ESSAY

THE IMPOSSIBILITY OF RELIGIOUS EQUALITY

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The Supreme Court has recently adopted a new rule of religious equality: Laws unconstitutionally discriminate against religion when they deny religious exemptions but provide secular exemptions that undermine the law's interests to the same degree as would a religious exemption. All the Justices and a cadre of scholars have agreed in principle with this approach to religious equality. This Essay argues that this new rule of religious equality is inherently unworkable, in part because it turns on treating that which is religious the same as its secular "comparators." But religion is not comparable to anything—neither in terms of its essence nor its value. The current doctrine assumes that "religion" is always at least as valuable as all that is "secular"—that is, that religion qua religion is as valuable as, and thus must always be treated as well as, all that is simply "not religion." This assumption lacks both conceptual coherence and a normative basis. It also renders religious "equality" a contradiction in terms as it establishes not religious equality, but religious superiority.

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INTRODUCTION

The Supreme Court has recently adopted a new rule of religious equality. Stated simply, whenever the government grants an exemption from a general law for a "secular" entity, activity, or motivation, it unconstitutionally discriminates against religion if it does not also offer an exemption to all "comparable" religious entities, activities, and motivations.[1] This doctrine has already had profound effects. Under the new rule, federal courts have held that local governments may not require religious objectors to comply with vaccine mandates if the mandates exempt those who are medically contraindicated;[2] that states may restrict gun-carrying in churches (as "sensitive places") only if the restriction also deems practically every secular place "sensitive";[3] and that Title VII is unconstitutional as applied to religious objectors because Title VII exempts businesses that employ fewer than fifteen employees.[4] More broadly, in part thanks to the valence of free exercise as an equality right that casts religious plaintiffs as a vulnerable group in need of protection, religious plaintiffs have prevailed—and will continue to prevail—in previously unsuccessful challenges to a range of antidiscrimination laws.[5]

1. See Tandon v. Newsom, 141 S. Ct. 1294, 1296–97 (2021) (per curiam) (granting injunctive relief from a California lockdown order because it treated some secular activities more favorably than home-based Bible study).

2. See infra section II.A.

3. See Antonyuk v. Chiumento, 89 F.4th 271, 350 (2d Cir. 2023), vacated sub nom. Antonyuk v. James, 144 S. Ct. 2709 (2024); Spencer v. Nigrelli, 648 F. Supp. 3d 451, 463–64 (W.D.N.Y. 2022).

4. See Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 613 (N.D. Tex. 2021) ("Title VII is not a generally applicable statute . . . ."), aff'd in part, rev'd in part, and vacated in part sub. nom. Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914 (5th Cir. 2023).

5. See infra notes 203–205 and accompanying text. In a 2022 speech, for example, Justice Samuel Alito had this to say: "There's also growing hostility to religion, or at least the

Moving forward, the Court's new rule of religious equality is poised to reshape laws touching the workforce, healthcare, education, housing, and beyond.[6]

The expansive nature of this new constitutional rule is ironic, considering it stems from the Court's earlier efforts to *limit* free exercise rights.[7] For much of the twentieth century, the Court approached free exercise through a liberty paradigm: Any law that burdened the practice of religion even incidentally was held presumptively unconstitutional unless the government showed that it was narrowly tailored to achieve a compelling government interest.[8] But the 1990 case of *Employment Division v. Smith*, in which the Court upheld a federal drug law outlawing peyote, marked a doctrinal sea change.[9] The liberty paradigm was unworkable, the Court explained, because it required judges to conduct problematic metaphysical inquiries into the nature of religion and inappropriate assessments of the value of religious practices relative to other governmental interests.[10] Instead of treating the free exercise of religion as a liberty interest, the Court opted to reinterpret it as a right that protects only against the unequal treatment of religion.[11]

Smith sowed the seeds of a new constitutional rule against religious discrimination, but it took three decades for this rule to reach maturity and take on precise meaning.[12] To be sure, *Smith* announced in no uncertain terms that free exercise does not require special religious exemptions from neutral and generally applicable laws and rather requires only that the government not wrongfully discriminate against religion.[13] But there is nothing that wrongful discrimination just *is*. Every

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traditional religious beliefs that are contrary to the new moral code that is ascendant in some sectors." See Josh Blackman, Justice Alito Speaks on Religious Liberty, Reason (July 28, 2022), https://reason.com/volokh/2022/07/28/justice-alito-speaks-on-religious-liberty [https://perma.cc/EPX7-6PCZ]; see also Leah M. Litman, Disparate Discrimination, 121 Mich. L. Rev. 1, 11–12 (2022) ("[Courts] view remedial policies or antidiscrimination measures as evidence that white people, or conservative Christian groups, are now groups in need of judicial protection from laws that seek to include other groups in society and democracy.").

6. For a few examples, see infra section II.B.

7. See infra section I.A.

8. See infra notes 38–40 and accompanying text.

9. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 872 (1990). This sea change was more nominal than real, considering the Court's pre-*Smith* habit of deferring to the government. But it is referred to here as a "sea change" because at least as a formal matter—and optically—the Court did change the doctrine. See infra section I.A.

10. See *Smith*, 494 U.S. at 886–88.

11. See id. at 879–82.

12. See infra Part I.

13. *Smith*, 494 U.S. at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious

law—indeed, every choice—discriminates; deciding which discriminations are wrongful and which are not (itself an act of discrimination) involves choices premised on (at times fraught) normative judgments.[14]

After three decades and a transformed bench, the Supreme Court finally settled on the following definition: When a law bestows the benefit of an exception according to a classification that does not include all "comparable" religious entities, activities, and motivations, the government has impermissibly treated "religion" unequally.[15] According to this rule, no law may pursue its objectives in a way that even incidentally denies to religious entities, activities, or motives exemptions that are conferred upon the "secular"—even if regulating religion is entirely unrelated to the law's purpose.

A diverse cadre of scholars has expressed support for some version of this principle of religious equality—that religion should not be treated worse than that which is secular—even while criticizing the results the Court has reached in its application.[16] This Essay takes a different view. It

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objector's spiritual development.'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988))).

14. See, e.g., Deborah Hellman, When Is Discrimination Wrong 4–9 (2008) ("The fact that we often need to distinguish among people forces us to ask when discrimination is morally permissible and when it is not.").

15. See, e.g., Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam))); *Roman Cath. Diocese*, 141 S. Ct. at 74 (Kavanaugh J., concurring) ("New York's restrictions discriminate against religion by treating houses of worship significantly worse than some secular businesses.").

16. See Douglas Laycock & Thomas C. Berg, Protecting Free Exercise Under *Smith* and After *Smith*, 2020–2021 Cato Sup. Ct. Rev. 33, 34, 61 (concluding that "*Smith*'s protective rule" that "if a law is not neutral, or not generally applicable, any burden it imposes on religion must be necessary to serve a compelling government interest" can do much to shield free exercise of religion); Christopher C. Lund, Second-Best Free Exercise, 91 Fordham L. Rev. 843, 875 (2022) ("The Court's recent attempts to retcon *Smith* into something that can protect religious exercise are noble; they are certainly better than nothing."); Laura Portuondo, Effecting Free Exercise and Equal Protection, 72 Duke L.J. 1493, 1499 (2023) ("Recent free exercise decisions have . . . set forth a positive theory for considering effects [in the equal protection context]. Specifically, the Court has embraced the theory that a law should trigger heightened scrutiny where it 'devalues' protected interests."); Mark Storslee, The COVID-19 Church-Closure Cases and the Free Exercise of Religion, 37 J.L. & Religion 72, 75 (2022) ("Where government creates carve-outs . . . one of those things must be religion . . . ."); Cass R. Sunstein, Our Anti-*Korematsu*, 2021 Am. J.L. & Equal. 221, 222 (2021) (applauding the Court in *Roman Catholic Diocese* for protecting free exercise during a national emergency); Nelson Tebbe, The Principle and Politics of Equal Value, 121 Colum. L. Rev. 2397, 2403–04 (2021) [hereinafter Tebbe, Equal Value] (endorsing the "new equality" as "a matter of ideal theory"). For a more qualified endorsement, see Andrew Koppelman, The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty, 108 Iowa L. Rev. 2237, 2240 (2023) (critiquing "the proliferation of new variants" of the doctrine while endorsing Professor Douglas Laycock's and then-Judge Alito's "earlier" version of the doctrine). Professors Alan

critiques the underlying principle rather than specific applications by arguing that such a principle is practically unworkable and conceptually incoherent.[17] The problem with any kind of religious equality principle of the sort set out by the Court's recent case law is that it turns on treating the religious the same as its secular comparators. Yet religion is not comparable to anything—not in terms of its essence, or, possibly even more importantly, its value.[18] Perhaps in an attempt to overcome this problem, the new doctrine presents itself as avoiding assessing and comparing religion's value.[19] But, as this Essay will show, it does so by ascribing to it practically infinite value. It assumes that religion is at least as valuable as—and, thus, must always be treated at least as well as—*anything* that is not religion.[20] Yet, as this Essay argues, there is no theoretical or normative basis for this assumption. And although its defenders and the entire Supreme Court characterize this new free exercise doctrine as a rule of equality[21] and justify it on that basis, it is nothing of the sort. For requiring that religion always be treated at least as well as everything else "comparable"—but not the reverse—establishes superiority of religion. Finally, accepting this premise would—and has begun to—jeopardize the viability of basic governance.

Before proceeding, a clarifying note is in order. This Essay does not object to rules of equality *among* religions—that is, that no religion or select religions may be singled out for adverse or beneficial treatment—or to a rule that the government may not intentionally discriminate against or in favor of religion as such (e.g., by making a benefit or detriment conditional on whether something or someone is religious or secular). These constitute intentional discrimination on the basis of religion and are distinguishable from governmental treatment of some interest (that

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Brownstein and Vikram Amar are mostly critical, but they too tacitly support what Professor Andrew Koppelman refers to as the "old" most-favored nation doctrine. See Alan E. Brownstein & Vikram David Amar, Locating Free-Exercise Most-Favored-Nation-Status (MFN) Reasoning in Constitutional Context, 54 Loy. U. Chi. L.J. 777, 789 (2023) (explaining how *Fraternal Order*'s "focus on underinclusivity has some validity" and how the case serves as an "early and classic example" of the doctrine's ability to distinguish between discriminatory and nondiscriminatory underinclusivity).

17. It is worth emphasizing, as this Essay does below, that this Essay distinguishes between intentional discrimination and free-floating equality and takes issue specifically with the latter. See infra Part IV (suggesting an alternative—namely, an anti-intentional-discrimination rule premised on a principle of anti-religious-persecution). See infra note 228.

18. See infra Part III (critiquing arguments for and assumptions underlying the principle of religious equality).

19. See infra note 362.

20. See infra section II.A. Adding "comparable" does not change this assumption. See infra section III.D (showing how the doctrine requires this of "practically infinite value" assumption regardless of any comparability analysis).

21. See infra notes 218–220 and accompanying text.

happens to not be religious and is thus "secular") better than "religion."[22] It is strictly this latter conception of religious equality, which has now been captured by free exercise doctrine, that is the subject of this Essay.

The Essay develops its critique of the new rule of religious equality in three parts. Part I recounts the doctrine's history, tracking how the normative and doctrinal foundations of free exercise have shifted over time, with equality ultimately supplanting liberty as free exercise's organizing principle. This shift was initially contested by practically every free exercise scholar based on fears that an equality standard would prove insufficiently protective of religious freedom. But even as *Smith*'s critics continued to castigate the Court for abandoning its religious liberty doctrine, some simultaneously began to advance an interpretation of religious equality that could—and eventually would—be even more deferential to religion than religious liberty had been.[23] According to this interpretation, religious equality "require[s] that religion get something analogous to most-favored nation status."[24] Just months after President Donald Trump's third Supreme Court appointee, Justice Amy Coney Barrett, joined the Court in 2020, the Court formally adopted this most-favored nation (MFN) definition of religious equality.[25]

Part II takes stock of the Court's new doctrine. It illustrates the doctrine's boundlessness by analyzing free exercise cases involving vaccine mandates during the COVID-19 pandemic, gun control regulations, medication restrictions, and laws prohibiting workplace discrimination.[26] This Part also situates religious equality among free exercise's three potential interpretations: as a liberty right, as a right against intentional discrimination, and as a broader equality right. It shows how the new religious equality theory is fundamentally different from, and more sweeping than, disparate impact theory, although on its face it may appear to be just that.[27] This Part argues that a key component of religious equality's novelty is the fact that it differs from other equality norms—which call for equal treatment *within* a protected category (e.g., among races)—by requiring parity between the protected class (religion) and all that is simply not in the class (i.e., all that is "not religion").

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22. See infra note 228.

23. See Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 31 [hereinafter Laycock, Remnants] ("There is little reason to believe that *Smith* heralds a serious renunciation of balancing . . . .").

24. Id. at 49.

25. See infra notes 129–130 and accompanying text.

26. See infra Part II.

27. Some scholars view the new doctrine as effectively a disparate impact test. See Litman, supra note 5, at 19, 22–23 (comparing the new doctrine to disparate impact analysis); Portuondo, supra note 16, at 1499 ("Whereas previous doctrine required an exclusive or nearly exclusive effect on protected interests, recent doctrine only requires a minor disparate effect.").

Part III focuses on this key distinction and argues that religious equality rests upon unstable conceptual foundations. While most commentators troubled by the new doctrine have restricted their criticism to select applications of it, this Part contends that the doctrine is defective in principle. That is so because religious equality requires attributing a specified value to religion when religion does not have an objectively identifiable value. The doctrine is also defective because requiring the government to treat religion equally with that which is secular, but not vice versa, translates into religious superiority—the very opposite of equality.[28] It is this amalgam of conceptual problems that makes religious equality impossible both in practice and in theory.[29]

Finally, Part IV gestures toward an alternative to the new rule of religious equality: a rule proscribing intentional discrimination premised on the principle of anti-religious persecution.

I. RELIGIOUS EQUALITY: A NEW FREE EXERCISE DOCTRINE EMERGES

The First Amendment guarantees that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[30] This Free Exercise Clause mentions neither liberty nor equality, yet the evolution of free exercise doctrine has been driven, dialectically, by those two values.[31] In the current chapter of free exercise jurisprudence, equality has supplanted liberty as the Clause's controlling principle.[32]

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28. The Court's treatment of religion as superior is not limited to its new religious equality doctrine—in fact, the latter is of a piece with the Court's general preferential treatment of religion. To provide one example, the Court has held that religious institutions are insulated from employment discrimination suits brought by "ministers," a term the Court interprets very broadly. See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2081 (2020) (holding that teachers of secular subjects at religious schools are qualified for the ministerial exception); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 190–95 (2012) (applying the ministerial exception to a teacher providing religious instruction). At least four Justices seem poised to adopt an even broader "church autonomy" doctrine that would immunize religious institutions from all kinds of challenges. See, e.g., Yeshiva Univ. v. YU Pride All., 143 S. Ct. 1, 2 (2022) (Alito, J., dissenting) ("The Free Exercise Clause protects the ability of religious schools to educate in accordance with their faith.").

29. Another clarification is in order: "Impossible" here refers specifically to courts determining on an *objective* basis that the government has *incorrectly* valued religion in comparison with some secular interest. See infra note 354.

30. U.S. Const. amend. I.

31. See infra sections I.A–.D.

32. See Zalman Rothschild, Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause, 131 Yale L.J. Forum 1106, 1115 (2022), https://www.yalelawjournal.org/pdf/F9.RothschildFinalDraftWEB_rmo9um7h.pdf [https://perma.cc/8QTZ-RFLT] [hereinafter Rothschild, Individualized Exemptions] (explaining that the doctrine has "converted free exercise, which had previously provided protection against even incidental burdens on religious practice, from a liberty right into an equality right").

This shift emerged from *Smith*, the foundation of modern free exercise jurisprudence, in which the Court squarely rejected the liberty paradigm of free exercise—holding that Oregon may proscribe the use of peyote even when it is to be used in religious ceremonies.[33] While the *Smith* Court rejected the liberty paradigm of free exercise, it declined to clearly articulate its replacement.[34] Indeed, *Smith* permits two competing interpretations, though one is more convincing than the other. According to the first, more natural interpretation, *Smith* construed the Free Exercise Clause as prohibiting intentional discrimination against religion—that is, targeting religion for adverse treatment.[35] According to the second, broader interpretation, *Smith* signaled that the government offends the Free Exercise Clause whenever it denies equality to religion (i.e., religious entities, activities, or motivations) by conferring a benefit (or declining to impose a cost) upon some secular subjects but not upon all comparable religious subjects.[36] Three decades after *Smith*, the broad equality principle has won out as the normative and doctrinal touchstone of free exercise.[37]

A. *The* Smith *Paradigm Shift*

For several decades, beginning in the 1940s[38] and ending in 1990, the Supreme Court interpreted the Free Exercise Clause to confer upon

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33. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

34. See id. at 889–90.

35. See Zalman Rothschild, Free Exercise's Lingering Ambiguity, 11 Calif. L. Rev. Online 282, 283–84 (2020), https://static1.squarespace.com/static/640d6616cc8bbb354ff6ba65/t/643f7f7f278fcc3a69d000e0/1681883008032/Rothschild_FreeExercise_11CalifLRev282.pdf [https://perma.cc/Z9EY-9BUM] [hereinafter Rothschild, Lingering Ambiguity] ("On this narrow view [of *Smith*], asking whether a law is generally applied is a method for smoking out discriminatory intent.").

36. See id.

37. Some have expressed the view that the new MFN doctrine is merely episodic, that there is no reason to think it will take hold because it first emerged in emergency docket orders and the Court's subsequent decision in *Fulton v. City of Philadelphia* was "narrow." See, e.g., Ira C. Lupu & Robert W. Tuttle, The Radical Uncertainty of Free Exercise Principles: A Comment on *Fulton v. City of Philadelphia*, 2020–2021 Am. Const. Soc'y Sup. Ct. Rev. 221, 228; see also Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1913 (2021). This author took the opposite position in previous work and here reaffirms that position. See Rothschild, Individualized Exemptions, supra note 32.

38. In most academic literature, it is assumed that religious liberty took root only in 1963 with Sherbert v. Verner, 374 U.S. 398 (1963). Indeed, this assumption is held by at least some current Justices (probably due to the prevailing consensus in religion clauses scholarship). For example, Justice Alito—one of religious liberty's most enthusiastic proponents—lamented how *Smith* had "overturned" twenty-seven years of religious liberty jurisprudence in a seventy-seven page impassioned concurrence in *Fulton* (joined by Justices Neil Gorsuch and Clarence Thomas). See Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1913 (2021) (Alito, J., concurring in the judgment). Justice Alito's concurrence is problematic for a host of reasons, but, somewhat ironically, it also missed an opportunity to tack on an additional twenty years to the religious liberty era it claimed was cut short by the

religious exercise a "preferred position."[39] Burdens placed on religion would not be tolerated if they were merely reasonable, but only if they were necessary to achieve a compelling governmental interest.[40] Still, even after (re)committing to this constitutional rule in 1963 in *Sherbert v. Verner*,[41] the Court repeatedly declined to apply it in earnest,[42] effectively siding with religious plaintiffs in only two cases over the ensuing twenty-seven years.[43]

In 1990, demanding more consistency of the doctrine, Justice Antonin Scalia announced on behalf of the Court that the liberty paradigm of free exercise could not stand.[44] Justice Scalia's majority

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Court in *Smith*. This Essay saves for later work a more fulsome argument that, though short-lived, religious liberty actually briefly took hold in the mid-1940s.

39. See Follett v. Town of McCormick, 321 U.S. 573, 575 (1944) (internal quotation marks omitted) (quoting Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)); see also Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1288 (2007) (discussing how in the 1940s "the First Amendment rights of speech, association, and religion . . . enjoyed a 'preferred position' and thus merited solicitous judicial protection"). This Essay uses "preferred position" in its technical, liberty-granting sense. Religion is certainly still privileged after 1990; if anything, under the Roberts Court, it is *more* privileged. See supra note 28.

40. See *Murdock*, 319 U.S. at 112–117 (striking down a license fee as applied to religious peddlers while emphasizing that religious groups are not free from all burdens placed on them by the government). In other words, while religious liberty need not be the state's *most* important value, it must be valued at least as the state's second to most important. See id. at 111 ("The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books.").

41. 374 U.S. 398 (1963).

42. See William P. Marshall, Solving the Free Exercise Dilemma: Free Exercise as Expression, 67 Minn. L. Rev. 545, 548–49 (1983) (canvassing cases in which the Court found government interests compelling, denying relief); Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1109–10 (1990) [hereinafter McConnell, Revisionism] ("In its language, it was highly protective of religious liberty. . . . In practice, however, the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims. The Court generally found either that the free exercise right was not burdened or that the government interest was compelling.").

43. The two cases were Sherbert v. Verner, 374 U.S 398, and Wisconsin v. Yoder, 406 U.S. 205 (1972). While there were three progeny cases that emerged from *Sherbert*, they, like *Sherbert*, dealt with unemployment benefits and served only to tweak *Sherbert*'s holding. See Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 830 (1989) (reversing denial of unemployment benefits for one who "refused a temporary retail position . . . because the job would have required him to work on Sunday"); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 137–38 (1987) (reversing denial of unemployment benefits for plaintiff who refused to work on Sabbath); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 709, 720 (1981) (reversing denial of unemployment benefits for a plaintiff who refused to build weapons because it was contrary to his religious convictions). And even *Sherbert* and its progeny did not last long as religious *liberty* cases; with time, they were interpreted as special antidiscretion, antidiscrimination cases. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 884 (1990) (describing *Sherbert* as limited to the unemployment compensation context); Bowen v. Roy, 476 U.S. 693, 708 (1986) (describing *Sherbert* as a discriminatory intent case).

44. See *Smith*, 494 U.S. at 872; see also McConnell, Revisionism, supra note 42, at 1137.

opinion in *Smith* underscored a core defect of religious liberty. To declare that any law burdening religious practice is presumptively unconstitutional is to "court[] anarchy," as such a declaration all but grants religious observers "a private right to ignore generally applicable laws"[45] and threatens to "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[46] The only way courts could avoid lawlessness is by balancing (on a case-by-case basis) a law's burdens on religious practices against the government's interests.[47] But far from saving the doctrine, such balancing only doomed it. It was "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice,"[48] as doing so requires courts to verify both the sincerity and "religiousness" of the beliefs in question and to assess the precise nature and degree of the religious "burden" at issue.[49] As Justice Scalia noted, none of these inquiries falls "within the judicial ken."[50]

Rejecting religious liberty as the controlling framework of free exercise, the *Smith* Court announced that rather than "reliev[ing] an individual of the obligation to comply with a 'valid and neutral law of general applicability[,]'"[51] the right to free exercise merely provides negative protection against wrongful discrimination.[52] Under such a framework, courts would no longer be forced to choose between blindly deferring to plaintiffs' invocations of their beliefs and becoming inquisitors of them. While a religious plaintiff might still need to demonstrate a religious objection for standing purposes, a court's analysis of whether the government had discriminated on the basis of religion would not turn on whether the plaintiff's objection was truly "religious" in

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45. *Smith*, 494 U.S. at 886, 888.

