguishable, and it also expressed a reluctance to "second guess the State's judgment about what should qualify as an essential business."[20] The Second Circuit Court of Appeals declined to issue a preliminary injunction, although it asked for full briefing.[21]

In an unsigned *per curiam* opinion, the U.S. Supreme Court rejected the analysis of the district court.[22] Its principal conclusion was that the applicants were likely to succeed on the merits because the restrictions did not meet "the minimum requirement of neutrality" to religion.[23] As the Court had it, "they single out houses of worship for especially harsh treatment."[24] To explain this conclusion, the Court noted that essential businesses, exempted from red zone restrictions, included "things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities."[25] The Court added that in orange zones, the "disparate treatment is even more striking."[26] In such zones, nonessential businesses are permitted to decide how many people to admit, whereas "attendance in houses of worship is limited to 25 persons."[27] As a result, there would be "troubling results"—as, for example, when a large store could have hundreds of people shopping there on a particular day, while a nearby church would be limited to ten to twenty-five people.[28]

The discrimination did not necessarily require invalidation, but it did trigger "strict scrutiny," mandating a demonstration that the measures were narrowly tailored to serve a compelling state interest.[29] Such a demonstration might serve to establish the requisite neutrality, showing that an animus against religion or religious groups, or insufficient

20 *Id.* (quoting *Roman Catholic Diocese*, 495 F. Supp. 3d at 130).

21 Agudath Israel v. Cuomo, 983 F.3d 620 (2d Cir. 2020), *rev'g and remanding* Roman Catholic Diocese of Brooklyn v. Cuomo, 493 F. Supp. 3d 118 (E.D.N.Y. 2020).

22 The decision in *Roman Catholic Diocese* might be taken as a departure from the direction indicated by two decisions earlier during the pandemic in which the Court denied applications for injunctive relief from houses of worship. *See* South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020). Justice Gorsuch embraced the change in tack, declaring, "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

23 Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. at 66 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)). The latter case involves the question of discriminatory exemptions, of course at issue in *Roman Catholic Diocese*.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

concern for them, was not responsible for the relevant discrimination. With respect to COVID-19, the state interest was clearly compelling, but the restriction was not narrowly tailored.[30] Among other things, the state had not demonstrated that a less restrictive approach to houses of worship would cause serious health risks. For example, "the maximum attendance at a religious service could be tied to the size of the church or synagogue."[31] Most of the targeted churches could seat 500 people, and some could seat as many as 1,000.[32] "It is hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows."[33] With this point, the Court seems to be raising the possibility that the restrictions would fail rationality review, although, of course, it was applying strict scrutiny.

The most noteworthy feature of the *per curiam* opinion is the absence of deference to state officials in a context in which deference might well be expected. To be sure, the Court did not say that restrictions on personal liberty, as such, would be subject to strict scrutiny. But it did say that whenever religious institutions were treated differently from similarly situated others, the discrimination must be shown to be narrowly tailored. The Court did not merely announce that principle; it applied it. Because narrower tailoring is almost always imaginable, and, because some exempted institutions might often be seen to be similarly situated to houses of worship, the Court's reasoning can be taken to be a strong signal that whenever some businesses or other institutions are exempted as "essential," a failure to exempt houses of worship will run into serious trouble.[34]

It is also worth pausing over the theoretical foundations of the Court's approach to the discrimination question. In some cases, strict scrutiny is a way of "flushing out" impermissible purpose. If female job applicants are treated worse than male job applicants, and if the government's interest (in, say, good performance) can be promoted without discrimination, we have reason to think that some kind of animus lies behind the unequal treatment. We could easily imagine cases of discrimination against religious institutions that can be analyzed in the same way. But in *Roman Catholic Diocese*, it is hard to defend the

30 *Id.*

31 *Id.*

32 *Id.* at 67.