46. Id. at 879 (internal quotation marks omitted) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)). *Smith* echoed the Court's warning in its very first free exercise decision from 1879, which it liberally quoted. See id.

47. Id. at 883.

48. Id. at 889 n.5.

49. Id. at 887.

50. See id. (internal quotation marks omitted) (quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)). Put slightly differently, a court would need to ask whether the plaintiff's religious convictions are "sincere," whether what they claim to be religious is really a feature of a "religion," and whether, assuming it is, the religious burden is "substantial." Whether the religious burden is substantial would be determined by asking whether a religious belief or practice that is implicated is "central" to the religion in question. See Wisconsin v. Yoder, 406 U.S. 205, 210 (1972); Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 937–42 (1989) ("One approach, operating at the level of claim definition, has been to distinguish among claimant behaviors, affording constitutional protection to some but not others.").

51. See *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

52. See id. at 890 (explaining that while the First Amendment provides negative protection, it does not require affirmative exemptions).

some metaphysical sense,[53] whether their beliefs were "sincere,"[54] or whether the burden on the beliefs was "substantial" (e.g., whether the beliefs were "central" to the plaintiff's religion).[55] Nor would the Court be placed in the position of balancing the value of religion against competing governmental interests. Instead, courts' inquiries would turn on "neutral"—one might say factual—assessments of the evenhandedness of the government's laws.[56]

While the critical component of *Smith* was clear enough, the decision's constructive component was severely lacking. Even as the Court explicitly rejected liberty as the normative foundation of free exercise, it was opaque about which precise organizing principle(s) it was adopting in liberty's stead. To be sure, *Smith* was not completely barren of constructive content:

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53. The question "what is religion?" has no answer, which explains why the Court has repeatedly dodged answering it and has been willing to address it only in the context of statutory interpretation. See John Sexton, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056, 1064–78 (1978) (discussing how "[t]he search for a definition [of religion] is inherently problematic" and the Court has "couched the issue narrowly as one of statutory construction").

54. The sincerity inquiry has its defenders, who believe testing for sincerity is similar to other fact-based court inquiries. See, e.g., Ramirez v. Collier, 142 S. Ct. 1264, 1298 (2022) (Thomas, J., dissenting) (arguing that the "relevant evidence in this case cuts strongly in favor of finding that Ramirez is insincere"); Nathan S. Chapman, Adjudicating Religious Sincerity, 92 Wash. L. Rev. 1185, 1191 (2017) ("Courts can, and should, carefully distinguish between three concepts: whether a claimant is *sincere*, whether the claimant's acts or omissions are *religious*, and whether the government's regulation imposes a 'substantial burden' on that 'religious exercise.'"); Linda Greenhouse, Should Courts Assess the Sincerity of Religious Beliefs?, The Atlantic (May 5, 2022), https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-sincere-religious-belief-coach-kennedy/629737/ (on file with the *Columbia Law Review*) ("Justice Thomas [in *Ramirez*] got it right."). Contra these defenders, Justice Robert Jackson put it best in 1944 in *United States v. Ballard*, in which he concluded that assessing religious sincerity is hardly like other fact-based questions courts routinely explore. See 322 U.S. 78, 92 (1944) (Jackson, J., dissenting) ("I do not see how we can separate an issue as to what is believed from considerations as to what is believable.").

55. Some have argued that the "substantial" requirement under the Religious Freedom Restoration Act (RFRA), which adopted the pre-*Smith* religious liberty model, is solely about the burden imposed by the *government* in the event the religious objector violates the law in question. See Michael A. Helfand, Identifying Substantial Burdens, 2016 U. Ill. L. Rev. 1771, 1794 n.135, 1808. But taking such a position would require treating all "sincere" claims of religious objection the same. It would require treating "the practice of throwing rice at church weddings" the same as "getting married in church." *Smith*, 494 U.S. at 888 n.4.

56. See, e.g., Ronald J. Krotoszynski Jr., If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of *Smith*, 102 Nw. U. L. Rev. 1189, 1198 (2008) (explaining how equality assessments require assessing only the government's "evenhanded[ness]"). Though, in theory, to adjudicate religious discrimination, a court would still need a definition of religion. See, e.g., D. Wendy Greene, Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection, 47 U. Mich. J.L. Reform 87, 90 (2013) (discussing courts that hold that "only intentional discrimination claims based upon an individual's *actual* protected status are cognizable under Title VII" (emphasis added)).

The Court gestured toward the relatively modest and familiar principle of anti-intentional discrimination as the new governing interpretation of free exercise. For example, *Smith* emphasized that "generally applicable, *religion-neutral* laws that [merely] have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[57] Based on this and similar language—including Justice Scalia's comparison of the Court's new approach to free exercise to equal protection's focus on classifications and discriminatory intent, stressing how after *Smith*, the former will be in sync with the latter—it seems the Court envisioned the negative treatment of religious subjects because they are religious as the paradigm case of a free exercise violation.[58] But despite such indications, the Court never explicitly provided a test for wrongful religious discrimination.

To make matters worse, the Court passingly referred to the drug law it upheld in *Smith* as an "across-the-board criminal prohibition," lending support (for anyone wishing to read this dictum literally) to the notion that only laws that include no exceptions whatsoever are not

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57. See *Smith*, 494 U.S. at 886 n.3 (emphasis added).

58. Responding to Justice Sandra Day O'Connor's concurrence accusing the Court of treating free exercise differently than other constitutional rights—including "race discrimination and freedom of speech"—the Court explained in a footnote how stripping free exercise of its liberty gloss would actually *align* it with other constitutional rights. See id. (internal quotation marks omitted) (quoting id. at 901 (O'Connor, J., concurring in the judgment)). Just as "classifications based on race . . . or on the content of speech" trigger constitutional review while "race-neutral laws that have [only] the *effect* of disproportionately disadvantaging a particular racial group" do not, and just as "generally applicable laws unconcerned with regulating speech that have [only] the *effect* of interfering with speech" do not call for heightened constitutional scrutiny, the same would now go for religion: Courts would "strictly scrutinize governmental classifications based on religion" and defer to the government when it comes to laws that merely "have the effect of burdening a particular religious practice." Id. It should be noted that while this language indicates that *Smith* forbids only intentional discrimination, the Court's comparison to other rights with respect to mere effects is not entirely equivalent to the Court saying the new doctrine covers only intentional discrimination. The Court provided one other tea leaf. At one point, the Court explained that "[i]t would be true, we think (though no case of ours has involved the point)," that if the government "sought to ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display"—if, say, a state "ban[ned] the casting of 'statues that are to be used for worship purposes,' or . . . prohibit[ed] bowing down before a golden calf"—that "would doubtless be unconstitutional." Id. at 877–78. Conversely, when the government passes "religion-neutral laws" that are "not aimed at the promotion or restriction of religious beliefs," and it "is not the object of the [laws] but [is] merely [their] incidental effect" to "prohibit[] the exercise of religion," then "the First Amendment has not been offended." Id. at 886 n.3., 878–79. Such language suggests a rule of anti-*intentional* discrimination. But here too, it should be noted that one could argue the Court was just providing an *obvious* example of religious inequality, not a comprehensive account of what it entails. At the end of the day, though this Essay takes the view that anti-intentional discrimination is what *Smith* had in mind, the Court was not very specific about the content of its new doctrine.

discriminatory toward religion.[59] Leveraging this ambiguity, the aftermath of *Smith* saw advocates of broad free exercise rights—both in the academy and on the bench—engage in (eventually) successful efforts to extract from the decision an expansive rule of religious equality that is far broader than merely proscribing intentional discrimination on the basis of religion.

B. *Extracting a Rule of Religious Equality From* Smith

These efforts began immediately. Writing in the *Supreme Court Review* just months after *Smith* was decided, Professor Douglas Laycock argued that *Smith*'s ruling that "generally applicable" laws need not exempt religion implied an important inverse rule: that *non*-generally applicable laws are *required* to exempt religion.[60] *Smith* gave scant indication as to what "generally applicable" meant, permitting various interpretations. Although a narrow interpretation—that general applicability serves to smoke out discriminatory intent, which becomes more likely as a law exclusively or almost exclusively applies to religious subjects[61]—is more plausible, Professor Laycock advanced the most expansive, absolutist reading of *Smith* possible. He read "generally" literally—that is, without any exception—to posit that even a single exemption for nonreligious activity could render a law not generally applicable.[62]

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59. The law in fact was not an "across-the-board . . . prohibition." See id. at 884–86; infra note 62. But be that as it may, the Court did use the *language* of "across the board," which could be interpreted literally, as Professor Laycock and then-Judge Alito went on to read it. See id.; see also infra notes 83–96 and accompanying text.

60. See Laycock, Remnants, supra note 23, at 41 (arguing that under *Smith* free exercise "never requires exemptions from formally neutral regulations of conduct," except for when "laws . . . are *not* formally neutral and generally applicable" (emphasis added)).

61. See Rothschild, Lingering Ambiguity, supra note 35, at 283–84.

62. See Laycock, Remnants, supra note 23, at 50–52 ("If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons. . . . [T]his is part of the requirement of . . . general applicability . . . ."). Professor Laycock's reading of *Smith* is unconvincing. For one, it is hard to read a decision explicitly designed to limit free exercise as expanding it. Further, it is at least plausible that the statute in *Smith* itself included secular exceptions, yet the Court concluded it was perfectly constitutional. The statute made it "unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to a valid prescription or order of, a practitioner while acting in the course of professional practice." Or. Rev. Stat. § 475.752(3) (2023) (retaining the phrasing of the 1985 statute). One might argue this exception did not apply to Schedule I drugs (including peyote), as such drugs by definition have no medical use. But while a doctor *should* not be prescribing Schedule I drugs, that does not mean a doctor never *would*—and it seems the whole point of the exception is to exempt those who are not culpable, such as those who were prescribed the drug in the normal course of medical practice, with no reason to suspect the prescription was unlawful. While one might read "valid" to mean "legally valid" (i.e., that the prescription in question must have been actually, and not just perceptually, "valid" for the exception to take hold), such a reading makes little sense. If the statute were referring

Thus, even as he continued to castigate the Court for stripping religious liberty of its preferred position (as did virtually every scholar in the field[63]), Professor Laycock pioneered the argument that *Smith* introduced a new definition of religious equality that was no less protective of religion than the liberty paradigm the Court had just emphatically rejected—a point he readily acknowledged and promoted.[64] As he framed it in 1990, the new equality model "require[d] that religion get something analogous to most-favored nation status."[65] If any secular activity, reason to engage or not engage in an activity, or entity is "favored" by being exempted from a law, comparable religious activities, reasons to engage or not engage in the activity, and entities must receive the same favorable treatment. Otherwise, the law treats religion unconstitutionally unequally.[66]

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to only actually valid (i.e., lawful) prescriptions, why the need for an exception in the first place? What is lawful is not in need of an exception.

Indeed, there were several unique requirements for Schedule II drugs—for example, that prescriptions must be written on a specific form. See Or. Rev. Stat. § 475.185. Yet no one suggests that the prescription exception is inapplicable when a Schedule II drug is prescribed incorrectly. Any "invalidity" with respect to *how* (when it comes to Schedule II) or *that* (when it comes to Schedule I) the drug was prescribed does not render either excluded from the statute's prescription exemption; they are the precise (and *only*) occasions in which the exception obtains.

But even accepting arguendo that the medical exception did not apply to peyote, the statute still contained a wholly separate exception for participants in research studies. See Or. Rev. Stat. § 475.125(2). Surely the government's interest in protecting individuals from the harms of Schedule I drugs was applicable to those participating in research activities no less than it was for those participating in religious activities. One might argue that there wasn't a competing interest underwriting the research exception, and rather the exception stemmed from the *same* interest as the interest driving the law itself: "public health." But research on Schedule I drugs need not be, and is not always, related to researching the health risks or benefits associated with the drug in question. See, e.g., Carli Domenico, Daniel Haggerty, Xiang Mou, Daoyun Ji, LSD Degrades Hippocampal Spatial Representations and Suppresses Hippocampal-Visual Cortical Interactions, Cell Rep., Sept. 2021, at 1–2 (discussing neuroscientific, epistemological research on psychedelic Schedule I drugs focused exclusively on mapping previously unknown neural pathways involved in subjective internal visual perception of external reality). Rather, the research exception—like most exceptions—was driven by a competing, *overriding* interest. See infra notes 340–348 and accompanying text.

63. See infra note 151.

64. See Douglas Laycock, Conceptual Gulfs in *City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 743, 772 (1998) [hereinafter Laycock, Conceptual Gulfs] (noting that under the MFN "standard [of] lack of general applicability . . . many statutes violate *Smith*"); Laycock, Remnants, supra note 23, at 31 ("There is little reason to believe that *Smith* heralds a serious renunciation of balancing . . . .").

65. See Laycock, Remnants, supra note 23, at 49.

66. Douglas Laycock & Steven T. Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 22–23 (2016) ("The question is whether a single secular analog is *not* regulated. The constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct.").

Professor Laycock did not limit his advocacy to the pages of law reviews. Three years after *Smith* was decided, he presented his theory to the Supreme Court on behalf of petitioners in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.[67] As he framed the issue, *Lukumi* concerned whether Hialeah's citywide bans on animal sacrifices violated *Smith*'s general applicability rule, considering they applied to religious animal sacrifice but not to all "secular" animal killings.[68] When Justice Scalia asked at oral argument whether a city "couldn't say you may kill animals for food but not for other purposes—not for sport, not for sacrifice, not for anything but food," because "once they make any exception at all, [the law is] no longer a law of general applicability," Professor Laycock had a ready response: "[T]hey can't make any exceptions . . . ."[69] And, according to "your opinion in *Smith*," Professor Laycock clarified to the decision's author, when a law is not generally applicable, officials "have to treat religion at least as well as they treat favored secular activities."[70] (As it happens, Justice Scalia in *Smith* included the district court's 1989 *Lukumi* decision in a "parade of horribles," suggesting it was horrible to contemplate the Court granting a "religious exemption" from—of all things—the ordinances and animal cruelty law at issue in *Lukumi*.[71])

Ruling for the religious plaintiffs, the Court neither fully embraced nor rejected Professor Laycock's theory of religious equality.[72] On one hand, Justice Anthony Kennedy's opinion for the Court endorsed the view that whenever a law "fail[s] to prohibit nonreligious conduct that endangers [its] interests[,]" its "underinclus[ivity]" renders it not generally applicable such that denying exemptions for religious activities constitutes unlawful religious discrimination.[73] On the other hand, Justice

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67. 508 U.S. 520 (1993).

68. See id. at 542.

69. Transcript of Oral Argument at 12–13, *Lukumi*, 508 U.S. 520 (No. 91-948), 1992 WL 687913 [hereinafter *Lukumi* Transcript of Oral Argument].

70. Id. (emphasis added).

71. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 888–89 (1990).

72. See *Lukumi*, 508 U.S. at 524.

73. See id. at 543. To be sure, this sentence was followed by: "The underinclusion is substantial, not inconsequential." Id. But that sentence is hardly a beacon of clarity. And, in any event, and perhaps most importantly, Hialeah had *conceded* that its ordinances targeted the roughly fifty-thousand-member Santeria community's practice of religious animal sacrifices, conducted mostly in its members' kitchens. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1470 (S.D. Fla. 1989). As the district court discovered over a nine-day trial, carcasses had been strewn throughout the city; before being slaughtered, the animals were not maintained in sanitary conditions; and the "method of [the sacrificial] killing [was] unreliable and not humane." Id. at 1486. The city explained that Santeria's animal slaughter ritual posed *unique* problems and that the only way to successfully regulate it was to explicitly outlaw the practice itself. See id. at 1487. The correct question would have been whether the city targeted a (problematic) *practice* that happened to be religious or if it targeted a specific *religion* that happened to engage in a (problematic) practice. Had the Court utilized ordinary intentional discrimination analysis, it would have

Kennedy explained that unconstitutional "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued *only* against conduct with a religious motivation."[74] Applying this rule, the Court concluded that the petitioners prevailed because "Hialeah's ordinances pursue[d] the city's governmental interests only against conduct motivated by religious belief."[75] In these parts of the opinion, the Court appeared to consider a law's lack of general applicability to be evidence of discriminatory intent. Given this and other language in *Lukumi*, practically all commentators foregrounded—and continue to foreground—discriminatory intent as the basis of the Court's first post-*Smith* free exercise decision.[76]

All except one. Pointing to the Court's conflicting reasoning, Professor Laycock—quickly becoming religious equality's greatest advocate—argued that *Lukumi* had nothing to do with "antireligious motive[s]."[77] Rather, he maintained, "[t]he ordinances in *Lukumi* were invalid because they gave less favorable treatment to religious killings of animals than to secular killings of animals."[78] To support this view, Professor Laycock highlighted the *Lukumi* Court's comparison of carcasses (from sacrifices) strewn throughout the city with a lack of a ban on hunting (outside the city) and uncollected garbage, and the Court's conclusion that, if the city's "public health" concerns were not strong enough to proscribe or remedy the latter two, the city could not regulate the former under the banner of public health.[79] To some, giving *Lukumi* this MFN-style religious equality gloss was outright "dishonest."[80] But in truth, much

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been hard to conclude that *religion* was the but-for cause of the ordinances. Thus, this author sympathizes with Professor Laycock's rejection of the common wisdom that *Lukumi* was decided on the basis of religious animosity. Only, unlike Professor Laycock, this author believes that *Lukumi* was *wrongly* decided—a position certainly not shared by Professor Laycock, and, potentially, no other law and religion scholar.

74. See *Lukumi*, 508 U.S. at 542–43 (emphasis added).

75. See id. at 545.

76. See, e.g., Koppelman, supra note 16, at 2254–55 ("Under *Lukumi*, strict scrutiny is triggered because the law is gerrymandered to target religion, which is treated worse than any secular activity.").

77. See Laycock, Conceptual Gulfs, supra note 64, at 771–72 ("Part of the *Lukumi* opinion was based on the City's motive, but that part received only two votes.").

78. Id. at 772.

79. *Lukumi* Transcript of Oral Argument, supra note 69, at 52 ("[T]he sources of supply of organic garbage are much greater from all of the secular food consumption in the city than they are from these sacrifices."); see also Laycock & Collis, supra note 66, at 11 (arguing that, in *Lukumi*, the city's appeal to public health purposes was undermined by the fact that garbage from restaurants posed a greater hazard to public health).

80. James M. Oleske, Jr., Free Exercise (Dis)Honesty, 2019 Wis. L. Rev. 689, 726–39 [hereinafter Oleske, (Dis)Honesty] (describing the "effort to convert *Smith*'s requirement of general applicability into a requirement of uniform or near-uniform applicability" as "fundamentally inconsistent with the Court's current understanding of the Free Exercise Clause").

of the Court's reasoning—including its comparison of religious sacrifices to, of all things, garbage collection—is hard to understand except as an application of the rule that Professor Laycock had proposed to the Court, namely, that whenever "there are exceptions for secular interests, the religious claimant has to be treated as favorably as those who benefit from the secular exceptions."[81]

In the years following *Smith* and *Lukumi*, the Supreme Court seemed to assume—including, for example, in *Ashcroft v. Iqbal*—that free exercise prohibits only intentional discrimination against religion.[82] Similarly, despite claims by Professor Laycock to the contrary,[83] the vast majority of federal lower courts declined to interpret *Smith* and *Lukumi* as establishing an MFN-style rule of religious equality.[84] However, two decisions served as exceptions and merit brief discussion because they prove the rule; because they played a formative role in the new rule's development; because they were penned by then-Third Circuit Judge Samuel Alito, one of free

81. Douglas Laycock, The Supreme Court and Religious Liberty, 40 Cath. Law. 25, 35–36 (2000).

82. See Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) ("Where the claim is invidious discrimination in contravention of the First and Fifth Amendments [—as it is here—] our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–41 (1993) (First Amendment); Washington v. Davis, 426 U.S. 229, 240 (1976) (Fifth Amendment))). "Under extant precedent purposeful discrimination requires" that the state "undertak[e] a course of action '"because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group'" so that plaintiffs must plead that the state "adopted and implemented the detention policies . . . for the purpose of discriminating on account of race, religion, or national origin." *Iqbal*, 556 U.S. at 676–77 (second alteration in original) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

83. Professor Laycock has repeatedly exclaimed that lower federal courts were split over the MFN approach to religious equality, even suggesting that a majority of them adopted MFN. See, e.g., Douglas Laycock, The Broader Implications of *Masterpiece Cakeshop*, 2019 BYU L. Rev. 167, 176–78 [hereinafter Laycock, Implications of *Masterpiece*] ("[M]ore courts [than not] have concluded that even one or a few secular exceptions . . . show that [a] law is not generally applicable."). But that is not so. A *single* federal court adopted the MFN approach to religious equality, in two decisions authored by a single judge—Judge Alito when he was on the Third Circuit. And the Third Circuit swiftly distanced itself from those decisions in subsequent cases. See infra note 85. The other decisions Professor Laycock cites were fact-heavy decisions denying summary judgment. See Laycock & Collis, supra note 66, at 20; see also Ward v. Polite, 667 F.3d 727, 738–40 (6th Cir. 2012); Axson-Flynn v. Johnson, 356 F.3d 1277, 1293 (10th Cir. 2004). The factual question at issue in these cases was whether school officials acted based on religious *animus*. See *Polite*, 667 F.3d at 738 (finding an issue of material fact as to whether the university harbored animus toward a religious student); *Johnson*, 356 F.3d at 1293 (denying summary judgment because "hostility to [the student's] faith . . . was at stake").

84. See infra note 85.

exercise's most vocal advocates; and—perhaps most importantly—because they are often held up as desirable applications of religious equality.[85]

Judge Alito's first religious equality decision, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, involved a police department's no-beard policy that included a medical exception for those with skin conditions that made it painful to shave but did not include a religious exception for those with religious convictions that made it spiritually painful to shave.[86] According to Judge Alito, "[T]he medical exemption raise[d] concern because it indicate[d] that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[87] Because "devalu[ing] [police officers'] religious reasons for wearing beards by judging them to be of lesser import than medical reasons" was all the "discriminatory intent" needed, the department was required to provide religious exceptions or abolish its no-beard policy altogether.[88] Judge Alito's opinion was immediately celebrated by scholars (including, if not especially, scholars associated with the left).[89]

Five years later, in *Blackhawk v. Pennsylvania*, a case involving black bears used in a Native American religious ritual, Judge Alito adopted an arguably even more expansive rule of religious equality.[90] While the religious plaintiff was required to pay a permit fee for keeping wildlife in captivity, nationally recognized circuses and public zoos were not so required.[91] Pennsylvania explained that it did not charge circuses and zoos because they were beholden to a different regulating scheme.[92] As a result,

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85. See infra note 96. When the question of the meaning of religious equality came up in subsequent cases, the Third Circuit walked Judge Alito's two decisions back. See, e.g., Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 276 (3d Cir. 2007) ("It is true that in *Blackhawk* we summarized the rule in [MFN] terms; however, this formulation is perhaps an overstatement.").