33 *Id.* After the application for injunctive relief was filed, Governor Cuomo greatly lessened restrictions on the houses of worship at issue. *Id.* However, the Court concluded that injunctive relief was still appropriate because "the applications remain under a constant threat" of reclassification that could disrupt service attendance while waiting for judicial relief. *Id.*

34 In response to the Court's signal in *Roman Catholic Diocese*, some states loosened the restrictions imposed on houses of worship. *See* High Plains Harvest Church v. Polis, 141 S. Ct. 527, 527 (2020) (Kagan, J., dissenting) ("The State has explained that it took that action in response to this Court's recent decision [in *Roman Catholic Diocese*].").

proposition that New York was seeking to "get" places of worship or that it was animated by some kind of intention to hurt them. It would be more reasonable to think that the Court's approach was flushing out something like "selective sympathy and indifference,"[35] in the form of insufficient focus on, attention to, or respect for the interests of those who run houses of worship, work for them, and depend on them.

The very distinction between "essential" and "nonessential" services and businesses, and including places of worship in the latter category, might be taken as a kind of insult. It is not too speculative to suggest that the terminology helped trigger the Court's attention. Are places of worship not "essential"? Are they less essential than grocery stores? If New York had not used provocative words of this kind and had spoken more specifically in terms of relevant numbers, perhaps the Court would have found the question of discrimination more challenging.

III.

A series of separate opinions offered different perspectives on the problem. Justice Gorsuch concurred, strongly emphasizing the need to justify discrimination, even under circumstances of a pandemic: "Government is not free to disregard the First Amendment in times of crisis. [W]e may not shelter in place when the Constitution is under attack. Things never go well when we do."[36] He noted that the category of essential services was very broad, including hardware stores, liquor stores, and bicycle repair shops.[37] The breadth of that exemption led Justice Gorsuch to some unusually harsh rhetoric, even an accusation of bad faith:

> So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?[38]

The Constitution does not permit this:

> The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: in his judgment laundry and

35 Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

36 Roman Catholic Diocese of Brooklyn, 141 S. Ct. at 70 (Gorsuch, J., concurring).

37 *Id.*

38 *Id.*

> liquor, travel and tools, are all "essential" while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.[39]

If this is not a claim about forbidden animus—and it might well be—it is the closest thing to it. Whether or not he was speaking of active hostility, Justice Gorsuch might be taken to be saying that houses of worship were "inessential," a kind of dispensable hobby, perhaps like a chess club. In a separate concurrence, Justice Kavanaugh wrote more cautiously, noting that New York's numerical restrictions were both unusually severe and discriminatory.[40] He added (convincingly) that "it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions."[41] The problem was that

> once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class. Here, therefore, the State must justify imposing a 10-person or 25-person limit on houses of worship but not on favored secular businesses.[42]

Of course, it is true that courts "must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic."[43] At the same time, "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised."[44] Note here the breadth of his claim, covering not only religious discrimination but also racial discrimination and free speech and "the like."

In dissent, Chief Justice Roberts did not disagree with the claim of unconstitutional discrimination;[45] instead, he bracketed that issue and emphasized a procedural point, which is that New York had weakened its restrictions on the very houses of worship in

39 *Id.*

40 *Id.* at 72 (Kavanaugh, J., concurring) (noting that restrictions were more than others the Court had reviewed during the pandemic).

41 *Id.* at 73 (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 537–38 (1993)).

42 *Id.*

43 *Id.* at 73 ("The Constitution 'principally entrusts the safety and the health of the people to the politically accountable officials of the States.'" (quoting South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring))).

44 *Id.* at 74.

45 *Id.* at 75 (Roberts, C.J., dissenting) (noting that "the challenged restrictions raise[ed] serious concerns under the Constitution" and they were distinguishable from those at issue in others the Court had reviewed during the pandemic).

the case.[46] For that reason, it was unnecessary to issue a preliminary injunction.[47] In important respects, Justice Breyer, joined by Justices Sotomayor and Kagan, essentially agreed with this procedural point.[48] He emphasized as well that the claim of discrimination might not be made out, for "the risk of transmission is higher when people are in close contact with one another for prolonged periods of time, particularly indoors or in other enclosed spaces."[49] He added that it was important to give a degree of deference to "elected branches of state and national governments, which marshal scientific expertise and craft specific policies" in response to fresh developments.[50]

Justice Sotomayor, joined by Justice Kagan, rejected the claim of illicit discrimination. In her view, New York was concerned about "large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time."[51] Hence it applies "[s]imilar or more severe restrictions ... to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."[52] At the same time, the state "treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods."[53] For example, "bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time."[54] For that reason, there was no free exercise violation.