86. See 170 F.3d 359, 360 (3d Cir. 1999).

87. See id. at 366.

88. Id. at 365.

89. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 91 (2007) [hereinafter Eisgruber & Sager, Religious Freedom] ("When, as in the Newark police case[,] . . . the government has already accommodated secular needs that are plainly analogous to a religious one, it is easy to recognize a failure of equal regard."); see also Thomas C. Berg, Religious Liberty in America at the End of the Century, 16 J.L. & Religion 187, 193–96 (2001) (citing *Fraternal Order* as potentially "preserv[ing] wide protection for religious liberty").

90. See 381 F.3d 202, 211 (3d Cir. 2004) (finding that requiring the religious plaintiff to pay a permit fee violated religious equality).

91. See id. ("The Commonwealth suggests that the fee requirement serves two main interests: it brings in money and it tends to discourage the keeping of wild animals in captivity . . . .").

92. Reply Brief for Appellants/Cross-Appellees Vernon Ross, Thomas Littwin, David E. Overcash, Frederick Merluzzi and Barry Hambley at 19, *Blackhawk*, 381 F.3d 202 (No. 02-

they were "not covered under the Game Code and therefore no permit [was] required [of them] in the first place."[93] But Judge Alito was not moved. In his view, Pennsylvania treated religion unequally because the fee requirement's two interests—raising money and discouraging keeping wild animals in captivity[94]—were "undermine[d]" by not requiring circuses and zoos to pay the fee "to at least the same degree as [they] would [be by] an exemption for a person like [the religious plaintiff]."[95] In other words, as he did in *Fraternal Order*, Judge Alito resolved the lingering ambiguity left in *Smith*'s and *Lukumi*'s wake—whether free exercise cases turn on intentional discrimination or MFN-style religious equality—in favor of the latter. *Blackhawk*, like *Fraternal Order*, won wide acclaim from scholars.[96]

C. *Religious Equality's Evolution*

One year later, when Justice Alito was confirmed to the Supreme Court,[97] the MFN approach to religious equality gained its first forthright advocate on the bench. The evolution of free exercise doctrine followed, albeit gradually. Over the course of his first decade on the Court, Justice Alito wrote several important statutory religious freedom opinions drawing on MFN-style religious equality logic[98] and elaborated on his views in a substantial dissent from denial of certiorari.[99] He gained an ally when

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3947, 02-4158), 2003 WL 24300780 ("[C]ircuses and zoos are subject to independent accreditation, and employ highly trained staffs who perform the important services which protect both the public and the animals under their care from harm . . . .").

93. Id. at 19.

94. *Blackhawk*, 381 F.3d at 211.

95. Id.

96. See Eisgruber & Sager, Religious Freedom, supra note 89, at 90–93 (describing the logic of *Blackhawk* and similar cases as "an attractive and practical approach to protecting religious liberty"). The two decisions' celebrated reception can perhaps be explained in part by the fact that they involved minority religion plaintiffs (that is, Sunni Muslim and Native American plaintiffs).

97. Justice Alito replaced Justice O'Connor, who had been a moderate on free exercise issues. See Kenneth L. Karst, Justice O'Connor and the Substance of Equal Citizenship, 2003 Sup. Ct. Rev. 357, 357 (describing Justice O'Connor as someone "who tend[ed] to defend the established legal order").

98. See Holt v. Hobbs, 574 U.S. 352, 356 (2015) (holding that the prison's grooming requirements failed strict scrutiny in light of secular medical exemptions); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690 (2014) (holding that the Affordable Care Act failed strict scrutiny in light of exemptions for religious nonprofits).

99. When the Court denied certiorari in *Stormans, Inc. v. Weisman*—a Ninth Circuit religious equality case involving a requirement that pharmacies dispense contraceptives—Justice Alito, joined by Justice Thomas and Chief Justice John Roberts, voiced his vigorous discontent in dissent. See 579 U.S. 942, 943 (2016) (Alito, J., dissenting) (warning that, given the decision, "those who value religious freedom have cause for great concern"), denying cert. to 794 F.3d 1064 (9th Cir. 2015).

Justice Neil Gorsuch joined the bench in 2017.[100] Just months after Justice Gorsuch was sworn in, the Court granted certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*—a case concerning a Christian baker whose religiously motivated refusal to design a wedding cake for a same-sex marriage had been held by Colorado courts to have violated Colorado's public accommodations antidiscrimination law.[101]

The religious discrimination claim at the heart of *Masterpiece* offered the Court an opportunity to clarify the contours of its religious equality doctrine. But the Court balked, issuing yet another frustratingly ambiguous decision. Even as it explicitly rejected the MFN approach to equality with respect to pregnancy under the Pregnancy Discrimination Act in a relatively contemporaneous case,[102] the Court declined to rule out that approach when it came to religious equality in *Masterpiece*.[103] Indeed, although the *Masterpiece* Court did not openly embrace MFN religious equality, its reasoning significantly relied on it.

The baker, Jack Phillips, had argued that Colorado discriminated against religion because in separate (orchestrated) litigation, Colorado rejected discrimination claims brought by an evangelical Christian who had asked three Colorado bakers to design cakes with antigay images and messages.[104] In response, Colorado maintained that its antidiscrimination law (on the basis of religion) did not apply to refusals to design specific antigay messages a baker found offensive, but its antidiscrimination law (on the basis of sexual orientation) did cover refusing to make cakes

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100. See Adam Liptak & Matt Flegenheimer, Neil Gorsuch Confirmed by Senate as Supreme Court Justice, N.Y. Times (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html (on file with the *Columbia Law Review*) (noting that Justice Gorsuch was "receptive to claims based on religious freedom").

101. See 138 S. Ct. 1719, 1723 (2018).

102. See Young v. United Parcel Serv., Inc., 575 U.S. 206, 210 (2015) (holding that UPS engaged in pregnancy discrimination). The Court in *Young* repeatedly used the term "most-favored nation" when explaining the theory of pregnancy discrimination it was rejecting. Notably, it did so even though the relevant statute explicitly required equality separately and apart from forbidding intentional discrimination. See id. at 222 ("We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. . . . [The statute] does not say that the employer must treat pregnant employees the 'same' as '*any* other persons' . . . nor does it otherwise specify *which* other persons Congress had in mind."). Instead, the Court adopted a hopelessly confusing rule of equality that sounds in intentional discrimination (the Court's burden-shifting test is drawn from *McDonnel Douglas*) even as it disavowed doing so.

103. See *Masterpiece Cakeshop,* 138 S. Ct. at 1729 ("The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.").

104. See id. at 1730 ("[O]n at least three other occasions the [Colorado] Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service.").

celebrating same-sex marriages.[105] In the state's view, cakes for same-sex marriages were proxies for same-sex attraction, whereas antigay messages were not proxies for religion.[106] But for Justice Kennedy, writing on behalf of the Court, such an interpretation of the law was not neutral: It targeted Phillips's religious beliefs for adverse treatment.[107]

Justice Kennedy's conclusion that disparate statutory coverage amounts to wrongful discrimination against religion is remarkably similar to MFN-style religious equality analysis. The only difference is that in *Masterpiece*, the "benefit" was not an exemption but a construction of a law regarding its coverage (a distinction that—as the Essay will later explain—is actually without a difference[108]). Yet rather than openly embrace the MFN standard, Justice Kennedy repeated his approach from twenty-five years earlier in *Lukumi*,[109] explicitly expressing a narrow view of religious discrimination and asserting that the Court was deciding in favor of the religious petitioners because the government had engaged in overt "hostility."[110]

Masterpiece is a masterpiece of confusion. Justice Kennedy's majority opinion relied on MFN-style equality reasoning while disclaiming reliance on it by emphasizing that the decision turned on the Colorado officials' "hostility."[111] Meanwhile, concurring on behalf of herself and Justice Stephen Breyer, Justice Elena Kagan (unsuccessfully, in this Essay's analysis) sought to distance the Court's majority opinion from MFN-style religious equality by underscoring the officials' "hostility."[112] In response,

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105. Id. at 1726 (determining that "Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage" (citing Appendix to Petition for Writ of Certiorari at 68a–72a, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111))).

106. See id. (holding that opposition to same-sex marriage constituted antigay discrimination).

107. See id. at 1729 ("The neutral and respectful consideration to which Phillips was entitled was compromised here, however.").

108. See infra section III.C.

109. See supra note 73 and accompanying text.

110. See *Masterpiece Cakeshop*, 138 S. Ct. at 1729, 1731–32. Justice Kennedy on behalf of the Court anchored much of his reasoning in "hostile" remarks toward religion made by two members of the Colorado Civil Rights Commission during its adjudication of the case. See id. at 1732 ("The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion.").

111. See id. at 1729; see also Leslie Kendrick & Micah Schwartzman, Comment, The Etiquette of Animus, 132 Harv. L. Rev. 133, 140 (2018) (stating that it was clear Commissioner Raju Jairam was only explaining "the respect owed to religious believers who must nevertheless make sacrifices and compromises as they interact with others of different beliefs in the public sphere"); Melissa Murray, Inverting Animus: *Masterpiece Cakeshop* and the New Minorities, 2018 Sup. Ct. Rev. 257, 277 (describing the commissioners' comments as "truths about the history of discrimination").

112. See *Masterpiece Cakeshop*, 138 S. Ct. at 1732–34 (Kagan, J., concurring) ("[S]tate actors cannot show hostility to religious views . . . .").

Justice Gorsuch, in a concurrence joined by Justices Alito and Clarence Thomas, argued the opposite: It is always unconstitutional unequal treatment of religion for a state's law (or for a commissioner of the state to interpret its law) to cover certain religious-based objections to making a cake but not "secular" objections to making cakes with certain messages on them.[113] Finally, dissenting on behalf of herself and Justice Sonia Sotomayor, Justice Ruth Bader Ginsburg tacitly disavowed a rule of religious equality premised on MFN logic, explaining that a state cannot be faulted for not exempting religious bakers who object to same-sex marriage just because it allows bakers to decline to design (religious) messages they find offensive.[114]

Scholars fiercely debated the "correct" reading of *Masterpiece*.[115] Among these scholars was Professor Laycock, who once again took to the pages of law reviews to argue that the Court had adopted MFN-style religious equality wholesale[116]—a position others adamantly rejected, claiming Professor Laycock's reading did grave injustice to precedent and would lead the way to "perverse . . . result[s]."[117] But Professor Laycock was not clearly wrong. Much like in *Lukumi*, the Court's ambivalence about the meaning of religious equality in *Masterpiece* and the decision's many ambiguities allowed for a range of readings.

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113. While Justice Gorsuch recognized the Court had not explicitly adopted a rule of MFN-style religious equality, he made clear *his* readiness to do so. See id. at 1734–49 (Gorsuch, J., concurring) ("[T]he one thing [the Commission] can't do is apply a more generous legal test to secular objections than religious ones.").

114. See id. at 1748–52 (Ginsburg, J., dissenting).

115. See, e.g., Oleske, (Dis)Honesty, supra note 80, at 731–39 (criticizing Laycock and Berg for "analogizing very dissimilar conduct" in a manner that "would render every civil rights law in the nation vulnerable to free exercise challenges"); see also Laycock, Implications of *Masterpiece*, supra note 83, at 179–87 (responding to the view that *Masterpiece* was "confined to an odd set of facts" by arguing that "the Supreme Court has gone much further than is generally recognized").

116. See Laycock, Implications of *Masterpiece*, supra note 83, at 168. For an example of an MFN argument in the briefing for *Masterpiece*, see generally Brief of Christian Legal Soc'y et al. as Amici Curiae in Support of Petitioners, *Masterpiece Cakeshop*, 138 S. Ct 1719 (No. 16-111), 2017 WL 4005662. For critiques of these arguments in *Masterpiece*, see generally Jim Oleske, Doubling Down on a Deeply Troubling Argument in *Masterpiece Cakeshop*, Take Care (Nov. 14, 2017), https://takecareblog.com/blog/doubling-down-on-a-deeply-troubling-argument-in-masterpiece-cakeshop [https://perma.cc/4CP5-SXWD] (discussing how Laycock and Berg's *Masterpiece* amicus brief's approach to general applicability could have troubling implications for sex and race discrimination cases); Jim Oleske, *Masterpiece Cakeshop* and the Effort to Rewrite *Smith* and Its Progeny, Take Care (Sept. 21, 2017), https://takecareblog.com/blog/masterpiece-cakeshop-and-the-effort-to-rewrite-Smith-and-its-progeny [https://perma.cc/RK75-THGK] (arguing that Laycock and Berg's brief "urge[d] the Court to blur the distinction [between laws that target religion and laws that incidentally burden religion] by fundamentally reinterpreting *Smith*").

117. See Oleske, (Dis)Honesty, supra note 80, at 738.

D. *Most-Favored Nation Doctrine Finds Favor*

The Court soon dispensed with that ambiguity. Two years after *Masterpiece* was decided, the three-Justice minority that supported MFN-style religious equality in *Masterpiece* became a five-Justice majority.[118] In 2020, as the COVID-19 pandemic swept across the country, states imposed lockdown orders.[119] Those restrictions impelled a flood of claims alleging religious inequality in federal courts across the country.[120] The anatomy of these claims was simple: The government discriminated against religion by virtue of exempting from its lockdown order several "secular" entities—including, for example, barber shops and hardware stores—but not houses of worship.[121] The discrimination, in other words, was precisely the sort that the MFN theory of equality sought to prevent.

As these charges of religious discrimination began to ring out across the country, with scant guidance from the Supreme Court as to the meaning of religious equality, federal courts split almost completely along partisan lines.[122] When the question first arrived at the Court's emergency docket, the Court declined to grant relief. In *South Bay United Pentecostal Church v. Newsom*, Chief Justice John Roberts and Justice Brett Kavanaugh debuted their views on religious equality—the former in a concurrence and the latter in a dissent.[123] In explaining the Court's denial of relief, Chief Justice Roberts clarified that religion is not unconstitutionally discriminated against so long as it is not singled out for adverse treatment.[124] Because various secular entities were also not exempted from the state's stay-at-home order, the state could not be said to have intentionally discriminated against religion.[125] Justice Kavanaugh disagreed. While his predecessor, Justice Kennedy, had been ambiguous about the meaning of religious equality,[126] Justice Kavanaugh was anything but. In his view, stay-at-home orders "discriminate against places of worship" whenever they exempt *any* secular entities but not *all* religious

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118. That three-Justice minority was composed of Justices Alito, Gorsuch, and Thomas. Chief Justice Roberts had joined Justice Alito's dissent from the denial of certiorari in Stormans Inc. v. Wiesman, 579 U.S. 942 (2016), but two years later he chose not to join ranks with these three and opted to not sign onto Justice Gorsuch's concurrence in *Masterpiece*.

119. See Rothschild, Lingering Ambiguity, supra note 35, at 287–91.

120. Id.

121. See S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020).

122. See Zalman Rothschild, Free Exercise Partisanship, 107 Cornell L. Rev. 1067, 1108 (2022) [hereinafter Rothschild, Partisanship] (explaining that, in early pandemic-related cases, "Republican-appointed judges sided with the religious plaintiff 94% of the time, and . . . Trump-appointed judges [did so] 100% of the time," while Democratic appointees "sided with the government 100% of the time," and partially attributing this to the Court's lack of guidance).

123. 140 S. Ct. 1613 (2020).

124. See *S. Bay United*, 140 S. Ct. at 1613.

125. Id.

126. See supra notes 72–76, 107–111 and accompanying text.

institutions[127]—which is to say, "religion" must always be treated as well as the most-favored secular entity or activity.[128]

A few months later—and thirty years after Professor Laycock first introduced his MFN approach to religious equality—Justice Amy Coney Barrett joined the bench, providing the fifth vote necessary to make MFN religious equality the operative constitutional rule of free exercise. Within months of joining the bench, the Court twice granted religious plaintiffs relief from a state's lockdown orders, first in *Roman Catholic Diocese of Brooklyn v. Cuomo*[129] and then in *Tandon v. Newsom*.[130]

Tandon, which provided the clearest articulation of the Court's new doctrine, concerned a California restriction on group events of more than three households.[131] Participants of private home-based Bible study and prayer meetings challenged the order on the ground that larger numbers of people were permitted to congregate in barber shops and city buses, for example, but such exemptions were not extended to home-based religious gatherings.[132] Agreeing with the petitioners, the Court clarified that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[133] It then explained that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. . . . [Which is to say,] [c]omparability is concerned with the *risks* various activities pose, not the *reasons* why people gather."[134]

In other words, the Court wholly adopted Professor Laycock's MFN approach to religious equality, along with the test for comparability that

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127. See *S. Bay United*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) ("The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.").

128. See id. (asserting that stricter requirements must not be imposed on religious institutions while secular institutions enjoy looser requirements).

129. 141 S. Ct. 63 (2020).

130. 141 S. Ct. 1294 (2021); see also Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289 (2021) (mem.); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021) (mem.); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.).

131. See Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam); State Appellees' Answering Brief at 11–12, *Tandon*, 141 S. Ct. 1294 (No. 21-15228), 2021 WL 1499787.

132. *Tandon*, 141 S. Ct. at 1297.

133. Id. at 1296 (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam)).

134. Id. (emphases added). For example, in the case of a lockdown order, the risk would be COVID-19 contagion; the reasons people gather would be the types of activities exempted and why people engage in them.

he had proposed.[135] Comparability is to be measured against the stated "interest" served by the law or policy in question—the test being whether the secular exemptions undermine that interest to the same degree as would a religious exemption.[136] If the answer is yes, the government has wrongfully discriminated against religion so long as it does not also exempt all comparable religiously motivated activities.

In *Tandon*, the interest of the restriction was stemming the spread of COVID-19, which the secular exceptions "undermined" just as much as religious exceptions would.[137] The reasons why people engaged in the secular activities that were exempted were irrelevant[138]—in fact, to defend the state's distinctions on the basis of the reason one wished to ride the city bus (say, for the "important" reason of getting to work) versus gather for Bible study (say, for spiritual fulfillment) would serve only to defeat them, as doing so is precisely what religious equality forbids. It would indicate that the government values some secular interests more than religious interests and thereby "devalues" religion. That other secular interests are treated just as poorly as religious interests does not change the fact that religion has been treated unequally vis-à-vis some comparable secular interest. Thus, it was "no answer," the Court clarified, that California treated a myriad of "comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[139] Even a single secular exemption renders a law not generally applicable and thus discriminatory toward religion if it does not also provide a blanket exemption for all similar religiously motivated activities.

Two months later, in *Fulton v. City of Philadelphia*, the Court ratified its MFN interpretation of religious equality in a unanimous decision.[140] *Fulton* involved a Catholic adoption agency that sued Philadelphia for refusing to refer foster children to it after the agency confirmed it would not match children with same-sex couples.[141] Among other arguments, the agency contended that because the city had discretionary authority to grant "exemptions" from its antidiscrimination provision, it unconstitutionally

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135. See Laycock, Implications of *Masterpiece*, supra note 83, at 168 (proposing the comparability test).

136. Id.

137. Id.

138. See *Tandon*, 141 S. Ct. at 1296 ("Comparability is concerned with the risks various activities pose, not the reasons why people gather." (citing *Roman Cath. Diocese*, 141 S. Ct. at 66 (Gorsuch, J., concurring))).

139. Id.

140. 141 S. Ct. 1868, 1876–77 (2021). Chief Justice Roberts seems to have won over the liberal Justices by authoring a "minimalist" free exercise decision that, in fact, is remarkably maximalist. As this author has argued elsewhere, the Justices on the left unwittingly helped the *Fulton* Court entrench a doctrine that is far more potent than the "religious liberty" doctrine *Smith* had rejected. See Rothschild, Individualized Exemptions, supra note 32, at 1108 n.6.

141. See *Fulton*, 141 S. Ct. at 1874–75.

discriminated against religion by not exercising that discretion in favor of "religion" and exempting the agency from its contractual obligation.[142]

The Court agreed. Writing for the majority, Chief Justice Roberts restated the MFN rule outlined in *Tandon*[143] and concluded that city officials had unconstitutionally discriminated against religion merely by not granting Catholic adoption agency an exception from the contract's antidiscrimination provision despite having the discretionary power to do so.[144] Thus, even nonexistent, purely hypothetical secular exceptions render failing to exempt religion presumptively unconstitutional. The most-favored nation logic then carried over to strict scrutiny, as it naturally would.[145] According to the *Fulton* Court, the government cannot have a compelling interest "in denying an exception" for religion when it generally "mak[es] them available," even if only potentially.[146] Since the

142. See Reply Brief for Petitioners at 17, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5578834.

143. Reviewing the current state of free exercise jurisprudence, the Court explained that a "law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." See *Fulton*, 141 S. Ct. at 1877. To be sure, this statement did not explicitly include *Tandon*'s "any" language (i.e., "whenever they treat *any* comparable secular activity more favorably than religious exercise," *Tandon*, 141 S. Ct. at 1296 (citing U.S. Const. amend. I)), but it also included no qualifications, stating simply "while permitting secular conduct." *Fulton,* 141 S. Ct. at 1877–78.

144. See *Fulton*, 141 S. Ct. at 1882 (holding that Philadelphia's ability to grant exemptions but not doing so for religious objectors was unconstitutional). The term for this version of most-favored nation discrimination is "individualized exemptions" discrimination. Some scholars have suggested that *Fulton*'s antidiscretion, antidiscrimination rule is of a piece with free speech's "similar" antidiscretion doctrine, usually pointing to Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). See, e.g., Oleske, (Dis)Honesty, supra note 80, at 727 (explaining how *Forsyth*'s individualized-exemption rule aligns with the Court's equal protection approach to the Free Exercise Clause); Nelson Tebbe, The Principle and Politics of Liberty of Conscience, 135 Harv. L. Rev. 267, 301–02 (2021) [hereinafter Tebbe, Liberty] (relying on *Forsyth*, among other free speech cases, to argue that the application of the antidiscretion principle made sense in *Fulton*). But the "too much discretion" rule in *Forsyth* and similar free speech cases involved the government regulating speech *as such*, not conduct in a way that incidentally burdened speech. See *Forsyth*, 505 U.S. at 133–34 (describing how a county ordinance limiting public demonstrations was a restriction on speech). These cases thus involved prior restraints on viewpoints and contents of speech which are incomparable to *Fulton*. For an argument that *Fulton* did not merely apply established doctrine and rather introduced—one might say smuggled in—a radical new rule in the tradition of MFN, see Rothschild, Individualized Exemptions, supra note 32, at 1109–10.

145. But see Koppelman, supra note 16, at 2251 ("What Laycock proposed was a triggering right, not an ultimate right.").

146. See *Fulton*, 141 S. Ct. at 1882. The government would need a "compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." Id. Meaning, first, the compelling interest cannot be the *general* interest underlying the law but must be a *particular* interest in *not* exempting religion. Id. at 1881 (explaining that Philadelphia must show it has a specific "interest in denying an exception to CSS" to prevail). Second, not exempting religion must be necessary. Id. But how can it

government cannot claim that its "non-discrimination polic[y] can brook no departures," applying the policy to the Catholic agency could not possibly be necessary or in service of an actually compelling interest.[147] Contrary to those who have described it as a narrow decision,[148] *Fulton* is both an expansion of and application of the MFN approach to religious equality the Court spelled out two months previously in *Tandon*.[149]

II. EQUALITY'S EXTENT: EXPLAINING RELIGIOUS EQUALITY

As the preceding discussion shows, free exercise as a constitutional right has metamorphosed over the past few decades, with its normative foundations shifting from liberty to equality.[150] The paradigm shift announced in *Smith* provoked immediate and widespread consternation from Congress and scholars, who worried that *Smith* was insufficiently protective of religious exercise.[151]

Yet this critique proved premature. For while *Smith* rejected the liberty paradigm, which had deemed incidental burdens on religious practice presumptively unconstitutional, it did not settle (clearly, at least) on what would come next. *Smith*'s ambiguity provided an opening for advocates and judges, and ultimately the Supreme Court, to adopt a broad principle of religious equality. As explained, this project culminated in a series of COVID-19-related free exercise cases and *Fulton*, in which the Court used

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be when a *comparable* secular activity is exempted (and, in any MFN case, a court would have already determined comparability *before* the strict scrutiny stage)?

147. See id. at 1882 (relying on the *Lukumi* Court's reasoning that underinclusivity means the governmental interests are not compelling and the ordinances are not narrowly tailored).

148. See Laycock & Berg, supra note 16, at 37, 39 ("[*Fulton*'s] general applicability holding turns [narrowly] on specific features of Philadelphia's rules. . . . Overruling *Smith*'s unprotective rule is important . . . ."); Lupu & Tuttle, supra note 37, at 8 ("[S]omewhere along the way, a deal was struck to eliminate any dissenting opinions. In exchange, the likely dissenters got a very narrow Court opinion . . . ."); Linda C. McClain, *Obergefell*, *Masterpiece Cakeshop*, *Fulton*, and Public-Private Partnerships: Unleashing v. Harnessing "Armies of Compassion" 2.0?, 60 Fam. Ct. Rev. 50, 67 (2022) (describing the majority opinion in *Fulton* as a "narrow ruling").

149. See Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (holding that regulations cannot treat secular activities or reasons to gather more favorably than religious ones).

150. See supra notes 46–56 and accompanying text.

151. See Frederick Mark Gedicks, The Rise and Fall of the Religion Clauses, 6 BYU J. Pub. L. 499, 505–06 (1992) (arguing that *Smith* "effectively repeal[ed]" the Free Exercise Clause); Laycock, Remnants, supra note 23, at 68 (claiming that *Smith* is too restrictive); Tebbe, Liberty, supra note 144, at 268 (discussing how scholars advocated for overturning *Smith*). Lobbying efforts, galvanized by the decision, ultimately led Congress to pass RFRA in 1993 in an attempt to nullify *Smith*'s holding. However, RFRA was struck down as applied to states by the Supreme Court a few years later. See City of Boerne v. Flores, 521 U.S. 507, 512–16, 529–36 (1997) (striking down RFRA because it was beyond Congress's power to enact "remedial, preventive legislation").

the "mere" equality framework to implement a doctrine of breathtaking scope. With these decisions, the Court forthrightly adopted what might be called a rule of "religious equality of liberty"—where "liberty" refers to exemptions granted and "equality" refers to the requirement that those exemptions be matched for religion. This Part explains how the new rule of religious equality works precisely, how it should be conceptualized, and why it is so powerful. In doing so, before turning to a closer analysis of the doctrine, it first provides several more examples that help illustrate its astonishing scope.

A. *Illustrating Religious Equality's Expansiveness*

1. *Vaccine Mandate Cases.* — Like the lockdown orders and mask-wearing mandates that preceded them, vaccine mandates prompted a flurry of free exercise challenges.[152] In one of the first free exercise challenges to a COVID-19 vaccine mandate, a (Democratic-appointed) federal district judge issued a preliminary injunction barring enforcement of a state mandate requiring healthcare workers to be vaccinated on the ground that the order was "not generally applicable."[153] Pointing to the order's "impact statement," the court observed that the mandate's objective was preventing individuals from "acquiring COVID-19 and transmitting the virus" to colleagues and patients.[154] Yet, by exempting the medically contraindicated, New York "accept[ed] this 'unacceptable' risk for a non-zero segment of healthcare workers."[155] Thus, the vaccine mandate could not be said to be absolute.[156] And because the non-absolute order did not exempt religious objectors, it unconstitutionally discriminated against religion.[157]

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152. See, e.g., Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173, 1176–77 (9th Cir. 2021) (challenging a student vaccination mandate that did not include a religious exemption); We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 272–73 (2d Cir. 2021) (challenging New York's vaccine mandate for healthcare workers that did not include a religious exemption), opinion clarified, 17 F.4th 368 (2d Cir.). These challenges followed on the heels of other pandemic-related free exercise challenges. See, e.g., Resurrection Sch. v. Hertel, 35 F.4th 524, 527–28 (6th Cir. 2022) (challenging an already-repealed mask mandate on free exercise grounds), cert. denied, 143 S. Ct. 372 (2022) (mem.).

153. See Dr. A. v. Hochul, 567 F. Supp. 3d 362, 375 (N.D.N.Y. 2021), vacated by No. 1:21-CV-1009, 2021 WL 12322139 (N.D.N.Y. Nov. 5, 2021); see also We The Patriots USA, Inc. v. Hochul, Nos. 21-2179, 21-2566, 2021 WL 5103443 (2d Cir. Oct. 29, 2021). Judge David N. Hurd, appointed by President Bill Clinton, granted the preliminary injunction. *Dr. A.*, 567 F. Supp. 3d at 377.

154. *Dr. A.*, 567 F. Supp. 3d at 375.

155. Id.

156. Id.

157. See id. at 377 ("Plaintiffs have established that [the vaccine mandate] conflicts with longstanding federal protections for religious beliefs . . . ." (citing Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (per curiam))).

The court considered a distinction between the two exemptions: Fewer workers had medical reasons than religious reasons to not be vaccinated, and thus the former category posed less of a threat than the latter.[158] But according to the court, such a distinction—even if proved factually sound—was constitutionally irrelevant.[159] New York's stated interest was stemming the spread of COVID-19 by ensuring maximum vaccination, and any exemption from its vaccination requirement would chip away at that interest.[160] The only basis on which an exemption could be justified is another interest of overriding proportion, such as the general health of the medically contraindicated medical workers that would be compromised if they were compelled to take the vaccine.[161] But to value these workers' health more than ensuring maximum vaccination, while not valuing other workers' religious commitments in equal proportion, is to devalue religion—precisely what the new religious equality doctrine forbids.[162]

The expansive nature of the Court's new religious equality doctrine is put into even starker relief in the next vaccine mandate example, which involved what might be called "chronological" religious inequality. In *Thoms v. Maricopa County Community College District*, religious nursing students objected to a vaccine requirement for their in-person clinical rotation.[163] The Mayo Clinic, where these students' clinical rotation was to take place, had a strict vaccine policy, and the college had a strict in-person rotations requirement.[164] The nursing students argued that the rotation requirement amounted to religious discrimination given that the college had previously waived its requirement during the early months of the pandemic when no clinics were available to provide in-person training.[165] Operating under the new religious equality logic, the court counted this prior "exception" against the college.[166] It did not matter that the college had temporarily lifted the requirement only because at the time there were no clinics for students to attend. The mere fact that the college had once

158. See id. at 375 ("[T]he number of people in need of a medical exemption [is expected] to be low . . . .").

159. See id. at 375–76 ("[T]he Supreme Court has recently emphasized that '[c]omparability is concerned with the risks various activities pose,' not the reasons for which they are undertaken." (quoting *Tandon*, 141 S. Ct. at 1297)).

160. Id.

161. Id. at 377.

162. Id.

163. See No. CV-21-01781-PHX-SPL, 2021 WL 5162538, at *3 (D. Ariz. Nov. 5, 2021).

164. Id.

165. See Verified Complaint for Declaratory and Injunctive Relief at 6, 13–4, *Thoms*, 2021 WL 5162538; see also Rothschild, Individualized Exemptions, supra note 32, at 1127–28.

166. See *Thoms*, 2021 WL 5162538, at *3 (finding it relevant that the college had "offered alternatives to in-person clinicals" by "provid[ing] simulated clinicals when in-person clinicals were not available during the COVID-19 pandemic").

countenanced an exception—regardless of its nature, timing, or the surrounding circumstances—was enough to demonstrate that the college's decision not to grant an exemption for students objecting on religious grounds amounted to religious discrimination.[167]

Under the new doctrine, the Free Exercise Clause is implicated whenever the government privileges anything secular over anything religious. When in-person clinical trainings were temporarily unavailable, the college *could* have temporarily closed its doors and put students' education on pause until in-person training was once again on offer.[168] But it did not. Instead, the college privileged the interest of timely matriculation over its interest in hands-on training, which meant the college valued something "secular" more than it valued students receiving hands-on training.[169] Yet when it came to an exemption for religion, the college determined that its interest in hands-on training was too important to compromise.[170] By treating disparately the two reasons for not partaking in in-person clinical trainings—their sheer unavailability and vaccine-related religious objections—the college demonstrated that it cared about the former more than it cared about the latter. Such disparate treatment violated the First Amendment.[171] To value the secular reason of sheer "physical unavailability" more than the religious reason of "spiritual unavailability" is to unconstitutionally devalue religion.

2. *Title VII, Guns, and Medicine*. — While the new rule of religious equality has been employed most extensively in COVID-19-related cases, it has also been applied in a variety of other contexts. For example, a federal court certified a class action brought by a seventy-plus-employee, "Christian-owned," wellness, for-profit business and other "Christian businesses" that had policies against "employ[ing] individuals who are engaged in homosexual behavior or gender non-conforming conduct of any sort."[172] The court held that Title VII violates the Constitution's command not to treat religion unequally: "Title VII does not apply to every

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167. See id. at *8 ("[C]onsidering Defendant considered simulated clinicals a sufficient academic alternative to in-person clinicals for graduating students a year ago, the Court is not convinced that they should now be considered ineffective or impractical as a religious accommodation . . . .").

168. See id. at *12 ("Defendant has available means to accommodate Plaintiffs' religious beliefs without affecting its ability to properly educate them or to provide clinical placements for future students.").

169. See id. ("Depending on how Defendant chooses to accommodate Plaintiffs, it may need to add to its employees' workload, hire additional staff, rearrange schedules, and take on other costs, all within the next seven weeks.").

170. See id. (noting the college's argument that clinical placements are essential to graduating skilled nurses).

171. Id.

172. See Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 587–89 (N.D. Tex. 2021), aff'd in part, vacated in part, rev'd in part sub nom. Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914 (5th Cir. 2023).

employer," but it "exempts businesses with fewer than fifteen employees" and "permits employers on *or near* Indian reservations to discriminate . . . in favor of Indians. These exemptions are '*secular*' in nature."[173] Once Title VII extends "exemptions to nonreligious decisions, [it] must treat requests for religious exemptions the same."[174] Other federal courts have concluded the same regarding other antidiscrimination policies.[175]

Gun control regulations have fared no better. When New York outlawed gun possession in "sensitive locations," including houses of worship and many other places where large groups congregate, the pastor and congregants of a nondenominational church challenged the law on free exercise grounds.[176] The pastor explained that because "the Bible often refers to religious leaders as 'shepherds,'" who are charged with "caring for and protecting their 'flocks,'" and "calls on the Church—as members of a single family united in Jesus Christ—to love, serve, and protect one another," they should be allowed to carry concealed weapons in church.[177]

A federal court agreed, finding that the law discriminated against religion because it was "not applied in an evenhanded, across-the-board way."[178] In the interest of protecting New York's "citizens from gun violence," the gun law covered locations that held special risks for gun violence—that is, "busy, crowded, and dense locations where individuals are often seated or moving slowly."[179] Yet some "private property owners[,]

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173. Id. at 613 (second emphasis added) (citation omitted).

174. Id.

175. See, e.g., Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., 82 F.4th 664, 687 (9th Cir. 2023) (holding that a school district's antidiscrimination policy for student organizations is not generally applicable).

176. See Spencer v. Nigrelli, 648 F. Supp. 3d 451, 456–57 (W.D.N.Y. 2022) ("Plaintiffs allege that the place of worship exclusion 'is a compendium of constitutional infirmities' that infringes on . . . the Church's 'rights to freely engage in religious exercise . . . .'" (quoting Complaint ¶ 55, *Spencer*, 648 F. Supp. 3d 451 (No. 22-CV-6486 (JLS)))), aff'd sub nom. Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023), cert. granted, judgment vacated sub nom. Antonyuk v. James, 144 S. Ct. 2709 (2024). As New York explained, other sensitive locations covered by the law "include[ed], but [were] not limited to, schools, public parks, homeless shelters, public transit, polling places, and theatres." Id. at 463 (internal quotation marks omitted) (quoting Memorandum in Opposition to Motion for Preliminary Injunction at 11, *Spencer*, 648 F. Supp 451 (No. 22-CV-6486 (JLS))).

177. Id. at 461 (quoting Declaration of Michael Spencer ¶¶ 22–23, *Spencer*, 648 F. Supp. 3d 451 (No. 22-CV-6486 (JLS))).

178. Id. at 463 (internal quotation marks omitted) (quoting Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423 (2022)). The plaintiffs also explained that hiring "outside security" was "not an adequate substitute because such individuals would be working for a paycheck—not acting pursuant to a spiritual calling." Id. at 461. And, in any event, the possibility of outside security was completely beside the point: "Pastor Spencer and Church members ha[d] a religious belief that they, *themselves*, must protect the flock." Id. (emphasis added).

179. Id. at 463 (quoting Memorandum in Opposition to Motion for Preliminary Injunction at 11, *Spencer*, 648 F. Supp 451 (No. 22-CV-6486 (JLS))).

[including] proprietors of hair salons, retail stores, shopping malls, gas stations, office buildings, [and] garages" were not covered by the regulation.[180] Since New York permitted "other private actors hosting secular activities to do what a house of worship may not[,]" the regulation's exclusion of houses of worship from its "noncoverage" category amounted to impermissible discrimination against religion.[181] The Second Circuit, in a unanimous per curiam decision[182] relying heavily on *Roman Catholic Diocese* and *Tandon*, affirmed that for New York's sensitive-places restriction to include houses of worship among a host of "other enumerated sensitive locations" is "neither neutral nor generally applicable" so long as it does not consider various other "forms of private property" sensitive places for the purposes of gun-carry.[183]

To provide one final example, in 2023 a federal district court considered a challenge from a religious clinic to a new Colorado law prohibiting an abortion-reversal medication that allegedly reverses the effects of abortion medication and that had been denounced by prominent medical groups as without scientific basis and as potentially unsafe.[184] Pointing to the lack of a prohibition on patients who simply opt not to take the second of two abortion pills,[185] the court explained that the law "treats comparable secular activity more favorably than . . . religious activity."[186]

As this sampling of cases illustrates, the Supreme Court's new religious equality doctrine has ushered in a new era of free exercise jurisprudence.[187] And these cases are harbingers of what is to come.[188]

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180. Id.

181. Id. (emphasis added). A later section of this Essay addresses the lack of any meaningful difference between exceptions and noncoverage. See infra section III.D.

182. Authored by Judges Dennis Jacobs, Gerard Lynch, and Eunice Lee—respectively, a George H. W. Bush appointee, Obama appointee, and Biden appointee.

183. See Antonyuk v. Chiumento, 89 F.4th 271, 349–50 (2d. Cir. 2023), certiorari granted, judgment vacated sub nom., Antonyuk v. James, 144 S. Ct. 2709 (2024) (mem.).

184. See Bella Health & Wellness v. Weiser, 699 F. Supp. 3d 1189, 1196–99 (D. Colo. 2023) (describing abortion reversal medication as "a dangerous and deceptive practice that is not supported by science or clinical standards, according to the American College of Obstetricians and Gynecologists, or by the United States food and drug administration" (internal quotation marks omitted) (quoting S.B. 23-190, 74th Gen. Assemb., 1st Reg. Sess. § 1(1)(d), (f) (Colo. 2023))).

185. Id. at 1212.

186. Id.

187. See Martha Minow, Walls or Bridges: Law's Role in Conflicts Over Religion and Equal Treatment, 48 BYU L. Rev. 1581, 1586–96 (2023) ("[A]cross areas of healthcare, education, employment, and social services, people can express a grievance arising from their religious beliefs . . . .").

188. For example, when the Supreme Court in 2022 prohibited Maine from disqualifying "sectarian" schools from receiving tuition assistance, see Carson v. Makin, 142 S. Ct. 1987 (2022), Professor Aaron Tang took to the pages of the *New York Times* and then the *Yale Law Journal* to express his optimism that so long as Maine conditioned funding on

There is little reason to believe that religious equality challenges to a wide assortment of laws will not meet the same fate as did many vaccine mandates, New York's sensitive locations regulation, Title VII, and a standard health law. Further, the doctrine could well migrate to other areas of constitutional law, as some scholars have argued it should.[189]

B. *Religious Equality's Edge*

It should by now be clear that religious equality has surpassed religious liberty, even though the latter is commonly perceived as the stronger right.[190] It is hard to imagine courts operating under the liberty

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compliance with a new antidiscrimination (on the basis of sexual orientation and gender identity) requirement, the sting from *Carson* would be removed as the schools would not (as they freely admitted they would not) comply with such a requirement. See Aaron Tang, Who's Afraid of *Carson v. Makin*?, 132 Yale L.J. Forum 504, 525 (2022), https://www.yalelawjournal.org/pdf/F7.TangFinalDraftWEB_uc2niseq.pdf [https://perma.cc/3LEA-WDVH] [hereinafter Tang, Who's Afraid?]; Aaron Tang, There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It, N.Y. Times (June 23, 2022), https://www.nytimes.com/2022/06/23/opinion/supreme-court-guns-religion.html (on file with the *Columbia Law Review*). Tang explained that he "underst[ood] the human instinct to worry about worst-case scenarios . . . . But fears that *Carson* will require [Maine and] every state to fund religious private education are overblown." See Tang, Who's Afraid?, supra, at 512. After all, "Maine's law treats every secular private school identically to how it treats religious schools that accept public funding with zero exceptions: no such school may discriminate against LGBTQ youth under any circumstance. So, the law should be permissible under existing free-exercise doctrine." Id. at 526. But as "sectarian" schools in several lawsuits have argued, the new requirement "do[es] not apply to private post-secondary schools . . . [which] are not covered by the Act[]." See, e.g., Complaint at 32, St. Dominic Acad. v. Makin, 744 F. Supp. 3d 43 (D. Me. 2024) (No. 2:23-cv-00246-JAW); see also Complaint at 15, Crosspoint Church v. Makin, 719 F. Supp. 3d 99 (D. Me. 2024) (No. 1:23-cv-00146-JAW) (noting that the current Maine statute "deter[s] religious schools from participating in the tuitioning program if they hold disfavored religious beliefs"). Sure enough, the district court agreed that the law was not generally applicable. See *Crosspoint Church*, 719 F. Supp. at 116. However, it then held that the law survived strict scrutiny (representing a rare instance of such a finding). See id. at 123.

189. For example, drawing on *Tandon* and other recent religious equality cases, the Ninth Circuit has held that for a pandemic-related lockdown order to privilege "'essential' businesses" by exempting them but not gun shops and firing ranges "reflects a government-imposed devaluation of Second Amendment conduct in relation to various other non-Constitutionally protected activities," and thus violates the Second Amendment. See McDougall v. County of Ventura, 23 F.4th 1095, 1114 (9th Cir. 2022), vacated en banc by 38 F.4th 1162 (9th Cir.). And at least one federal court has lamented the lack of MFN-style free speech doctrine. See Glob. Impact Ministries v. Mecklenburg County, No. 3:20-CV-00232-GCM, 2022 WL 610183, at *8 (W.D.N.C. Mar. 1, 2022) ("There is admittedly an obvious logical incongruity in finding that the Proclamation was not content-neutral for purposes of the free exercise claim, but content-neutral for purposes of the free speech claim."); see also infra note 236 (discussing how Tebbe and others advocate extending the new doctrine to other areas of constitutional law).

190. See, e.g., Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (explaining how liberty rights are stronger than equality rights because while the former "leaves ungoverned and ungovernable conduct which many people find objectionable," the latter "merely means that the prohibition or regulation must have a

model granting a free exercise right to carry concealed guns in sensitive places or not take a mandated vaccine. Indeed, under the religious liberty model, no court in the country's history was willing to even entertain the notion that free exercise includes entitlement to an exemption from a vaccine mandate; they scoffed at the very suggestion that it might.[191] The same goes for exemptions from lockdown orders. Even if a religious plaintiff would have succeeded in showing that a lockdown order imposed a "substantial burden" on a sincerely held religious belief or practice, the plaintiff almost certainly would not have succeeded in impeaching the compelling nature of the government's interest or the necessity of the government's chosen methods just because the government provided exemptions for select activities.[192] Yet under the new equality paradigm, both Republican- and Democratic-appointed judges have repeatedly held that religious objectors to COVID-19 vaccines and lockdown orders must be carved out from both.[193]

This outcome is ironic. Recall that the core issues the Court sought to overcome in *Smith* were balancing the value of religion against the interests of the government and "courting anarchy."[194] But replacing religious liberty with religious equality has served only to exacerbate these problems rather than eliminate them. At the end of the day, both religious liberty and equality rest on essentially the same method of judicial review. Under both, courts replace the government's cost-benefit analysis with their own; both rely on assumptions regarding the (unique) value of religion;[195] and both have the capacity of requiring the government to ensure that nearly

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broader impact"); Douglas Laycock, Religious Liberty as Liberty, 7 J. Contemp. Legal Issues 313, 314 (1996) [hereinafter Laycock, Religious Liberty] (describing religious liberty as determining that "the federal government was declared a permanent neutral").

191. See Rothschild, Individualized Exemptions, supra note 32, at 1108–09 (discussing the history of courts upholding vaccine mandates).

192. See, e.g., Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (expressing "doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one"); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988) (holding that a substantial burden does not exist when the "incidental effects of government programs . . . may make it more difficult to practice certain religions").