There is a question whether Justice Sotomayor's rejoinder is factually correct. Let us suppose, plausibly, that New York's restrictions were too draconian to serve its purposes because the Roman Catholic Diocese itself could operate without allowing people to congregate in large groups in close proximity for extended periods. Intriguingly, and somewhat puzzlingly, the *per curiam* opinion did not respond in terms to Justice Sotomayor's argument. Treating grocery stores, banks, laundromats, and other places less restrictively than houses of worship may or may not be discriminatory; everything depends on whether they are relevantly similar. Perhaps it is true that attention to whether people congregate

46 *Id.*

47 *Id.* Chief Justice Roberts also spoke in terms of the need for deference to public officials. *See id.* ("The Governor might reinstate the restrictions. But he also might not. And it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic.").

48 *Id.* at 76–77 (Breyer, J., dissenting).

49 *Id.* at 78.

50 *Id.*

51 *Id.* (Sotomayor, J., dissenting).

52 *Id.* at 78–79 (quoting S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)).

53 *Id.*

54 *Id.*

in large groups and remain in close proximity for extended periods could establish that New York had not discriminated at all. Or perhaps not.

IV.

The Court's analysis in *Roman Catholic Diocese* is in evident contrast with that in *Korematsu v. United States*, where the question also involved the constitutionality of discrimination under emergency conditions.[55] *Korematsu* is part of the anti-canon of constitutional law and indeed it might lead the list; the decision is widely regarded as a national shame, a terrible stain on the United States and the Supreme Court itself.[56] In 2018, the Court went out of its way to disapprove of *Korematsu*.[57] But from the standpoint of the present, it is not adequate simply to dismiss *Korematsu* as a disgrace and a disaster. It indeed does count as both, but before reaching that conclusion, it is important to investigate what the Court actually said, which is of enduring interest.

The Court began its analysis by establishing, for the first time, the framework of strict scrutiny. In its words,

> all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[58]

55 There is a voluminous literature. *See*, *e.g.*, Peter Irons, Justice at War (1993); Lorraine Bannai, Enduring Conviction: Fred Korematsu and His Quest for Justice (2015); Dean M. Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 UCLA Asian Pac. Am. L.J. 72 (1996).

56 *See* Charlie Savage, *Ruling on Japanese Internment Is Finally Tossed Out*, N.Y. Times (June 26, 2018), https://www.nytimes.com/2018/06/26/us/korematsu-supreme-court-ruling.html ("[*Korematsu*] has long stood out as a stain that is almost universally recognized as a shameful mistake."); Noah Feldman, *Why Korematsu Is Not a Precedent*, N.Y. Times (Nov. 18, 2016), https://www.nytimes.com/2016/11/21/opinion/why-korematsu-is-not-a-precedent.html; *see also* Bob Egelko, *Scalia's Favorite Opinion? You Might Be Surprised*, SFGATE (Oct. 30, 2015, 9:00 AM), https://blog.sfgate.com/politics/2015/10/30/scalias-favorite-opinion-you-might-be-surprised/ (documenting that Justice Scalia called Justice Jackson's dissent in *Korematsu* the Supreme Court's most admirable opinion, noting "it was nice to know at least somebody on the court realized that that was wrong").

57 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("The dissent's reference to Korematsu . . . affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" (quoting Korematsu v. United States, 323 U.S. 124, 148 (1944) (Jackson, J., dissenting)).

58 *Korematsu*, 323 U.S. at 216 (majority opinion).

That is, of course, the heart of the framework in *Roman Catholic Diocese*. Intriguingly, the Court offered these propositions without seriously engaging the text of the Constitution or the original understanding. After all, the Equal Protection Clause does not apply to the national government, whose actions were at issue in the case—which means that the Court must have been speaking, in some unclear sense, of the requirements of the Due Process Clause.[59]

The question in *Korematsu*, then, was whether some "pressing public necessity" really was at work. To answer that question, the Court collapsed what *Roman Catholic Diocese* treated as two questions: whether the state interest was compelling and whether the exclusion measure was sufficiently tailored to its achievement. The Court concluded that even under strict scrutiny, the government had not violated the Constitution, for "exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion."[60]

No one argued, of course, that most Japanese Americans were disloyal. Nonetheless, "exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group."[61] To be sure, distinguishing between the loyal and the disloyal and imposing the exclusion order accordingly would have been much better, but according to the military authorities, doing that was simply not practical[62]:

> The judgment that exclusion of the whole group was . . . a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion.[63]

The Court acknowledged the objection that "we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without

59 *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process . . . are not mutually exclusive."); Adarand Constructors v. Peña, 515 U.S. 200, 226–27 (1995); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

60 *Korematsu*, 323 U.S. at 218.