193. See, e.g., Air Force Officer v. Austin, 588 F. Supp. 3d 1338, 1357 (M.D. Ga. 2022) (Judge Tilman E. Self III, a Trump appointee); Thoms v. Maricopa Cnty. Cmty. Coll. Dist., No. CV-21-01781-PHX-SPL, 2021 WL 5162538, at *13 (D. Ariz. Nov. 5, 2021) (Judge Steven Logan, an Obama appointee); Dr. A. v. Hochul, 567 F. Supp. 3d 362, 375 (N.D.N.Y. 2021) (Judge David N. Hurd, a Clinton appointee), rev'd in part, vacated in part sub nom. We the Patriots USA, Inc. v. Hochul, 17 F.4th 266 (2d Cir.); Tabernacle Baptist Church, Inc. v. Beshear, 459 F. Supp. 3d 847, 856 (E.D. Ky. 2020) (Judge Gregory F. Van Tatenhove, a George W. Bush appointee).

194. See Emp. Div., Dep't. of Hum. Res. v. Smith, 494 U.S. 872, 888 (1990); see also supra section I.A (discussing the *Smith* paradigm shift).

195. One might prefer to call this the value of *liberty* to exercise one's religion, but there is no actual difference between the two. So long as the liberty is for religion specifically, talk of the value of "religious liberty" versus the value of "religion" devolves into a meaningless distinction.

(if not) all of its laws exempt "religion."[196] Only, the religious equality approach comes with additional deference that renders it even more sweeping and more potent than religious liberty.

Several factors explain the increased muscularity of religious equality. First, as a practical doctrinal matter, equality is a structural rather than individual right: It is concerned with the *government*'s placing burdens on religion rather than the specific burdens on *individuals*' religious practices.[197] This shift allows courts to sidestep a host of thorny questions. Under the religious equality model, courts need not inquire into the nature of an individual's religious practice or beliefs or the degree to which they are burdened. Rather, the only relevant question is whether the government has acted inappropriately by treating religion unequally.[198] If the government has granted secular exemptions but not comparable religious ones, it has devalued religion.[199] Moreover, as this Essay explains later, once a finding of wrongfulness is established, it is game over for the government.[200] Under the liberty model, it was at least theoretically possible for the government to demonstrate a compelling interest in not exempting religion and be forgiven for not doing so.[201] But it is impossible to justify *wrongfulness*, which is what even a preliminary finding of unequal treatment of religion constitutes under the new doctrine. A finding of wrongful inequality already assumes the discrimination at issue is unjustified, which, after all, is precisely what makes it wrongful.[202]

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196. Since every law could burden someone's religious beliefs or practices, in theory every law could be required to exempt religion.

197. See, e.g., *Smith*, 494 U.S. at 878–79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.").

198. See, e.g., id. at 877 ("Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'" (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963))). An interesting question warranting further scholarship is whether a definition of religion is required to get (even) religious *equality* off the ground.

199. See Tebbe, Equal Value, supra note 16, at 2443 ("Using the government's interest to set the baseline for comparability is a device for identifying most situations where protected actors or activities have been devalued.").

200. See infra section III.A.

201. "Theoretically" because, in fact, under the current version of strict scrutiny adopted in free exercise cases dating back to *Gonzales*, see infra notes 247–251 and accompanying text, it is effectively impossible under liberty too. But rhetorically, at least, it is possible to muster strict scrutiny for a religious liberty challenge and, given that rhetorical advantage, it is possible lower courts (but highly doubtfully the Supreme Court) would indeed so hold.

202. And the result of a finding of wrongful discrimination is the annulment of the governmental action in question. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. at 520, 547 (1993) (holding that discriminatory laws that "were enacted contrary to these constitutional principles . . . are void"); Loving v. Virginia, 388 U.S. 1, 11 (1967) (striking down antimiscegenation law that rested "solely upon distinctions drawn

In the context of religious convictions conflicting with equality-based rights (such as LGBTQ rights) and laws, the valence of free exercise as an equality right offers an additional benefit.[203] So long as free exercise is construed as a liberty right, it faces the charge that liberty rights (in particular) should run out when they conflict with others' rights. That argument—that one's freedom to swing one's fist ends where another's nose begins—has an old pedigree and is often invoked in the context of free exercise.[204] But free exercise is subordinated to the equality-based rights and laws it is increasingly at odds with only so long as it is conceived of as a liberty right.[205] When free exercise is reconceptualized as an equality right, it takes on a commensurate status to more conventional equality-based rights and laws.

Religious equality's potency is compounded by the ease with which it is breached. Consider how religious equality compares with both anti-intentional religious discrimination and religious liberty. Under the religious liberty paradigm, religion must be treated better than most other interests: The government must treat religion as special by going out of its way to ensure its laws do not even inadvertently burden religious exercise.[206] A rule against intentional discrimination works the opposite way.[207] It prohibits the government from treating religion as special when

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according to race" because "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification").

203. See Rothschild, Partisanship, supra note 122, at 1100.

204. See Nigel Warburton, John Stuart Mill *On Liberty*, *in* Philosophy: The Classics 156, 156 (4th ed. 2014); Zechariah Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919) ("Your right to swing your arms ends just where the other man's nose begins." (internal quotation marks omitted)). Many free exercise claims can be seen as conflicting with others' equality-based rights, like LGBTQ rights. For a pivotal article on third-party harms and free exercise, see generally Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA Exemptions From the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 Harv. C.R.-C.L. L. Rev. 343 (2014).

205. See Rothschild, Partisanship, supra note 122, at 33–34. Some have lamented what they perceive to be the insufficient weight given to religious liberty in the face of ascendant recognition of equality rights in the LGBTQ and reproductive contexts. For example, while Justice Kennedy in *Obergefell* nodded at religious freedom for those opposing gay rights, two of the four dissenting opinions took issue with the decision's lack of engagement with religious liberty. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 711 (2015) (Roberts, C.J., dissenting) (declaring that the decision "creates serious questions about religious liberty"). Framing free exercise as an equality, rather than a liberty, right also provides a ready answer to the normative challenge to religion's specialness. See, e.g., Micah Schwartzman, What if Religion Is Not Special?, 79 U. Chi. L. Rev. 1351, 1377–90 (2012) (explaining "why religion is not special"). On a religious equality model, (in theory) religion need not be seen as special. All religious equality requires is that it be treated the *same* as what is secular.

206. See supra section I.A.

207. See Rothschild, Lingering Ambiguity, supra note 35, at 283 ("If a facially neutral law is applied almost exclusively to religious activity, such exclusive application suggests the law in fact has a discriminatory purpose.").

it comes to the detriment of restrictions.[208] The government may not go out of its way to burden religion.[209] While religion need not be a consideration when it comes to granting benefits, it cannot be a consideration when it comes to allocating detriments.

Ostensibly, religious equality sits somewhere between these two. It requires the government to treat religion as well as its comparators. If religious liberty requires the government to treat religion as though it has positive value, and anti-intentional religious discrimination demands that it not treat religion as though it has negative value, religious equality insists that the government treat religion as if it has *equal* value.[210]

Yet what precisely is the difference between a rule against intentional discrimination and a rule prohibiting religious inequality? It is deceptively easy to conclude that the difference lies in the word "intent"—that only the former involves "bad intent, object, or purpose[,]"[211] while the latter "constrains outcomes, not processes."[212] But that is not quite right, as religious equality still manages to sweep in intent.[213] Religious equality, after all, is a rule against disparate treatment: What is religious cannot be treated worse than what is secular.[214] If the government breaches that rule,

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208. Id.

209. Id.

210. In actuality, equality requires some kind of positive valuation of religion just as religious liberty does. See infra note 214. Professor Peter Westen's powerful argument that any equality norm must rest on substantive valuations—and, on its own, without such substance, is empty—is relevant to this observation. See Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 542 (1982); see also Steven D. Smith, Blooming Confusion: Madison's Mixed Legacy, 75 Ind. L.J. 61, 63–65 (2000) (linking Westen's ideas about equality with religious equality).

211. Tebbe, Equal Value, supra note 16, at 2425.

212. Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1301–02 (1994) [hereinafter Eisgruber & Sager, Vulnerability] (emphasis omitted); see also Tebbe, Equal Value, supra note 16 at 2424 ("Nor is the purpose or object of a law central to the concept of equal value . . . .").

213. It is not for nothing that the Court in *Lukumi* described the government's iniquity of "devalu[ing] religious reasons for killing by judging them to be of lesser import than nonreligious reasons" as "*singl[ing] out* [religion] for discriminatory treatment." Church of the Lukumi Babalu Aye, Inc v. City of Hialeah, 508 U.S. 520, 537–38 (1993) (emphasis added) (citing Bowen v. Roy, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.); id. at 722 & n.17 (Stevens, J., concurring in part and concurring in the result); United States v. Lee, 455 U.S. 252, 264 n.3 (1982) (Stevens, J., concurring in the judgment)). Similarly, while some scholars have characterized MFN as a doctrine of disparate impact, see supra note 27, others have framed it as a doctrine of intentional discrimination. See Nathan Chapman, The Case for of the Current Free Exercise Doctrine, 108 Iowa L. Rev. 2115, 2150 (2023) (describing MFN as a device for "rooting out prejudice against religious discrimination"); Storslee, supra note 16, at 88 (describing *Roman Catholic Diocese* as the Court holding that "regimes regulating religion based on subjective or value-based categories trigger strict scrutiny").

214. Put differently, not only must the government not have "negative" intent, but it must also have the correct amount of "positive" intent. Similarly, not having the correct

it has treated religion as if it has negative value relative to that which has (more) positive value.[215]

Put differently, if something secular receives better treatment due to a higher valuation, religion has received worse treatment due to a *lower* valuation.[216] To be sure, when religion is treated less well than a comparator, the problem is not intentional discrimination in the sense of religion serving as a but-for cause of the disparate treatment. Religion has not necessarily been singled out qua religion for adverse treatment. But—contrary to some who have understood it this way—religious equality is also not a rule against disparate impact, troubled by a law's unintended effects.[217] Religious equality is concerned with governmental *treatment* of religion. It "requires," in the words of Justice Kagan, "that a State treat religious conduct as well as the State treats comparable secular

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amount of positive intent (or "regard") equates with having "negative" intent. This understanding of intent is both similar and dissimilar to the view that disparate impact can also be understood as involving bad intent in the sense of insufficient good intent. See, e.g., Stephanie Bornstein, Reckless Discrimination, 105 Calif. L. Rev. 1055, 1064 (2017) ("So long as employees can show that protected class membership entered the chain of volitional acts that resulted in adverse employment actions, they may prevail."); Sophia Moreau, Discrimination as Negligence, 36 Canadian J. Phil. 123, 139 (2010) (describing theory that "the wrong does not consist in the presence of malice or of an exclusionary intent"). It is similar because the "negative intent" is the *lack* of (sufficient) "positive intent" (i.e., regard or sensitivity) for both. It is dissimilar because, with respect to disparate impact, the "negative intent" is a lack of sensitivity to one consequence (among others) of an otherwise benign policy, specifically the disparity resulting from it. Meanwhile, with respect to MFN, similar to disparate treatment doctrine, the negative "intent" is regarding the subjects of the policy in question themselves: The government is treating one subject better than another—akin to treating one race better than another—due to a lack of adequate positive regard for that other subject ("religion").

215. But see infra note 216 (comparing but-for causation in the racial and religious discrimination contexts). The "intent" involved when the new rule of religious equality is breached is significantly different from "but-for intent," the type of intent normally associated with intentional discrimination. This author proposes that there are three kinds of "intent": the intent affiliated with disparate impact, the intent of MFN, and the intent associated with intentional discrimination.

216. Another way to put this is that under this model, religion must not only not be a but-for cause of adverse treatment, it also cannot be the but-for-it-were-not-something-else, as strange as that might sound. That is, if religion *were* some other secular thing that has received an exemption, it too would receive the exemption. See generally Katie Eyer, The But-For Theory of Anti-Discrimination Law, 107 Va. L. Rev. 1621 (2021) (discussing but-for causation in antidiscrimination law).

217. See, e.g., Litman, supra note 5, at 19, 22–23 (comparing the new doctrine to disparate impact analysis); Portuondo, supra note 16, at 1499 (same); René Reyes, Religious Liberty, Racial Justice, and Discriminatory Impacts: Why the Equal Protection Clause Should Be Applied at Least as Strictly as the Free Exercise Clause, 55 Ind. L. J. 276, 309 (2022) (same). In a piece on MFN published in 2020, this author also (somewhat) compared MFN to disparate impact doctrine, calling it a variant of disparate impact. See Rothschild, Lingering Ambiguity, supra note 35, at 284 & n.14 ("The other interpretation of *Smith*'s general applicability test is that it is a variant of the disparate impact test.").

conduct"[218]—that it "*treat* like cases alike."[219] Or, as Justice Gorsuch explained, if a state forbids all indoor gatherings, including "indoor worship," while allowing some secular "operations to proceed indoors," it "obviously *targets* religion for differential treatment."[220]

For the government to treat that which is religious worse than something secular reflects a lack of "equal value"[221]: The government values something secular more than it values religion, while the Constitution requires it to value them (at least) equally.[222] Doing so, as Chief Justice Roberts put it, "reflect[s] . . . insufficient appreciation or consideration of the [religious] interests at stake."[223] It expresses, in the words of Justice Gorsuch regarding lockdown orders, "a judgment that what happens" in "religious places . . . just isn't as 'essential' as what happens in secular spaces."[224] The problem, as Justice Alito clarified in *Fraternal Order* and Justice Kennedy described in *Lukumi*, is that the government has "devalued" religion.[225] This is not the insensitivity toward different consequences of a benign policy—in other words, "disparate impact." Rather, it is the wrongfulness of different valuations resulting in "disparate treatment."

While the new rule of religious equality shares much with disparate treatment antidiscrimination law,[226] this brand of equality is substantively different from disparate treatment doctrine in other areas because what cannot be treated better in this context is an amorphous grouping defined in the negative: anything and everything that is *not* in the protected class. Put differently, the mandate of religious equality rests on a religion–secular binary. What is "secular" is simply all that is not "religious." Because everything is either secular or religious, any time the government

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218. See Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting).

219. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 721 (2021) (Kagan, J., dissenting) (emphasis added) (internal quotation marks omitted) (quoting Vacco v. Quill, 521 U.S. 793, 799 (1997)).

220. Id. at 717 (Gorsuch, J., dissenting) (emphasis added).

221. See Tebbe, Equal Value, supra note 16, at 2398–99 ("If its interest applies evenly to the regulated and unregulated categories, then it presumptively has devalued protected practices—it has treated them as less worthwhile than the exempted activities.").

222. See Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."). Though, the "intent" of *Epperson* is a far cry from the "intent" of MFN. See supra note 216 (describing but-for causation in religious discrimination).

223. See *S. Bay United*, 141 S. Ct. at 717 (Roberts, C.J., concurring in the partial grant of application for injunctive relief).

224. See Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring).

225. Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999); see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535–37 (1993).

226. See Storslee, supra note 16, at 88 ("[R]egulations may not discriminate against religion by drawing value-based distinctions . . . .").

extends a benefit to anything secular but not to all things religious, by definition religion has been treated worse than what is secular.

This equality mandate stands alone in constitutional jurisprudence. The constitutional rules against racial and speech discrimination forbid discrimination among different races and among different contents or viewpoints of speech.[227] In contrast, religious equality covers not only equality *among* religions (and intentional discrimination against religion or the secular as categories) but also any unequal treatment between phenomena that are "religious" and "secular"—that is, all phenomena that happen to not be religious.[228] To better appreciate the novelty of this brand of equality, picture this rule of equality in other contexts. Were this rule applied to race or speech, the government could not treat *anything* better than "race" or "speech" as such. The rule would bifurcate the world into race and all that is not race, speech and all that is not speech. Any time the government granted a benefit to anything at all, it would be wrongful discrimination to not also grant that benefit to all that is "racial" and "speech-regarding." Needless to say, such an understanding of racial and speech equality is unknown to American equality law.

III. PROBLEMS WITH RELIGIOUS EQUALITY

Perhaps surprisingly, the new religious equality doctrine has commanded endorsement—in principle at least—from a wide variety of scholars.[229] For example, Professor Nelson Tebbe supports the Court's "new [version of] equality," which he dubs "equal value,"[230] commending the notion that "the government [ought not] wrongly burden protected actors through disregard or devaluing,"[231] and that "[b]y regulating a basic freedom while exempting other activities, the government implicitly judges the former to be less valuable than the latter."[232] This principle is not only "supportable"; it holds "real attraction."[233] Tebbe has concerns

227. See, e.g., Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 47–48 (1987) (discussing the Supreme Court's practice of nearly always invalidating content-based restrictions).

228. It might be hard to immediately discern the difference between *intentional* discrimination against religion (or against the secular) and (merely) the unequal treatment of that which is secular and that which is religious. Examples might help. There are three categories, which can be illustrated with three examples: (1) a benefit for only those who are Catholic; (2) a benefit for only those who are secular; (3) a benefit for only those who regularly volunteer at the local hospital. The first two are instances of intentional discrimination on the basis of religion. The third is an example of privileging something secular over religion (i.e., the benefit is not granted on the basis of regular church attendance).

229. See supra note 16 and accompanying text.

230. See Tebbe, Equal Value, supra note 16, at 2399–400.

231. Id. at 2401.

232. Id. at 2441.

233. Id. at 2404, 2416.

with the Court's new equality, but they are limited to its "nonideal execution."[234] For Tebbe, "in practice," the "ideal" of equal value is being "applied according to a particular politics,"[235] evidenced by the fact that despite equal value's "significant appeal" for "other areas of constitutional equality law," the Court has declined to apply it beyond free exercise.[236] Tebbe is not alone in leveling only "as applied" criticism of the new religious equality principle.[237] On some level, though, perhaps none of this should come as a surprise: Endorsements of religious equality fit within a long-standing tradition of liberal egalitarianism, a tradition that has included many celebrated progressive scholars who have advanced such

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234. See id. at 2482; see also id. at 2401, 2403.

235. Id. at 2482; see also id. at 2405 ("Religious groups, including the largest denominations, are winning cases, and private speakers are being protected against public regulation, while sexual and racial communities are left undefended by constitutional law against a naturalized stratification of social power.").

236. Id. at 2405, 2462, 2482; see also Portuondo, supra note 16, at 1561 (advocating for adopting the Supreme Court's new approach to the Free Exercise Clause in the equal protection context); Reyes, supra note 217, at 279 (calling for a strengthened disparate impact standard in the equal protection context, following the greater protection for religious groups in the Free Exercise context).

237. Other scholars have also largely centered their criticisms on the ways in which courts have "mis*applied* equal value." See, e.g., Micah Schwartzman & Richard Schragger, Slipping From Secularism 1, 6 (Univ. of Va. Sch. of L. Pub. L. & Legal Theory Rsch. Paper Series No. 2022-75, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4266290 [https://perma.cc/4GX8-SUGE] ("But on another reading, the court misapplied equal value when it held that the state had to give equal treatment to 'life-sustaining' and 'soul-sustaining' activities."). According to Professors Schwartzman and Schragger, some courts have problematically required the government to have as one of its interests "religion" itself (which, in their view, indicates a "slipping from secularism"). This author agrees with Professors Schwartzman and Schragger that the way the current doctrine operates requires the government to include religion as one of its interests. They shed much light on a key problematic feature of the current doctrine. However, while their essay suggests "equal value" *need not* work this way, this Essay takes the position that it must. They seem to assume there is a meaningful distinction between a government's "interests" and its "values." Thus, when a secular reason is *valued* by the government enough to override the secular interests that justify the government's policy exemptions but a religious reason is not, Professors Schwartzman and Schragger would see a "plausible" argument that the government has problematically violated the principle of equal value. See id. at 2. This Essay does not. Interests and values are interchangeable. And, in any event, every law has "interests" that are undermined to some degree due to governmental attributions of "value."

It should be noted that, as a general matter, some limit their normative endorsement of equality for religion to minority religions, specifically. See, e.g., Paul Gowder, Why Majority Religions Should Not Be Accommodated, 108 Iowa L. Rev. 2153, 2186 (2023) ("The same rule [that free exercise protection should be limited to religious minorities, lacking power] ought to be applied to non-accommodations-based claims of religious discrimination . . . ."). But if applied to only minority religions, it is hard to see how such concern for minority religions is not just a rule of equality *among* religions given the premise that religious majorities *would* receive the benefit in question (and that is certainly not the type of religious equality that has been captured by the doctrine). See supra note 216.

theories of religious equality as "equal regard," "equal concern," and "equal liberty."[238]

This Part argues, however, that a rule of religious equality according to which courts evaluate governmental "unequal" treatment of religion is not only inherently boundless but also conceptually incoherent. Religious equality turns on treating that which is religious the same as its secular "comparators." But religion is not comparable to anything—not in terms of its "essence" nor its value.[239] The only way a rule of religious equality could work is either if all judges decided for themselves the value of religion (or of the particular religion or religious activity before the judge) or assumed that religion is always at least as valuable as all that is secular. The Supreme Court—in this Essay's analysis, the entire Court, not just the more conservative Justices[240]—has taken the latter route. Its new rule assumes that religion is as valuable as, and thus must be treated as well as, anything "not religion."[241] But there is no basis for such an assumption, and, if taken seriously, it would put the viability of basic governance in jeopardy (as it has begun to do). The problem with recent religious equality cases, in other words, is not bad judges or unfortunate and avoidable "misapplications" of an otherwise desirable principle. The problem lies with the principle itself.

By illustrating how the new principle of religious equality licenses extreme results, this critique is not meant to suggest that the Supreme Court (or any court) is likely to reach all of those results. Rather, the reductio ad absurdum critique serves three related objectives. First, it aims to situate lower courts' recent free exercise decisions within the new

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238. Beginning with a cluster of articles in the mid-1990s (which were turned into a much-anticipated and much-discussed book in 2007), Professors Eisgruber and Sager developed a theory of religious equality based on "equal regard." See Eisgruber & Sager, Religious Freedom, supra note 89, at 13; Eisgruber & Sager, Vulnerability, supra note 212, at 1253. According to this principle, the state is "obliged to treat . . . deep [religious] interests as equal in importance and dignity to the deep religious or secular interests of other persons." Id. at 1286. Professors Eisgruber and Sager also refer to this principle as "equal liberty," a term John Rawls used as well. See Eisgruber & Sager, Religious Freedom, supra note 89, at 15; John Rawls, A Theory of Justice 171–86 (1999). Similarly, Ronald Dworkin proposed that "religions may be forced to restrict their practices so as to obey rational, nondiscriminatory laws that *do not display less than equal concern for them*." Ronald Dworkin, Religion Without God 136 (2013) (emphases added); see also Jocelyn Maclure & Charles Taylor, Secularism and Freedom of Conscience 21 (2011) ("[A] 'difference-blind' conception of equality can end up preventing the free exercise of religion of the members of religious minorities."); Martha Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality 19–22 (2008) (advancing an "equality principle" interpretation of free exercise premised on "equal respect").

239. See, e.g., Abner S. Greene, Liberalism and the Distinctiveness of Religious Belief, 35 Const. Comment. 207, 210 (2020) ("For many religious people, belief in God and what follows from that is not comparable to anything . . . .").