61 *Id.*

62 *See id.* at 219.

63 *Id.*

evidence or inquiry concerning his loyalty and good disposition towards the United States."[64] But in the Court's view, the objection was not convincing:

> [T]o cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.[65]

If strict scrutiny were really at work, of course, or indeed if anything in its vicinity were at work, the Court could not possibly have written these sentences. At the very least, less restrictive measures, not rounding up and segregating Japanese Americans, would have been required.

V.

Seen through the lens of *Korematsu*, *Roman Catholic Diocese* is a puzzle and difficult to understand. It would have been simple, through that admittedly distorting lens, to make three points about New York's restriction. The first is that officials had made difficult choices based on evolving evidence. The second is that courts should be reluctant to second-guess those judgments. The third is that in light of the relevant considerations, including the size of groups and how long people in them would be proximate to one another, there was no discrimination at all. Whether that claim is true would depend, of course, on the evidence.

Seen through the lens of *Roman Catholic Diocese*, *Korematsu* was at best reckless. Discrimination against Japanese Americans was sufficient to trigger strict scrutiny. Indeed, discrimination was unambiguous, as it was not in *Roman Catholic Diocese*. Protecting the nation against serious threats was a compelling interest, but the exclusion order was not narrowly tailored to protecting that interest. To conclude that it was, we would have to agree that (1) some Japanese Americans were intensely loyal to Japan and deeply disloyal to the United States; (2) some Japanese Americans were not merely disloyal to the United States but also had both the willingness and the capacity to engage in some form of

64 *Id.* at 223.

65 *Id.*

espionage, and effectively so, against the United States; (3) a curfew order, and other lesser restrictions, would not provide sufficient protection against the risks associated with (2) above; and (4) the authorities lacked the capacity to make some kind of judgment about the very large number of Japanese Americans who undoubtedly did not pose a security risk, sufficient to exempt them from the exclusion order.

Investigation of (1), (2), (3), and (4) would have made it impossible to uphold the exclusion order. *Roman Catholic Diocese* makes that conclusion clear, and it is our anti-*Korematsu* for that reason.

Of course, it is true that *Roman Catholic Diocese* is not on all fours with *Korematsu,* and that those who despise the latter might also reject the former. To some of them, the very comparison might seem outrageous and even odious. On one view, *Korematsu* is about palpable discrimination, rooted in the basest form of prejudice against what was then a politically weak group. The exclusion order was based on racial animus, and the Court's decision to uphold the order was effectively a license to discriminate. By contrast, the restrictions in *Roman Catholic Diocese*—the objection goes—were either (1) entirely reasonable, given the context (see below), or (2) a reflection of something like inadvertence or insufficient regard, and nothing at all like what happened in California in the 1940s.

This objection puts a bright spotlight on the limitations of analogical reasoning. *Roman Catholic Diocese* and *Korematsu* are alike in many ways, and different in many ways as well. The claim here is that insofar as the *Roman Catholic Diocese* Court was willing to vindicate antidiscrimination principles under exceedingly unusual circumstances posing severe risks, and to do so employing genuinely strict scrutiny, it reflected an approach that is directly antithetical to that in *Korematsu*.

VI.

We have seen that although *Roman Catholic Diocese* was a free exercise case, not an equal protection case, it involved a claim of discrimination. Like other discrimination cases, it is easily understood to have a kind of democracy-reinforcing function.[66] Nothing in the decision would forbid New York from imposing a more draconian set of restrictions, as long as they are neutral. Suppose, for example, that New York had done what it did, but with one exception: it did not exempt "essential businesses." If that were what it had done, there would be no discrimination against houses of worship and, hence, no free exercise objection under the Court's framework.

We can understand the framework as creating political safeguards. A selective set of restrictions, exempting some but not others, weakens those safeguards because the natural

66 *See* John Hart Ely, Democracy and Distrust (1981).

political objections to across-the-board restrictions are not called into play. After all, many businesses have been exempted, and so they have no reason to object. Across-the-board restrictions would undoubtedly trigger significant backlash—and thus would be allowed to come into play only if they had compelling justifications. The central idea here was nicely sketched by Justice Robert Jackson in a compelling, flawed opinion that deserves far more contemporary attention than it receives.

The problem in *Railway Express Agency, Inc. v. New York* involved a New York City ordinance that prohibited anyone from operating an "advertising vehicle"—a vehicle that sells its exterior for advertising purposes—on the streets.[67] From the general prohibition, the ordinance exempted advertising of the owner's business placed on vehicles engaged in the ordinary business of the owner and not used mainly or only for advertising.[68]

Railway Express, a company operating nearly two thousand trucks for advertising purposes, challenged the New York law under the Due Process and Equal Protection Clauses.[69] The U.S. Supreme Court upheld the law, emphasizing that judges should defer to legislatures and noting that the local authorities might have believed that people who advertise their own wares on trucks do not present the same traffic problems.[70] The Court added:

> The fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.[71]

In this way, the Court rejected the idea that the principle of generality imposed serious limits on legislative classifications.

Justice Jackson took this seemingly mundane case as an occasion for celebrating the use of the Equal Protection Clause as a guarantor of the rule of law, understood as a ban on selectivity. Justice Jackson began by contrasting the Due Process Clause with the Equal Protection Clause.[72] The Due Process Clause does not require equality; instead, it imposes a flat barrier to legislative enactments. In this way it "leaves ungoverned and ungovernable

67 Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 107–08 (1949).

68 *Id.*

69 *Id.* at 108–09.

70 *Id.* at 109–10 ("We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom." *Id.* at 109. "It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered." *Id.* at 110.).

71 *Id.* at 110.

72 *Id.* at 111 (Jackson, J., concurring).

conduct which many people find objectionable."[73] But the Equal Protection Clause is not similarly disabling: "It merely means that the prohibition or regulation must have a broader impact."[74] The requirement of breadth in turn serves a democratic function:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[75]

In Justice Jackson's view, a requirement of generality helps to flush out illegitimate reasons for legislation. If the law is imposed on some but not all, it may be based on hostility or some form of prejudice. Perhaps the law is a means of oppressing a particular group; if it cannot be passed unless it is partial, we may suppose that it is undergirded by something other than the articulated justification. Perhaps it is a form of rent-seeking or supported solely by private pressure. Perhaps it reflects selective sympathy and indifference; consider *Roman Catholic Diocese* in that light.

There is much good sense in Jackson's discussion. A system of law should require general justifications for the denial of benefits or the imposition of burdens. Moreover, the requirement of generality can produce political checks, where opposition would otherwise be too weak to prevent oppressive legislation from going forward. But a problem remains: How are we to know when a seemingly narrow enactment should be applied "generally"? Is it illegitimate, for example, to exempt labor unions from the antitrust laws, electric cars from the Clean Air Act, or small businesses from occupational safety and health regulation? Is it illegitimate to say that blind people cannot receive drivers' licenses? These are all examples of rules that might be thought to have escaped from the requirement of generality.

To determine whether generality is required, it is necessary to ascertain whether there are relevant similarities and relevant differences between those burdened and those not burdened by legislation. No one thinks that "generality" should be required when relevant differences exist. No one supposes that the speed limit laws are unacceptable because they do not apply to police officers and ambulance drivers operating within the course of their official duties. Indeed, Justice Jackson did not even vote to invalidate the New York law:

73 *Id.* at 112.

74 *Id.*

75 *Id.* at 112–13.

"[T]he hireling may be put in a class by himself and may be dealt with differently than those who act on their own."[76]

We should conclude that any requirement of equal treatment depends on a substantive account establishing whether there are relevant differences between the cases to which a law applies and the cases to which it does not. If a law says that in order to receive federal employment, everyone who is not white must take certain tests, we can easily see that the grounds for the distinction are illegitimate. In such a case, Justice Jackson's analysis seems sufficient and unimpeachable. But sometimes the plea for generality is based on more controversial grounds. In such cases, the requirement of generality hides a range of substantive judgments, and those judgments cannot be supplied by the requirement itself.