240. See infra section III.D.

241. See infra note 362.

doctrine. Far from representing contorted applications of the doctrine, these recent cases are faithful applications of it. Second, the critique aims to destabilize the principle's normative appeal by way of reflective equilibrium, that is, by showing the results that a principled, consistent application of the rule would yield. Finally, it seeks to motivate scholars and jurists to (re)consider alternative normative and conceptual bases for free exercise doctrine. To that end, the critique in this Part sets up a brief discussion in Part IV about the role that "intent" can play in crafting a synthetic and more workable—even if less attractive—doctrine of free exercise.

A. *The Futility of Strict Scrutiny*

It is worth starting at the end—with the "remedy" of strict judicial scrutiny that is granted if a court determines that the government has treated religion unequally. Courts adjudicating religious equality cases and scholars opining on them have assumed that the new religious equality standard is not entirely destructive to the government's ability to enforce laws that incidentally burden religious practice while exempting comparable secular activity.[242] The government can still justify such laws if they are narrowly tailored to advance compelling interests. In other words, regardless of how powerful of a constitutional mandate religious equality might be at the front end, it will not always impede governmental regulations at the back end. At most, a finding of religious inequality "triggers" a more searching review of the government's interests and selected means for achieving them, a type of review that is common in constitutional law and that need not be fatal.[243] In that vein, several commentators during the pandemic expressed optimism that strict scrutiny could and would bail out the government when lockdown orders

242. See Tebbe, Equal Value, supra note 16, at 2450 ("With regard to equal value, claims . . . can be defeated at the back end of the analysis if the government can carry its burden."); Tebbe, Liberty, supra note 144, at 283, 295 (describing the new free exercise equality right as "contain[ing] an egalitarian safeguard at the back end of the analysis, insofar as it can be overcome by strong state interests"); Douglas Laycock, Opinion, Do Cuomo's New Covid Rules Discriminate Against Religion?, N.Y. Times (Oct. 9, 2020), https://www.nytimes.com/2020/10/09/opinion/cuomo-synagogue-lockdown.html [hereinafter Laycock, Cuomo's New Covid Rules] (on file with the *Columbia Law Review*) ("Nondiscriminatory rules to protect human life can be applied to the exercise of religion. But the rules must really be nondiscriminatory.").

243. See Koppelman, supra note 16, at 2251 ("What the triggering right triggers is the application of some level of heightened scrutiny."); Tebbe, Equal Value, supra note 16, at 2451 (advocating for "first . . . determining comparability at the threshold stage . . . and then [doing] . . . the back end . . . analysis").

and vaccine mandates were challenged on religious discrimination grounds.[244]

But these reassurances proved empty, not because of a "distort[ion in] the application of strict scrutiny,"[245] but because—for relatively straightforward reasons—the outcome of any scrutiny of the government's reasons for treating religion unequally is foreordained. Once a court has determined that the government has wrongfully discriminated against religion, it will not—because it cannot—then conclude that the government has a compelling reason for doing so.[246] The valence of "inequality" precludes the government from surviving any kind of constitutional scrutiny. The logic that implicates strict scrutiny under religious equality—that a secular entity or activity has been exempted while comparable religious entities and activities have not—locks in the conclusion that the lack of religious exemptions bespeaks a lack of narrow tailoring, a lack of a compelling interest, or both.

More specifically, as courts have indeed reasoned, how compelling can an interest that tolerates (secular) exceptions possibly be?[247] And even if the interest is compelling, how can the government claim it is *necessary* for the law to not provide an exemption (for religion) when the law does provide exemptions?[248] In *Fulton*, Chief Justice Roberts—drawing on one of his own early free exercise opinions[249]—explained that to survive strict scrutiny (in the context of free exercise, at least), the government must demonstrate a "compelling interest" not just "in enforcing its . . . policies generally, but . . . in denying an exception" to the religious objector.[250] In

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244. Indeed, one such commentator was Professor Laycock. See Laycock, Cuomo's New Covid Rules, supra note 242 (insisting that "[p]andemic restrictions" on houses of worship and vaccine mandates can survive strict scrutiny).

245. Koppelman, supra note 16, at 2253.

246. See Rothschild, Individualized Exemptions, supra note 32, at 1113–14 ("[T]his rendering of free exercise as an equality right not only triggers strict scrutiny in essentially every instance but also virtually guarantees victory for religious objectors.").

247. See, e.g., Thoms v. Maricopa Cnty. Cmty. Coll. Dist., No. CV-21-01781-PHX-SPL, 2021 WL 5162538, at *9–11 (D. Ariz. Nov. 5, 2021) (holding that a school's policy was not generally applicable when it granted secular exemptions to vaccine policies but not religious exemptions); see also supra notes 163–171 and accompanying text.

248. See Rothschild, Individualized Exemptions, supra note 32, at 1113–14 ("The very logic that implicates strict scrutiny . . . locks in the conclusion that the lack of an exemption for religion is either not compelling, not narrowly tailored, or both."); see also Rothschild, Lingering Ambiguity, supra note 35, at 284 & n.13 ("[U]nder a broad general applicability test, strict scrutiny would almost always fail—how can a discriminatory, underinclusive exemption scheme be narrowly tailored?—and likely would not be undertaken in the first place."); Rothschild, Partisanship, supra note 122, at 1094 & n.130 (arguing the same).

249. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) ("Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'" (alteration in original) (quoting Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006))).

250. Id.

other words, the government must first present a compelling interest in *not* exempting religion, then it must prove that it could not achieve that interest if it exempted religion. The test is impossible to meet so long as the government has extended any exceptions (or, for that matter, if its law is "underinclusive" in any other way—more on that later). Even a single exemption (or any other underinclusivity) precludes the government from claiming it is necessary to not—meaning, not *possible* to—exempt religion. So long as the law "brook[s] . . . departures," as Chief Justice Roberts put it in *Fulton*, it cannot be said that it is not possible to make a departure for religion.[251]

One might argue that the Court is applying strict scrutiny incorrectly. On this view, the Court could simply course correct and apply strict scrutiny differently (and better) by asking instead if the secular *exemption* furthers a *distinct* compelling interest—a shift that perhaps could (partially) rehabilitate the new religious equality doctrine.[252] But under MFN religious equality, conducting a strict scrutiny test of this sort would be conceptually contradictory. That is because the new religious equality is premised on a religion–secular binary. It divides the world—people, entities, activities, motivations, and interests—into the religious and the secular. And it imbues the latter with significance: What is secular (and receives an exemption) is not just descriptively the (benign) "not-religious," but the (charged) "*non*religious." That is, everything that is not religious is to the religious as male is to female, Catholicism is to Judaism, and Black is to white. Put differently, the new rule of equality for "religion" collapses any distinctions between (1) privileging one religion over other religions or treating the secular *as a category* better than religion and (2) valuing something that happens to not be religious more than something that is. As a result, it is impossible for a law that even presumptively violates the new rule of religious equality to pass muster under strict scrutiny. While the government can rarely successfully defend a law that treats one race or gender better than another using any justification,[253] it can *never* win under strict judicial scrutiny with the argument that one race or gender is simply more valuable than others.[254] Yet that is precisely what the government's argument regarding the "interest" in exempting the secular

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251. See id at 1882.

252. See infra note 308. Later, this Essay argues that "interests" in avoiding costs associated with applications of laws (i.e., the interests that propel exceptions) should be conceptualized as part of a law's general interest.

253. See April J. Anderson, Cong. Rsch. Serv., IF12391, Equal Protection: Strict Scrutiny of Racial Classifications 1 (2023), https://crsreports.congress.gov/product/pdf/IF/IF12391 (on file with the *Columbia Law Review*) ("When a statute, regulation, or other government action distributes burdens or benefits based on race, ethnicity, or national origin, courts will impose a rigorous, 'strict scrutiny' test . . . .").

254. See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that "maintain[ing] [w]hite [s]upremacy" is not a legitimate interest).

activity or entity would be—that it values a secular concern more than a religious one. Under the MFN rule of equality, a discrepancy in valuation is what triggers constitutional scrutiny: The government has valued something secular more than religion and thereby *de*valued religion relative to that secular comparator. For the government to now argue at the so-called back-end that the secular interest served by the activity that is exempted is compelling serves only to dig the government into an even deeper hole. That the government finds something secular, but not "religion," important enough to override the law's application is precisely the constitutional wrongdoing that sets strict scrutiny into motion in the first place.[255]

To construe MFN's first prong as a mere triggering device for strict scrutiny and not as itself a finding of fault is not only inconsistent with the very novelty and purpose of the new doctrine, it also results in a tautology. It would mean that courts take a closer look to determine in a case-by-case way if the government has "actually" devalued religion. Courts would do so by asking if the secular interest served by the law's exemption is compelling, that is, if the government has *deservingly* considered it more valuable than religion.[256] The rule is thus that the government has valued religion less than it should whenever the government has valued religion less than it should (or, put differently, that the government has valued religion less than its *actual* value whenever the government has valued religion less than . . . its actual value).

This is not merely a theoretical musing. To date, and for good reason, one would be hard-pressed to find cases in which federal courts have held both that a law triggers strict scrutiny because it treats religion unequally under MFN religious equality *and* that the law survives strict scrutiny.[257]

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255. To put this slightly differently, so long as we are talking about a rule of equality and so long as the rule is that religion cannot be treated unequally (worse) vis-à-vis something "secular," the government surely cannot defend its inequality by stating that the "secular" interest that it treats unequally better *is* better (read: "compelling"). That would be akin to saying men just *are* better (or more valuable) than women. Under no version of strict scrutiny is that permissible.

256. See Tebbe, Liberty, supra note 144, at 292–93 ("[G]overnment . . . may not regulate a conscientious practice while exempting other activity to which the government's interests apply in the same way. Such differential treatment usually, though *not invariably*, violates free exercise by treating the exercise of conscience with less than equal regard." (emphases added) (footnote omitted)); see also Brief of Amici Curiae Professors Stephanie H. Barclay and Richard W. Garnett in Support of Appellants-Defendants' Petition to Transfer at 7, Members of the Med. Licensing Bd. v. Anonymous Plaintiff 1, 233 N.E.3d 416 (Ind. Ct. App. 2024) (No. 22A-PL-2938), 2024 WL 2863289 ("The [a]bortion [l]aw easily satisfies strict scrutiny.").

257. It is exceptionally rare for a federal court to first find a lack of general applicability and then hold that the government's actions survive strict scrutiny. For a rare exception, see St. Dominic Acad. v. Makin, No. 2:23-CV-00246-JAW, 2024 WL 3718386 (D. Me. Aug. 8, 2024).

B. *The Plasticity of Comparability*

That strict scrutiny does not provide an escape valve puts more pressure on the new religious equality doctrine. If a limiting principle cannot be found at the back end, it must inhere within the principle of religious equality itself at the front end. And indeed, the doctrine does appear to come equipped with a limiting principle: Religious entities, activities, and motivations must be exempted only if they are *comparable* to the secular entities, activities, and motivations that are exempted. In the words of Justice Kagan, religious equality requires the equal treatment of apples and apples, not "apples and watermelons."[258] To know the difference, Justice Kagan instructs—along with every other Justice and a coterie of scholars—that one look to the "government's interests" and ask whether the secular exemption "endangers [the interests] in a similar or greater degree" as religious exemptions would.[259]

This "comparability" test serves the new doctrine well. It has the double upshot of offering an easy way to render unconstitutional essentially every law that does not offer religious exemptions—a feature of the rule that was not lost on its architect[260]—while simultaneously providing the veneer of limitation. Since not *every* law that provides secular but not religious exemptions wrongfully discriminates against religion, proponents of the new religious equality rule can portray it as sensible and manageable.[261] It is sensible because requiring the government to "treat

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258. See Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting).

259. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993); see also Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."); Laycock & Collis, supra note 66, at 11 ("We must look to the reasons the state offers for regulating religious conduct and then ask whether it permits secular conduct that causes the same or similar harms."); Tebbe, Equal Value, supra note 16, at 2409 (noting that the *Lukumi* Court held that "the ordinances were underinclusive because they failed to prohibit nonreligious behavior that implicated [the city's policy goals] in a similar way and to a similar degree").

260. Under the MFN "standard [of] lack of general applicability," Professor Laycock explained, "many statutes violate *Smith* and *Lukumi*." See Laycock, Conceptual Gulfs, supra note 64, at 772; Laycock, Implications of *Masterpiece*, supra note 83, at 176 ("[M]any laws will fail the test of general applicability . . . ."); see also Richard F. Duncan, Free Exercise Is Dead, Long Live Free Exercise: *Smith*, *Lukumi* and the General Applicability Requirement, 3 U. Pa. J. Const. L. 850, 883 (2001) [hereinafter Duncan, General Applicability] ("[M]any religious liberty claims will receive more protection than ever under *Lukumi* when brought against laws that are not neutral or not generally applicable.").

261. See Koppelman, supra note 16, at 2255 ("The plaintiffs' success in [*Fraternal Order*] was based on the existence of a clear secular comparator—the exemption for [medical reasons]."); Douglas Laycock, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty, 118 Harv. L. Rev. 155, 209 (2004) (listing *Fraternal Order* as the "leading case" in drawing the line); Lund, supra note 16, at 869 (describing *Smith* as "den[ying] judges any discretion" by requiring plaintiffs to show there is a secular exception that "has already undermined the law . . . as much as a religious exemption would").

like cases alike"—as Justice Kagan put it[262]—is a well-established constitutional rule; it is manageable because only in *some* instances will laws be rendered unconstitutional as applied to religion.[263]

Yet all this is illusory. Comparability as a limiting principle in this context is not principled and does little limiting. The most obvious problem is the sheer prevalence of exceptions. Essentially every law has exceptions, and it is in the nature of exceptions to "undermine" the "interests" of the law to which the exception applies.[264] Consider the example of an Orthodox Jewish person rushing to make it home before the Sabbath begins at sundown on a Friday who exceeds the speed limit and runs a red light. According to religious equality's comparability test, this person should be immune from the state's traffic laws if the state provides even a single exemption—including, say, for entourages of foreign dignitaries or emergency vehicles—that undermines the law's interest in traffic safety.[265] To privilege the secular interests served by the exemptions over the religious interests that would be served by allowing the Orthodox Jewish person to avoid violating a religious command is to

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262. See S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 721 (2021) (Kagan, J., dissenting) (internal quotation marks omitted) (quoting Vacco v. Quill, 521 U.S. 793, 799 (1997)).

263. See id. at 720 ("[The] government cannot put limits on religious conduct if it 'fail[s] to prohibit nonreligious conduct that endangers' the government's interests 'in a similar or greater degree.'" (second alteration in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993))); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting) ("[S]tate officials seeking to control the spread of COVID–19 . . . may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict."); Schwartzman & Schragger, supra note 237, at 3 ("[I]f [religious objectors] can show that the state has regulated their interests in a manner that devalues them as compared with others, then they have at least a *prima facie* claim for legal exemption."); Tebbe, Equal Value, supra note 16, at 2243 ("Using the government's interest to set the baseline for comparability is a device for identifying most situations where protected actors or activities have been devalued."); see also Brownstein & Amar, supra note 16, at 789 ("This focus on underinclusivity has some validity. Certainly, not all exemptions to laws are inconsistent with a law's purpose such that granting the exemption would render the law underinclusive as to its objective."); Koppelman, supra note 16, at 2251 ("Discrimination claims are a contingent kind of triggering right. They depend on the availability of comparators.").

264. Laycock & Collis, supra note 66, at 21 ("[A] single secular exception . . . triggers strict scrutiny if it undermines the state interest allegedly served by regulating religious conduct"). And it takes only a single "similar" secular exception to fail the "most-favored nation" doctrine. See Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (stating this rule).

265. See, e.g., N.Y. Veh. & Traf. Law § 1104(a)–(b)(3) (McKinney 2025) ("The driver of an authorized emergency vehicle, when involved in an emergency operation, may . . . [p]roceed past a steady red signal . . . [or] [e]xceed the maximum speed limits . . . ."). If one sees these as incomparable because emergency vehicles have lights and sirens that alert other drivers to yield to them, imagine emergency vehicles that do not have lights and sirens, or that the car being driven by the Orthodox Jewish person does have them. Also, one might argue that dignitaries can ignore traffic rules in light of the risk of being attacked on the road; imagine the exception is driven by the desire to show them respect.

devalue the latter in light of the former.[266] It does not help to recast the "interest" at a higher level of abstraction—say, as general "safety"—such that the secular exceptions would not undermine the interest while the religious exception would.[267] For while doing so might deal with *some* emergency vehicles under that exception, it would not address the suspension of speed limits for foreign dignitaries or, for that matter, an ambulance transporting someone in labor to the hospital. And more fundamentally—as this Essay discusses later—the move to higher levels of abstraction to avoid triggering comparability collapses under its own weight.[268]

In addition to the sheer prevalence of secular exceptions, there is a more fundamental problem with a rule of religious equality that assesses comparability based on laws' interests: Laws often do not *have* "interests"—at least not identifiable and determinate ones.[269] Most prosaically, legal rules often do not reveal their rationales.[270] And even if a rule explains its interests in some way, those interests are often so thinly described that they are practically of no use. In the COVID-19 free exercise

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266. Moving beyond hypotheticals, consider the police department's no-beard policy in *Fraternal Order*. Indeed, *Fraternal Order* is often touted as the paradigm case of MFN-style equality's limiting principle in action, garnering support even from those who critique MFN. See Brownstein & Amar, supra note 16, at 789 (citing *Fraternal Order* as a paradigm case on this point); Koppelman, supra note 16, at 2256 (same). Yet, in fact, *Fraternal Order* only further reinforces the absence of "comparability" doing any meaningful limiting. Recall that in *Fraternal Order*, the police department's no-beard policy included two secular exemptions, one for undercover officers and one for officers with medical conditions, but none for officers who had religious objections to shaving. See Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360, 365 (3d Cir. 1999). Judge Alito was quick to explain that the former did *not* undermine the policy's interests. Id. at 366. Had the policy exempted *only* undercover officers, Judge Alito reported, the policy *would* have been generally applicable. Id. The department's interest "in fostering a uniform appearance" was not undermined by the undercover exception "because undercover officers 'obviously [we]re not held out to the public as law enforcement personnel.'" Id. (quoting Reply Brief in Support of the Appellants, City of Newark, Newark Police Department & Employees of the City of Newark, Appeal at 9, *Fraternal Order*, 170 F.3d 359 (No. 97-5542), 1998 WL 34104439). Judge Alito's "demonstration" of MFN's limiting principle does not hold up to closer inspection. To be sure, when undercover officers are on undercover missions, they are not identifiable as on-duty police officers. But undercover officers are not always on undercover missions. In fact, as the police department explained to the court, the officers were undercover for only "limited periods" to run "specific undercover operations." Reply Brief in Support of Appellants, City of Newark, Newark Police Department and Employees of the City of Newark at 9, *Fraternal Order*, 170 F.3d 359 (No. 97-5542), 1998 WL 34104439. *Fraternal Order*'s undercover officer exemption is thus an ironic model of religious equality's limiting principle.

267. I thank Nelson Tebbe for pointing out this objection and encouraging me to address it.

268. See infra section III.B.

269. See infra note 272.

270. See Martin Shapiro, The Giving Reasons Requirement, 1992 U. Chi. Legal F. 179, 193 ("Legislatures are not seen as subject to a formal giving reasons requirement.").

cases, for example, the constitutionality of local governments' mandates turned on the precise nature of the governments' interests.[271] Yet many of the emergency orders did not state a rationale beyond barebones observations that the ongoing pandemic required an emergency response.[272] Unsurprisingly, the lack of clarity around a law's precise interests can lead to judges inventing interests so as to achieve desired results.[273]

Even if a law does articulate detailed interests, more fundamental problems lie ahead. Because comparability looks to the law's interests as a benchmark for comparing exemptions, it assumes that interests are stable, precise, and objectively identifiable. They are not. Not only do laws often pursue multiple interests, but each interest typically permits multiple

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271. That is because, recall, the "test" for comparability is whether the secular exception undermines the governmental interest motivating the law in question to the same degree as would a religious exception. See supra notes 134–136 and accompanying text.

272. For example, New York's order at issue in *Roman Catholic Diocese* provided only this as its "purpose": "Whereas, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue . . . ." N.Y. Exec. Order No. 202.68 (Oct. 6, 2020). One might argue that the order's purpose was obvious: to reduce contagion. But courts split hairs over how to construe the governments' interests in these cases because everything hinges on the precise nature of the interests. See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 78 (2020) (Breyer, J., dissenting) ("The State of New York will, and should, seek ways of appropriately recognizing the religious interests here at issue without risking harm to the health and safety of the people of New York.").

273. Such was the case in *Blackhawk*, the second of then-Judge Alito's early religious equality decisions that, in addition to *Fraternal Order*, is often advertised as a model example of court-enforced religious equality. Recall that *Blackhawk* involved an owner of black bears used in religious rituals. See Blackhawk v. Pennsylvania, 381 F.3d 202, 204–05 (3d Cir. 2004). Because Pennsylvania exempted nationally recognized circuses and public zoos from its permit fee requirement, Judge Alito held that not exempting the keeping of wild animals for religious purposes constituted discrimination against religion. See id. at 211–12. The state had explained that it did not charge zoos and circuses the fee because they were subject to independent accreditation and thus were not required to secure a permit in the first place. See Reply Brief for Appellant/Cross-Appellees Vernon Ross, Thomas Littwin, David E. Overcash, Frederick Merluzzi and Barry Hambley at 19, *Blackhawk*, 381 F.3d 202 (Nos. 02-3947, 02-4158), 2003 WL 24300780. But this difference did not matter. One of the state's interests, Judge Alito explained, was "discourag[ing] the keeping of wild animals in captivity," and the secular exemptions "work[ed] against [that] interest[] to at least the same degree" as a religious exemption would. *Blackhawk*, 381 F.3d at 211. The only problem is that Pennsylvania never suggested its annual $200 fee was underwritten by such an interest—indeed, its policy did not mention any interests whatsoever. See 34 Pa. Stat. and Cons. Stat. Ann. § 2904 (2004) (listing the permit fees without reasons). The court *deduced* it from the sheer fact that Pennsylvania permitted the Commissioner to issue fee waivers for those who exhibited extreme hardship *and* were keeping wild animals temporarily "with the intent of reintroducing [them] into the wild." Blackhawk v. Pennsylvania, 225 F. Supp. 2d 465, 470 (M.D. Pa. 2002). Thus, Judge Alito divined, Pennsylvania's "interest" in requiring an annual $200 permit fee was to disincentivize the keeping of wild animals in captivity. *Blackhawk*, 381 F.3d at 211. It is once again ironic that one of religious equality's canonical cases suggests the opposite: that, if anything, the "comparability" test upon which religious equality rests is (at least often) *not* availing.

characterizations.[274] That is because laws are means to ends, and in between the most granular of means and the most abstract of ends—from the law's concrete, specific command to its ultimate objective—there is often a chain of means and ends. The law's command is a means to an end which in turn is a means to a more abstract end, and on it goes until some ultimate end is reached. Any one of these ends can be used to describe the law's interest; none is more correct than the other.[275]

Consider the government's interests in *Fraternal Order*.[276] The police department had justified its no-beard policy with reference to an interest in "uniformity," which was premised on an interest in building the public's confidence in the police force.[277] That interest might seem straightforward—Judge Alito and those who championed the decision certainly portrayed it as such.[278] But it was not. The government's interest could have been construed in various ways: narrowly, as uniformity (with respect to facial hair); more generally, as respect for and confidence in the police force; and more generally still, as public safety. And how one chooses to characterize the interest—again, a choice with no objectively correct answer—can determine the outcome of the comparability analysis.