In fact, that helps to explain the disagreement between the Court and Justice Sotomayor in *Roman Catholic Diocese*. Were houses of worship situated similarly to essential businesses? Nothing in the idea of generality could answer that question.

VII.

That question signals that even if we put the procedural posture of the case to one side, *Roman Catholic Diocese* may not have been an easy case. The *per curiam* opinion makes a reasonable argument that New York did in fact discriminate against houses of worship. But that question depends on some difficult issues of fact, which intuition cannot answer. To know the risks associated with various buildings and institutions, we need to answer several questions. Does it matter if people are together for ten minutes, or thirty, or sixty? How much does that matter? How much does proximity matter? If people speak together or sing together, what are the incremental risks? What happens, exactly, in drugstores and grocery stores, and how does it compare to what happens in churches and synagogues?

To answer those questions, it is not enough to list institutions and to sneer (as Justice Gorsuch did). It is not enough to declare that essential businesses, exempted from red zone restrictions, included "things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities."[77] It is necessary to know much more about those institutions. It is also necessary to note that in a pandemic, the line-drawing problems are challenging. If one business is deemed essential that seems relevantly like a church, or if two are, is it enough for invalidation? And what kinds of factual demonstration are necessary, exactly, to show relevant similarity?

The point is not that *Roman Catholic Diocese* was wrongly decided. It is that the issue in the case was not easy, which fortifies the conclusion that as a matter of

76 *Id.* at 115.

77 *See* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (per curiam).

institutional role, and of discrimination law, the Court's approach is likely to have enduring importance.

VIII.

I have been proceeding as if *Roman Catholic Diocese* reflects a *general* disposition toward careful scrutiny of discrimination in the midst of a pandemic and perhaps under emergency circumstances more broadly. But importantly, the case involved the Free Exercise Clause, not discrimination in general. Those with realist inclinations might emphasize that within the current Supreme Court, some of the Justices are greatly concerned about discrimination against religious believers and religious institutions in particular and are interested in moving constitutional law in directions that are highly protective of their concerns. Indeed, realists might note that an important division on the Court can be found precisely there.

More crudely, the Justices who are conventionally described as "conservative" tend to side with religious organizations and to seek doctrinal changes in directions that would please them, whereas the Justices conventionally described as "liberal" are less likely to side with those organizations and are less likely to seek such changes. Indeed, some of the former Justices have expressed a lack of enthusiasm for the *Smith* case,[78] which held that neutral rules are not subject to invalidation under the Free Exercise Clause, even if they have a severe or disparate impact on religious believers.[79] *Roman Catholic Diocese* did not involve a mere disparate impact but for those who find its claim of discrimination unconvincing, it might be tempting to read the opinion as a tacit rejection of *Smith*. Perhaps it is best taken as a rejection of *Smith* rather than a case of discrimination.

To put the point more sharply: Suppose that in a pandemic, a state adopted restrictions that arguably discriminated on the basis of race or sex. Should we expect the Court to issue a kind of anti-*Korematsu*? Would it show the same sort of suspicion and solicitude that it showed in *Roman Catholic Diocese*? It is, of course, hard to answer such questions without knowing the details. If a state allowed male-owned businesses to remain open but forced female-owned businesses to close, it would, of course, be acting unconstitutionally, and the Court would certainly say so. But suppose that the exempted businesses were predominantly white and that others, not exempted, were predominately African American. Suppose that there is an arguable difference between the two sets of businesses—but no more than arguable. Would we see a repeat of *Roman Catholic Diocese*? Would one of the Justices write an opinion like that of Justice Gorsuch? It is not unfair to wonder whether we would see words like these, a variation on his in *Roman Catholic Diocese*: "The only

78 *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019).

79 Emp. Div. v. Smith, 494 U.S. 872, 883 (1990).

explanation for treating institutions in predominantly African American places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in predominantly white places."

However that may be, *Roman Catholic Diocese* is likely to be of enduring importance. It reflects intense concern about discrimination, even in extraordinary circumstances, where human lives are on the line. In the face of a plausible claim of discrimination, it reflects a willingness to second-guess official judgments, even though those judgments were not self-evidently mistaken. It is our anti-*Korematsu*.