For example, in light of the department's interest in "uniformity," driven by its interest in "public confidence and respect," propelled by its interest in "public safety," one might conclude that the department's

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274. See Joseph Blocher, Bans, 129 Yale L.J. 308, 311–13 (2019) (framing a regulation as a "ban" can be decisive in determining its validity); Daryl J. Levinson, Framing Transactions in Constitutional Law, 111 Yale L.J. 1311, 1383 (2002) ("[D]ifficult and potentially controversial judgments . . . [are often] simply buried underneath implicit framing choices.").

275. To be sure, levels-of-generality manipulability is hardly unique to religious equality. See, e.g., Joseph Blocher & Eric Ruben, Originalism-by-Analogy and Second Amendment Adjudication, 133 Yale L.J. 99, 161–68 (2023) (showing how levels of generality inform constitutional interpretation when looking for historical analogies); Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1058 (1990) ("The question then becomes: at what level of generality should the Court describe the right previously protected and the right currently claimed?" (emphasis omitted)).

276. See supra note 266 and accompanying text.

277. See Reply Brief in Support of the Appellants, City of Newark, Newark Police Department and Employees of the City of Newark, Appeal at 4, Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (No. 97-5542), 1998 WL 34104439 (quoting certification of Director Joseph J. Santiago) ("The grooming policy creates an environment of teamwork and solidarity among the officers. My goal is to project professionalism and dignity among Newark Police Officers. This will foster respect and confidence among the public and police officers." (quoting certification of Director Joseph J. Santiago)).

278. See *Fraternal Order*, 170 F.3d at 366 ("The Department's decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department's interest in fostering a uniform appearance through its 'no-beard' policy."); Storslee, supra note 16, at 77 ("Exemptions for medical beards and religious beards both undermine[d] the government's asserted interest in officer uniformity.").

exception for undercover officers undermined its interests, while another might conclude the opposite.[279] Neither would be wrong. From the vantage point of the department's interest in uniformity, that interest was undermined because (as previously explained[280]) there was no reason to believe that undercover officers (who often were not on undercover operations) typically went unrecognized as officers.[281] Yet from the vantage point of the policy's far more abstract interest in public safety, one could say the policy's interest was not undermined if facial hair was necessary for the success of undercover operations which contributed to public safety.[282]

The more recent and much-discussed free exercise vaccine mandate case, *Does 1–3 v. Mills*, helps to further illustrate the malleability of laws' interests.[283] In *Mills*, plaintiffs challenged Maine's emergency vaccine mandate for healthcare workers, which exempted the medically contraindicated but not the religiously contraindicated.[284] The state, in a declaration, provided three interests that its mandate was designed to serve, which could be grouped into two categories.[285] The first category was individual-based: to protect healthcare workers and patients in their individual capacities from contracting COVID-19.[286] The second category was system-based: to avoid a collapse of the healthcare system in the event of too many healthcare workers contracting COVID-19.[287] In light of these interests, the First Circuit reasoned that the two sets of exemptions—for the medically contraindicated and for religious objectors—were not comparable; whereas the latter would undermine the state's interests, the former was in perfect harmony with it.[288] That was so because the mandate's interest was "public health" writ large.[289] Once the interest was framed at so high a level of abstraction, it was effortless for the court to map it onto Maine's exemption for the medically contraindicated and

279. See supra note 277–278 (detailing the police department's interests in uniformity, confidence, and respect).

280. See supra note 266.

281. But see Tebbe, Equal Value, supra note 16, at 2412 (suggesting that the undercover officer exemption "did not raise the same concern because it did not undermine the department's interest in uniformity").

282. Assuming, that is, that the officer must have facial hair at all times, even while not on undercover operations. As it happens, though, even this construction of the policy's interest *ultimately* does not save the government under the MFN approach to religious equality. See supra notes 264–268 and accompanying text.

283. 142 S. Ct. 17 (2021).

284. See Does 1–6 v. Mills, 16 F.4th 20, 24 (1st Cir. 2021).

285. See id. at 30–31; see also supra note 272.

286. See *Mills*, 16 F.4th at 30–31.

287. See id. This second interest, of course, is a corollary of the first—if too many healthcare workers are unable to work, the entire healthcare infrastructure could collapse—but it is also ultimately a distinct interest as the focus is not individuals contracting COVID-19 but the *effect* of *too many* (individual) healthcare workers contracting COVID-19.

288. See id. at 34.

289. Id. at 28.

conclude that the two were harmonious.[290] The vaccine mandate was driven by an interest in protecting public health and the medical exemption was propelled by precisely the same interest.[291]

When the Supreme Court declined to grant emergency relief—Justices Barrett and Kavanaugh concurred in the denial on procedural grounds[292]—Justice Gorsuch, joined by Justices Alito and Thomas, wrote an impassioned dissent.[293] The dissent characterized the state's interest at a different level of abstraction than the First Circuit had and thus arrived at a different conclusion.[294] To appreciate the difference between Justice Gorsuch's characterization of Maine's interests and Judge Sandra Lynch's, it will be productive to see their respective descriptions side by side. First, Justice Gorsuch wrote:

> Maine . . . offered four justifications for its vaccination mandate:
>
> (1) Protecting individual patients from contracting COVID-19;
>
> (2) Protecting individual healthcare workers from contracting COVID-19;
>
> (3) Protecting the State's healthcare infrastructure, including the work force, by preventing COVID-caused absences that could cripple a facility's ability to provide care; and
>
> (4) Reducing the likelihood of outbreaks within healthcare facilities caused by an infected healthcare worker bringing the virus to work.[295]

Meanwhile, Judge Lynch described Maine's interests as:

> (1) ensuring that healthcare workers remain healthy and able to provide the needed care to an overburdened healthcare system; (2) protecting the health of the those in the state most vulnerable to the virus—including those who are vulnerable to it because they cannot be vaccinated for medical reasons; and (3)

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290. See id.

291. Indeed, the court found that "the medical exemptions *support* Maine's public health interests" because "Maine would hardly be protecting its residents if it required them to accept medically contraindicated treatments." Id. at 34 (emphasis added).

292. The Court's basis for denying emergency relief was that it was generally preferable to refrain from granting such (discretionary) relief so as to avoid incentivizing petitioners to "use the emergency docket to force the Court to give a merits preview . . . on a short fuse without benefit of full briefing and oral argument. . . . [T]his discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented." Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief, joined by Kavanaugh, J.).

293. See id. at 18–22 (Gorsuch, J., dissenting).

294. See id.

295. Id. at 19 (citing Appendix to Brief of Respondents ¶ 56, *Mills*, 142 S. Ct. 17 (No. 21-717)).

> protecting the health and safety of all Mainers, patients and healthcare workers alike.[296]

Justice Gorsuch and Judge Lynch agreed that Maine's interests included protecting patients and healthcare workers and avoiding structural complications due to healthcare worker shortages.[297] Yet behind their agreement lay a nuanced but critical disagreement regarding how each of those interests should be construed. For Justice Gorsuch, the interests were tethered to COVID-19 specifically; for Judge Lynch, they were not. Both noted Maine's concern for the health of individual healthcare workers and patients. But for Justice Gorsuch, that concern was specific: It was a concern about the deterioration of health caused by contracting COVID-19.[298] For Judge Lynch, by contrast, Maine's interest was understood at a higher level of abstraction: It was the "health and safety" of the individual healthcare workers and patients.[299] The same went for Maine's other interests. For Justice Gorsuch, the state's structural interests were "preventing COVID-caused absences that could cripple a facility's ability to provide care" and "[r]educing the likelihood of outbreaks within healthcare facilities caused by an infected healthcare worker bringing the virus to work."[300] But for Judge Lynch, the state's other interests were, first, "ensuring that healthcare workers remain healthy" so that they can "provide the needed care" and, second, "protecting the health of the those in the state most vulnerable to the virus."[301] For Justice Gorsuch, the state's interests were granular; for Judge Lynch, they were general.

What might appear like hairsplitting semantic differences were quite significant; indeed, they were determinative. If Maine's interests were grounded in general public health, it would be fair to say that exemptions for the medically contraindicated not only did not undermine its interests but reinforced them. Yet if Maine's interests were more specific and pertained to stemming the tide of COVID-19, exempting health workers for reasons unrelated to reducing COVID-19 contagion would undermine those interests to the same degree as would religious exemptions.[302]

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296. *Mills*, 16 F.4th at 30–31 (citing Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 874 (1990)).

297. See id.; see also *Mills*, 142 S. Ct. at 19–20 (Gorsuch, J., dissenting).

298. See *Mills*, 142 S. Ct. at 19–20 (Gorsuch, J., dissenting) (framing the mandate's objective as "protecting patients and healthcare workers from contracting COVID-19").

299. See *Mills*, 16 F.4th at 31 (framing Maine's third interest as protecting "health and safety" generally, without reference to COVID-19).

300. *Mills*, 142 S. Ct. at 19 (Gorsuch, J., dissenting).

301. *Mills*, 16 F.4th at 30–31.

302. One might argue—as Maine tried to argue—that numbers should be taken into consideration; that, for example, perhaps there are *fewer* people who are medically contraindicated than those who are "religiously contraindicated." But putting aside that the government would need actual empirical support for such a prediction, Justice Gorsuch

Who was right, Judge Lynch or Justice Gorsuch? Both were. It is true, as Justice Gorsuch contended, that it is "the government's *actually asserted* interests as applied to the parties before it [that should] count."[303] But there was hardly only one way to *characterize* those interests. According to Justice Gorsuch, the state's interests in public health writ large were just "*post-hoc* reimaginings . . . expanded to some society-wide level of generality."[304] Each of Maine's four asserted interests mentioned COVID-19 explicitly, and for obvious reasons: They appeared in a declaration regarding the state's mandate for vaccination against COVID-19.[305] But that does not mean Maine's interest in diminishing COVID-19 contagion by way of a vaccine mandate could not also fairly be described in terms of a broader public health goal. If Maine had not cared about public health in the first place, it would not have sought to reduce COVID-19 transmission. There is no telling which of these interests is more "actual"; one is just more general than the other.

This gives courts license to pick the "interest" that will yield their preferred outcome. If religious equality depends on comparability, and comparability is to depend on the extent to which secular and religious exemptions undermine the law's interests, courts hoping to avoid striking down a law as applied to religious objectors can characterize the law's interests at higher levels of abstraction, while courts wishing to side with the religious plaintiffs can select among various other levels of generality to reach their preferred outcome—or vice versa.[306] The trend of selecting

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(correctly, in this Essay's view) rebutted this attempt at an answer in a separate case. If the state in fact believed that exempting *all* the medically contraindicated would not jeopardize herd immunity but exempting *all* religious objectors would, why not require the government to "divide[] [the total number of exemptions in] a nondiscriminatory manner between medical and religious objectors"? See Dr. A v. Hochul, 142 S. Ct. 552, 557 (2021) (Gorsuch, J., dissenting). If equality is the touchstone, allocate the exemptions equally.

303. See *Mills*, 142 S. Ct. at 20 (Gorsuch, J., dissenting).

304. See id.

305. See id. at 19–20 (describing Maine's four "asserted interests" behind its COVID-19 vaccine mandate); see also Me. Rev. Stat. Ann. tit. 22, § 802 (West 2021) (requiring workers to be vaccinated against specified infectious diseases).

306. Sometimes *narrowing* the government's interest will result in free exercise protection, as was the case in the vaccine mandate cases, see, e.g., Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651 (E.D.N.C. 2020), and other times *abstracting* the government's interest will enable a finding of comparability and, thus, wrongful inequality. See Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004). In addition to the "disincentivizing" interest Judge Alito invented in *Blackhawk*, Judge Alito discovered a second "interest" in the permit fee requirement: raising funds. See id. at 211. Because at one point in its brief Pennsylvania had explained that it used the funds it collected from the permit fees to help cover costs associated with facilitating the permit, according to Judge Alito that meant its interest was "raising money." See id. With such a general interest in place, it was impossible not to conclude that the secular exemptions and religious exemptions were similar—both resulted in less money in Pennsylvania's coffers. To be sure, the fact that Pennsylvania used the fee money for "administering and enforcing its regulations . . . such as inspecting the facilities of owners of wild animals," Blackhawk v. Pennsylvania, 225 F. Supp. 2d 465, 469 (M.D. Pa.

the preferable level of abstraction for describing the government's interests in a given law or policy—be it at a high level or a low level—is quickly becoming commonplace in religious equality cases.[307] Identifying religious discrimination under the current doctrine, then, has more to do with whether a judge wants a law to unconstitutionally discriminate against religion than whether the law does; courts do not discover a law's wrongful discrimination but rather construct it.

As problematic as that may be, opting for higher levels of abstraction does not ultimately help courts wishing to avoid striking down a law as applied to religion. Construing a law's interest at a high level of generality might permit a court to win the religious equality battle, but only at the expense of the war. The more general the law's interest, the less possible it is that the law covers *all* it can to further that interest. For example, if the interest in issuing a vaccine mandate is public health writ large, all that is *not* regulated that, if regulated, would further public health constitutes "underinclusivities." So long as exceptions are measured against a law's interests—that is, exceptions are "unequal" when they undermine the law's motivating interest, but not if they do not—there is no reason to conclude that "noncoverages" are not "exceptions" for all intents and purposes. Thus, abstracting a vaccine mandate's interest as "public health" may result in the determination that one set of exemptions—medical exemptions from the vaccine mandate—do not undermine the mandate's interest in "public health." But it will also mean that countless other "nonapplications" *do* undermine that interest, as there will always be additional ways the mandate (or other means entirely) could further the law's broad interest in public health. This observation leads to another, possibly unintuitive, observation: All interests other than those that tautologically restate the law itself as its "interest" are undermined to some degree.

C. *The Meaninglessness of Exceptions*

If nonapplications can just as well be recast as exceptions, it follows that "exceptions" do not comprise an independently meaningful analytic

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2002) aff'd sub nom. *Blackhawk*, 381 F.3d at 215–16, could suggest it had an affirmative desire to "bring[] in money." *Blackhawk*, 381 F.3d at 211. Unlike the "disincentivizing" interest Judge Alito had divined, this interest was not completely fabricated. It was just, conveniently, exceptionally general.

307. See, e.g., U.S. Navy Seals 1–26 v. Biden, 27 F.4th 336, 351 (5th Cir. 2022) ("The Navy has an extraordinarily compelling interest . . . (1) to reduce the risk that they become seriously ill and jeopardize the success of critical missions and (2) to protect the health of their fellow service members."); Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173, 1178 (9th Cir. 2021) ("Limitation of the medical exemption in this way serves the primary interest for imposing the mandate—protecting student 'health and safety'—and so does not undermine the District's interests as a religious exemption would."); see also Rothschild, Partisanship, supra note 122, at 1102–1103 (discussing the high level of abstraction at which government interests are sometimes described).

category. Conceptually, exceptions are no different than limitations on the scope of the rule to which they apply. Exceptions merely reflect the outer bounds of a law and the determination that the costs of applying it in certain circumstances outweigh the benefits of doing so—and every law has an outer bound informed by costs. There is nothing exceptional about exceptions.[308]

Yet exceptions' exceptionality plays a crucial role in the rule of religious equality. First, and most obviously, a necessary premise of religious equality for exceptions is that exceptions are distinct benefits, reflecting a lawmaker's choice to grant preferred—that is, exceptional—treatment to select beneficiaries who are relieved from the burdens imposed by the law in question. Thus, the very question whether the government has acted wrongfully by treating religion unequally with respect to the benefit of receiving an exception depends on the assumption that exceptions are a coherent category, the unequal distribution of which constitutes wrongful discrimination. Second, religious equality invests exceptions with special significance because otherwise every law would be rendered religiously discriminatory so long as it restricts some religiously motivated activity but not every secularly motivated activity—an outcome even the most ardent supporters of religious equality disclaim.[309] The category of exceptions enables the distinction between all laws and only those laws that discriminatorily favor (by exempting) specific secular interests. The distinction, in other words, saves religious equality from the charge of absurdity.

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308. In one of the (surprisingly) few scholarly works dedicated to "exceptions" as a legal category, Fred Schauer very helpfully problematizes the exception–rule binary. He does so in a slightly different way than this Essay does (though there is overlap). See Frederick Schauer, Exceptions, 58 U. Chi. L. Rev. 871, 898 (1991) (describing how "exceptions [are] often used to disguise what is no different from a modification or repeal of the previously existing rule"). For Schauer, when one adds exceptions to a rule, one is *changing* the rule. Id. at 872 ("[T]here is no logical distinction between exceptions and what they are exceptions to, their occurrence resulting from the often fortuitous circumstance that the language available to circumscribe a legal rule or principle is broader than the regulatory goals the rule or principle is designed to further."). On this Essay's analysis, exceptions do not change anything. They are part and parcel of the rule itself. The only difference between the outer bound of a rule and an exception is that the latter is (often) more granular than the former; conceptually, though, they are the same. Schauer, in his book-length project on rules (published contemporaneously with his essay), acknowledges a distinction between internal and external interests that seemingly would grant exceptions some conceptual independence. See Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life 117–18 (1991) [hereinafter Schauer, Playing by the Rules] This Essay grants them none. See infra note 339.

309. See supra note 266 (discussing how Judge Alito in *Fraternal Order* distinguished the exemption for undercover officers, concluding it was not an "exemption" because it did not undermine the government's interest); see also Tebbe, Equal Value, supra note 16, at 2447 ("No one believes that regulatory exemptions are necessarily invalid just because they fail to include a protected group.").

Fraternal Order nicely illustrates this assumption of religious equality and its shortcomings.[310] According to then-Judge Alito in *Fraternal Order*, the police department's choice to provide medical but not religious exceptions from its no-beard policy "indicate[d] . . . a value judgment that [certain] secular . . . motivations" were more important than religious motivations.[311] In Judge Alito's view, however, the same could not be said of the department's exception for undercover officers. Unlike the medical exception, this exception did not undermine the department's "interest in uniformity" because undercover officers purportedly were not recognized by the public as officers.[312] Rather than revealing a "value judgment," exempting undercover officers merely reflected the scope of the department's interest—and "the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing."[313] The undercover officer exception, Judge Alito seemed to say, was not really an exception at all. Rather, undercover officers simply fell outside the scope of the policy. Judge Alito's distinction between governmental interests (that define the scopes of laws) and governmental valuations (that define exemptions from laws) is—for obvious reasons—shared by other supporters of the new religious equality.[314]

Yet this purported distinction between value judgments and mere interests proves unsustainable.[315] How can the government choose which interests to pursue—and how far to pursue them—without making value judgments? And how can it make value judgments without a view to its interests? The scopes of laws—the extent to which and the ways in which the government chooses to pursue its interests—are hardly value-neutral. Like decisions to grant exceptions to laws, decisions about how far and in what way to apply a law reflect judgments about the costs of the various possible structures of the law in question. And so long as the scopes of laws are informed by value judgments, there is no principled reason not to apply the rule of religious equality to laws that cover religious conduct but not some nonreligious conduct merely because the law does not include explicit secular exemptions.

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310. For more on this case, see supra section I.B.

311. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999).

312. Id. But as explained in supra note 266, as a factual matter, there was no reason to assume the undercover officers were not often recognized by the public as officers. Judge Alito played fast and loose with the facts.

313. *Fraternal Order*, 170 F.3d at 366.

314. See, e.g., Tebbe, Equal Value, supra note 16, at 2443 (assuming and agreeing with this distinction); see also Schwartzman & Schragger, supra note 237, at 4 (same).

315. Taken seriously, the distinction would render antidiscrimination law completely hollow, as the defendant could always just assert that he has an "interest" in granting benefits to some—say, those of a specific gender or race—but not others. The *interest* is precisely the problem.

The COVID-19-related lockdown orders help show the lack of a meaningful distinction between exceptions and scopes of laws. Many states issued lockdown orders that differentiated between essential and nonessential businesses, requiring the latter but not the former to close their doors. Some houses of worship objected to the government not including them in the state's essential category, which presumably rested on the belief that, as Justice Gorsuch put it, "what happens [in houses of worship] just isn't as 'essential' as what happens in secular spaces."[316]

In *Roman Catholic Diocese*, the Brooklyn diocese argued along precisely such lines: that distinguishing between essential and nonessential entities, and categorizing houses of worship as the latter, constituted unconstitutional discrimination against religion.[317] A federal district court disagreed, concluding that the "religious gatherings" were covered by the ordinance strictly "because they [we]re gatherings,[and] not because they [we]re religious."[318] As for the diocese's grievance that religious institutions were not categorized as essential such that they would be spared the order's restrictions, the district court declined "to second guess the State's judgment about what should qualify as an essential business."[319] The Second Circuit affirmed.[320]

In its first decision to formally adopt the new rule of religious equality, the Supreme Court overturned the Second Circuit's decision and granted the diocese emergency relief.[321] What bothered the Court was that New York had created two classes: a preferential class of all that was essential and a nonpreferential class of all that was nonessential.[322] Since New York placed churches in the latter class,[323] the Court held, its "regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."[324] To be sure, New York's order did not issue a list of nonessential businesses and thus by no means explicitly classified houses of worship for adverse treatment. Rather, the state simply applied its lockdown to one class—"non-essential businesses"—and not another.[325] Nonetheless, according to the Court, New York engaged in "disparate

316. See Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65 (2020) (Gorsuch, J., concurring).

317. See Roman Cath. Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118, 130 (E.D.N.Y. 2020), rev'd by Agudath Israel of Am. v. Cuomo, 983 F.3d 620 (2d Cir.).

318. See id.

319. See id.

320. See Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 225–26, 228 (2d Cir. 2020) (denying the Diocese's motion for an injunction pending appeal).

321. See *Roman Cath. Diocese*, 141 S. Ct. 63, 69 (2020) (per curiam).

322. See id. at 66.

323. Id.

324. Id.

325. See N.Y. Exec. Order No. 202.68 (Oct. 6, 2020). For an example of a similar lockdown order, see generally Conn. Exec. Order No. 7HH (May 1, 2020).

treatment" simpliciter;[326] it treated some secular entities better than houses of worship. At the end of the day, New York carved out a class for preferential treatment and houses of worship were not in it. The absence of houses of worship in the favored class necessarily meant that they were included in an implied disfavored class—or, put differently, the order *classified* houses of worship disfavorably.[327]

Roman Catholic Diocese thus represents not only the first time the Court formally adopted a clear rule of religious equality; it also hinted that there is no reason to assume religious equality would be, or should be, limited to traditional exemption cases—a view the Court had already unwittingly assumed in *Masterpiece Cakeshop* several years earlier.[328] Without saying so explicitly, the Court adopted the logic that exceptions contained within laws are no different than the limitations that are inherent to the scopes of laws. It did not matter to the Court that New York never "exempted" any businesses from its lockdown order and rather simply opted to cover certain businesses and not-for-profits (including houses of worship) but not those it deemed central to New Yorkers' "health, [physical] welfare, and safety."[329] The Court did not even purport to engage in comparability analysis between the noncovered secular entities and houses of worship.[330] Instead, it simply declared that any beneficial category created by the government that does not include "religion" in it wrongfully discriminates against religion.[331] Lest the breadth of that approach get lost, Justice

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326. See *Roman Cath. Diocese,* 141 S. Ct. at 66.

327. See id. at 67.

328. See supra notes 101–113 and accompanying text.

329. See N.Y. Exec. Order No. 202.6.

330. If one reads the decision carefully, one will notice that the fraction of an allusion to "comparability" analysis is not really "analysis" at all. See *Roman Cath. Diocese*, 141 S. Ct. at 66–67 (discussing in one paragraph the limitations on secular spaces compared to houses of worship with a limited analysis of the risk of COVID-19 transmission in those spaces). Selecting its words carefully, the Court included comparability language merely for dramatic effect. See id. After establishing that the problem with New York's order was that it differentiated between essential and nonessential businesses and considered houses of worship to be of the latter sort (and thus, according to the Court, "*singl[ing] out*" religion), as an aside, the Court mentioned: "And the list of 'essential' businesses includes 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." See id. at 66. A little later, and again for dramatic effect, the Court observed (after having already concluded its analysis) that:

> These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could 'literally have hundreds of people shopping there on any given day.' Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service.

See id. at 66–67 (quoting App. to Application in No. 20A87, Exh. D at 83).

331. See id. at 68 ("The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty.").

Kavanaugh in a concurrence underscored the Court's new rule: "[O]nce a State creates a favored class of businesses, . . . [it] must justify [under strict scrutiny] why [religion is] excluded from that favored class"—full stop.[332]

Every law includes a favored class by virtue of covering only a limited class. Under the Court's rule of religious equality, then, *every* law that applies to religiously motivated activity wrongfully discriminates against religion. New York can be understood to have raised precisely this concern to the Court. In its briefing, New York intimated that it did not classify houses of worship for adverse treatment any more than any law classifies for adverse treatment that which it *covers*. To be sure, New York's reason for including within its scope houses of worship and not other entities was that it deemed only some activities essential (i.e., very important)—a reason that ignited outrage from Justices and scholars alike, propelling Cass Sunstein to dub *Roman Catholic Diocese* "our anti-*Korematsu*."[333] But it is perfectly ordinary for regulations to consider costs and decide not to cover some things they otherwise would have if costs were irrelevant. Making such determinations is what governments do: They balance competing interests in light of unfolding circumstances and make choices about when to regulate, how to regulate, and what to regulate.[334] Decisionmaking based on cost–benefit analysis is the very stuff of government.[335]

According to the Supreme Court, however, it did not help that New York's classifications were the product of everyday cost–benefit analysis.[336]

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332. See id. at 64 (Kavanaugh, J., concurring).

333. See Sunstein, supra note 16, at 237; see also *Roman Cath. Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring) ("[T]here is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."); Michael W. McConnell & Max Raskin, Opinion, If Liquor Stores Are Essential, Why Isn't Church?, N.Y. Times (Apr. 21, 2020), https://www.nytimes.com/2020/04/21/opinion/first-amendment-church-coronavirus.html (on file with the *Columbia Law Review*) ("It is not for government officials to decide whether religious worship is essential. . . . Mass is not a football game, a minyan not a cruise.").

334. See Roman Cath. Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118, 130 (E.D.N.Y 2020) ("[T]he court should not and will not parse the reasonable distinctions that the State has made, in very difficult circumstances, between essential and non-essential businesses."), rev'd by Agudath Israel of Am. v. Cuomo, 983 F.3d 620 (2d Cir.).

335. There is not only nothing remarkable about a government engaging in cost–benefit analysis when deciding the scope of a lockdown order, but the converse is true—it would be remarkable for the government *not* to do so. See, e.g., Ole F. Norheim, Joelle M. Abi-Rached, Liam Kofi Bright, Kristine Bærøe, Octávio L. M. Ferraz, Siri Gloppen & Alex Voorhoeve, Difficult Trade-Offs in Response to COVID-19: The Case for Open and Inclusive Decision Making, 27 Nature Med. 10, 10–13 (2021) (discussing governmental choices "involving the best balance between health on the one hand and income, liberties, education and further goods on the other").

336. See *Roman Cath. Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring) ("The only explanation for treating religious places differently seems to be a judgment that what happens

In fact, that was precisely the problem. In light of its cost–benefit analysis, New York concluded that the cost of applying its lockdown order to some secular establishments outweighed the benefits of doing so, but it did not draw the same conclusion when it came to religious establishments.[337] That meant New York attributed greater value to certain secular interests—including ensuring access to pharmacies, grocery stores, barber shops, and hardware stores—than it did to religious interests. And to value anything secular more than religion is to "*de*value religion"—exactly what the new religious equality forbids.[338] New York violated the Free Exercise Clause insofar as it did not apply its lockdown order to some secular entities *because* of the cost of doing so but applied it to religious entities *despite* the cost of doing so.[339]

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there just isn't as 'essential' as what happens in secular spaces. . . . *That* is exactly the kind of discrimination the First Amendment forbids.").

337. New York considered it too costly to cover under its lockdown order "any business providing products or services that are required to maintain the health, welfare and safety of the citizens of New York State." See Empire State Dev., Frequently Asked Questions for Determining Whether a Business Is Subject to a Workforce Reduction Under Recent Executive Order Enacted to Address COVID-19 Outbreak 2 (2020), https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_032220.pdf [https://perma.cc/T23L-MDQL]; see also N.Y. Executive Ord. 202.6 (Mar. 18, 2020). Thus, all entities that New York considered necessary to secure "health, [physical] welfare, and safety"—including "laborator[ies]," "airports," "grocery stores," and "pharmacies"—were deemed essential by New York. Id.; see also Reply Brief in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction at 3–4, Agudath Israel of Am. v. Cuomo, 980 F.3d 222 (2d Cir. 2020) (No. 20-cv-4844), 2020 WL 10319982.

338. The Court in *Lukumi* described the government as "devalu[ing] religious reasons for killing by judging them to be of lesser import than nonreligious reasons." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–38 (1993); see also S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 721 (2021) (Roberts, C.J., concurring) (stating that the government has "devalued" religion); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614 (2020) (Alito, J., dissenting) (arguing that granting exemptions to only certain gatherings but not all religious gatherings devalues religious reasons for congregating); id. at 2614 (Kavanaugh, J., concurring) (stating that the government "'devalues religious reasons' for congregating 'by judging them to be of lesser import than nonreligious reasons'" (quoting *Lukumi*, 508 U.S. at 537–38)); Stormans, Inc. v. Wiesman, 579 U.S. 942, 949–50 (2016) (Alito, J., dissenting) ("Allowing secular but not religious refusals is flatly inconsistent with [*Lukumi*]. It 'devalues religious reasons' for declining to dispense [abortion] medications 'by judging them to be of lesser import than nonreligious reasons[]' . . . ." (quoting *Lukumi*, 508 U.S. at 537–538)); Tebbe, Equal Value, supra note 16, at 2398 ("If [the government's] interest applies evenly to the regulated and unregulated categories, then it presumptively has devalued protected practices . . . .").

339. The select few scholars who have engaged with legal exceptions draw a sharp distinction between "internal" and "external" limitations. For example, according to Professor Claire Finkelstein, there is a difference between a sign that reads, "Do not enter unless authorized personnel" and a sign that reads, do not enter "unless someone is having a heart attack inside . . . and you are a doctor." See Claire Oakes Finkelstein, When the Rule Swallows the Exception, 19 Quinnipiac L. Rev. 505, 508–09 (2000). On Professor Finkelstein's account, the first sign includes only a condition, whereas the second sign includes an exception. See id. at 509–10. The first sign's statement is made up entirely of a *rule*, the rule being that non-authorized persons cannot enter the designated area. By

Thus, *Roman Catholic Diocese* helps illustrate that the underlying logic of the new religious equality is not limited to explicit exceptions granted for specific secular interests. Recognizing the nonexceptionality of exceptions—as the Court unwittingly did in *Roman Catholic Diocese*—puts into sharper relief the limitlessness of the new doctrine, a limitlessness that cannot be undone with a formalist distinction between a rule's exceptions and its scope.

D. *The Impossibility of Value*

Appreciating the role of costs in determining the scopes of laws helps bring into focus arguably the most fundamental problem with a rule of religious equality: It requires attributing specific value to religion qua religion. This requirement puts courts in the untenable position of either assessing religion's value in a case-by-case way or attributing some predetermined, set value to religion.

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contrast, the second sign's qualification "fall[s] *outside* the rule," making that sign's statement an exception to, rather than just a condition of, the rule. Id. (emphasis added). But what makes the limitation in the second sign any more a limitation than the limitation in the first sign? And what makes the rule in the first sign any more a "rule" than the rule in the second sign? The only difference is the specificity of the carve-out: In the first sign, the exception is broad, whereas in the second sign, the exception is narrow. But why should that matter? And in any event, generality and specificity are relative. All laws are general in some respects and specific in other respects.

For Professor Finkelstein, they are different because there is a meaningful distinction between exceptions that stem from "internal failure[s]" and those that result from "external failure[s]." Id. at 515. Only the latter are *exceptions*. When an exception is granted because a specific application of the rule would conflict with the interests that drive the rule, such a carve out is not in fact an exception but only a clarification of the rule. It is entirely different, however, when an exception stems from "external" principles that conflict with "the rule's own background justification." Id. at 511. When such conflicts arise and result in exceptions, they are given in "recognition of the weight or importance of [the] *contrary* . . . principle." Id. at 516. Only under such conditions is it appropriate to speak of exceptions. To make this more concrete, consider the two signs. One might argue that the rule prohibiting unauthorized individuals from entering a restricted area is not "exempting" authorized individuals if the purpose of the rule is to keep out *un*authorized individuals. Conversely, a rule seeking to prevent *anyone* from entering but exempts doctors under certain circumstances *does* provide an "exception," since allowing doctors to enter has no relation to the "purpose" of the rule. Here, the "exception" is motivated by a wholly "external" purpose that stands in conflict with the purpose underlying the rule. Although Fred Schauer elsewhere helpfully problematizes the rule–exception binary, he shares this view that there is a categorical difference between exceptions that stem from internal failures and those that are motivated by external failures (and only the latter are exceptions, whereas the former are not). See Schauer, Playing by the Rules, supra note 308, at 117–18.

The problem with Finkelstein's and Schauer's distinction is that it rests on a rather (surprisingly) impoverished view of law. Determining a law's bounds is not secondary to its creation. Such determination is not undertaken at some point *after* (temporally or conceptually) the "rule" comes into being. Rather, declaring what is *not* law occurs at the inception of the law's creation, and is as integral to it as any "affirmative" determinations.

Ironically, this results in religious equality reproducing the very problems that motivated the Court to adopt it in *Smith* in the first place. Under the religious liberty model, courts were required to balance a law's burdens on religious practices against its intended benefits. *Smith* replaced religious liberty with equality largely because the latter purported to resolve the problem of judges weighing the value of religion against competing governmental interests.[340]

But religious equality works similarly and thus proves no better than religious liberty. Under both, the government is constitutionally mandated to "value" religion sufficiently to refrain from imposing even unintended, incidental burdens on religious practice.[341] And under both, courts fill the role of judging the government's judgments,[342] ensuring that the government has valued religion sufficiently in its cost–benefit analyses.

For a court to judge the government's judgment, it must reassess the government's cost–benefit analysis—for how can a judgment be wrong if it balanced all the costs and benefits correctly? If, in the court's assessment, the government's cost–benefit analysis was pristine, presumably the court would have made exactly the same judgment. To declare that the government's judgment not to exempt religion was wrong, then, the court must supplant the government's cost–benefit analysis with its own. Put another way, the government will be held to have acted wrongly whenever its cost–benefit analysis differs from the court's.

The difference between religious liberty and religious equality is that while the former requires the court to evaluate one cost–benefit analysis, the latter requires it to assess two. When the government has exempted certain secular activities but not all religious activities, it has (at least implicitly) made two determinations: (1) that the benefits of applying its law to the religious activities in question outweigh the costs of doing so and (2) that the costs of applying the law to the secular activities it has exempted outweigh the benefits of doing so. To judge that judgment, a court must weigh for itself the costs and benefits of the law's application to both the nonexempted religious activities and the exempted secular activities. Only if the court determines that the net benefits (or costs) of applying the law in question to the religiously motivated activity are no greater (or less) than the benefits (or costs) of the secular activity that has been exempted can it conclude that the government has treated unequally what it should have treated equally. In contrast, the liberty paradigm called

340. See Krotoszynski, supra note 56, at 1199 (explaining the superiority of the equality-based approach to free exercise advanced in *Smith*).

341. See Laycock, Remnants, supra note 23, at 52; supra section I.A.

342. As Justice Felix Frankfurter put it somewhat similarly, courts are "not exercising a primary judgment but [are] sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

for no such comparative cost–benefit analysis: Courts assessed the costs and benefits of a law's application to a given religious activity without having to also assess its applications to *other* secular activities.[343]

How might a court go about making these assessments? The court might start by looking to the law's intended benefits. After all, laws are instruments for achieving designated beneficial objectives, so decisions about whether, how, and when to apply legal requirements will depend on the likelihood of realizing the hoped-for benefits. If the secular and religious activities differ with respect to that likelihood, it would be sensible for the government to treat them differently.[344]

But benefits should not be the sole dimension of comparison. As previously discussed, decisions about the content and scope of laws involve more than just consideration of the law's potential benefits.[345] It would be irresponsible, if not reckless, for the government to one-sidedly concern itself with a law's potential benefits without also considering attendant costs.[346]

Consider a simple example. Applying a speed limit to unmarked police vehicles rushing to catch fleeing criminals would generate the same benefit of reduced risk of injury and death (caused by speeding vehicles) as applying the speed limit to cars racing to make the showtime of a new blockbuster. But the two applications—to unmarked police cars and hurried moviegoers—would incur sharply different costs, which is why the state "exempts" only emergency vehicles. It does so not because applying the speed limit to emergency vehicles would not yield highway-safety benefits, but because the costs of applying it (including, for example, of criminals fleeing with impunity) outweigh those benefits.

The same goes for all laws. Every law could accomplish more if it covered more. But no law is truly universal in scope; every law has a stopping point because, at a certain point, the costs of expanded coverage outweigh the benefits. Indeed, it would perhaps not be wrong to say that, at least in many contexts, consideration of costs plays as significant a role in determining a law's content and scope as considerations of benefits. Which is to say, laws' interests are just as much "negative" as they are "positive." They are composites of (equally important) desired benefits and *non*desired costs.[347]

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343. See supra notes 39–40 and accompanying text.

344. Here, the government would be treating differently "apples and watermelons," as Justice Kagan put it. See Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting).

345. See supra notes 317–339 and accompanying text.

346. See, e.g., Irving L. Janis & Leon Mann, Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment 174–75 (1977) (arguing that rational decisions require consideration of costs and benefits); supra note 335.

347. Another example may help make this more concrete. Suppose someone has an interest in going on vacation to obtain the benefit of relaxation but also does not wish to

In addition to recognizing that comparisons between religious and secular exemptions require a *two*-step inquiry into both benefits and costs, it is important to appreciate the different natures of these inquiries. The first inquiry, which asks whether two sets of activities are similar with respect to a law's intended benefits, is (at least in theory) based on a defined, externally-provided metric. The hoped-for benefits that laws are intended to achieve are (in theory, anyhow) preselected. Once a court believes it has identified those intended benefits and construed them at the correct level of abstraction (both of which are not without their problems, as explained earlier[348]), the only question remaining is whether applying the law to the two sets of activities would yield similar benefits. That analysis certainly may provoke outcome-determinative disagreements, but (again, in theory at least) they would be disagreements about facts.

One can see this in the COVID-19 lockdown order cases decided once Justice Barrett joined the bench. In these cases, Justices Breyer, Sotomayor, and Kagan each wrote fiery dissents chastising the majority for engaging in "armchair epidemiology,"[349] that is, for inappropriately assuming for themselves the role of public health expert and making factual public health-related assessments. But even as the Justices leveled this critique, they too assessed the facts for themselves.[350] It seemed clear to them that there was a higher risk of COVID-19 contagion when congregants pray than when patrons dine or get a haircut.[351] The Justices' comparability

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spend more than $2,000. In that case, the person's interest ought to be formulated as "relaxing by going on a $2,000 (or under) vacation." A vacation that would cost $3,000 would further one of their interests (relaxation) but undermine another (not spending more than $2,000). While one of the interests might be framed positively and the other negatively, they are of equal importance. If the person did not want to relax *or* if they could not find a vacation within their price range, they would not be going on vacation.

348. See supra text accompanying notes 269–282.

349. See, e.g., S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720–23 (2021) (Kagan, J., dissenting) ("Justices of this Court are not scientists. Nor do we know much about public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic.").

350. See id. at 722 ("The only secular conduct the State treats better is the kind that its experts have found does not so imperil its interests—the kind that poses less risk of COVID transmission."). So long as the relevant question is whether two sets of entities are similar for the purposes of religious equality, how could they *not*? Indeed, precisely because the Court engaged in this fact-based inquiry despite the complex nature of the inquiry and that a national emergency was afoot, Cass Sunstein heaped praise on the Court for, as he (inaptly) put it, finally parting ways with *Korematsu*. See Sunstein, supra note 16, at 222 (describing *Roman Catholic Diocese* "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").

351. See *S. Bay United Pentecostal Church*, 141 S. Ct. at 722–23 (Kagan, J., dissenting) (criticizing the majority for holding that "the State must treat this one communal gathering like activities thought to pose a much lesser COVID risk, such as running in and out of a hardware store").

analyses rested on "the conditions [that] facilitate the spread of COVID-19,"[352] including and especially the amount of "respiratory droplets produced."[353] The relevant questions when comparing the benefits of applying the lockdown order, in other words, were questions of fact.

In contrast, assessing the costs of such applications involves a much more fraught kind of inquiry. The costs of applying a law to a certain activity are the lost benefits that otherwise would have been obtained had the restrictive law not applied. The cost of applying a speed limit to emergency vehicles, to return to our example, is the loss of the benefits that would otherwise be derived from making timely arrests, deterring crime, rushing people to hospitals, and so on. The trouble is that comparing the costs of restricting different activities requires a shared metric of valuation, and there is none. The cost of burdening an activity depends on the value of that activity *itself*. In the COVID-19 context, the cost of applying a lockdown order to hair salons is measured according to the value of accessing the services provided by salons. The more one values haircuts, the greater the perceived costs of restricting access to them. The same goes for communal prayer. The cost of applying a lockdown order to churches depends on the value of unrestricted access to churches and the communal prayer that takes place in them.

Note that only once we have turned to a comparison of the costs of laws' applications to various entities or activities are we actually employing a rule of religious equality. Only now are we comparing *religion*—not room sizes and respiratory droplets—with that which is secular. And to conduct such a comparison requires an assessment of religion's value and comparing it with the value of a given secular activity that has been exempted.

Yet such a comparison is impossible.[354] For how can a court divine the value of religion? What—for example—is the value of communal prayer? As hard, if not impossible, as it would be for a court to know the value of a haircut, it is even harder, and even less possible, to know the value of communal prayer. The Court has not even been willing (because it is not able) to provide a definition of religion.[355] How can one know the value of something for which one has no definition? But even putting to the side

352. See Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting).

353. Id. at 78 (Breyer, J., dissenting).

354. Subjective valuations are certainly possible. People make valuations all the time; they could not decide among alternatives if they did not. And, as this Essay discusses in the context of cost–benefit determinations, the *government* engages in valuations with respect to every rule it enacts. See supra notes 336–338 and accompanying text. What is impossible are *objective* valuations. To assess a valuation made by the government, how is a *court* to know it was "wrong" without an objective metric? It cannot. To pass judgment on a judgment about the value of religion and conclude it was wrong is impossible to do objectively.

355. See supra note 53.

the problem of definitions, religion does not have a cognizable inherent and objective value.[356] And if the value of religion is beyond reach, how can a court know whether religion should have been valued the same, and thus treated the same, as a secular activity? It cannot.

To claim, as some have, that the Constitution's "singling out" of religion reveals religion's legal value as a purely positivist matter is circular.[357] For the entire debate is over how the Free Exercise Clause *should* be interpreted, and construing religion as especially valuable—rather than as especially vulnerable to persecution as a sheer historical matter—is hardly the Clause's only plausible interpretation.[358] Further, the Bill of Rights names plenty of interests other than just religion.[359] Imagine requiring the government to treat all interests in the Constitution as though they have practically infinite value and applying the Court's new rule of equality to them. Would anyone say that because the Constitution singles out speech and guns, privileging anything without granting speech or guns the same benefit is to unconstitutionally discriminate against them?[360]

How then might courts proceed? Broadly speaking, courts have two options. One option is for each court to subjectively assess for itself the value of religion—or of the particular religion or particular religious activity before it—on a case-by-case basis. The second option is for the Supreme Court to establish, and for lower courts to apply, an ex-ante

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356. Its value, like the value of "beauty," is in the eye of the beholder.

357. See, e.g., Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 228, 230 (2d Cir. 2020) (Park, J., dissenting) (stating that New York's lockdown order was "odious to our Constitution" because "a public health measure 'must always yield in case of conflict with . . . any right which [the Constitution] gives or secures'" (alterations in original) (internal quotation marks omitted) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017); Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 (1905))); see also Laycock, Religious Liberty, supra note 190, at 314 (arguing for a robust religious liberty right "[b]ecause the Constitution says so" (internal quotation marks omitted)); Michael W. McConnell, The Problem of Singling Out Religion, 50 DePaul L. Rev. 1, 9 (2000) ("The very text of the Constitution 'singles out' . . . religion . . . .").

358. See infra notes 372–381 and accompanying text.

359. See, e.g., U.S. Const. amend. II.

360. Say, for example, the government provides a subsidy for housing for the poor but not for shooting ranges or theaters. In fact, as surprising as it might seem, thanks in no small measure to the new religious equality doctrine, some courts *have* already begun to hold precisely this. See supra note 189. And while courts during the pandemic rejected free *speech* MFN-style challenges, that well may change (as some have argued it should). See Clementine Co. v. de Blasio, No. 21-CV-7779, 2021 WL 5756398, at *23–30 (S.D.N.Y. Dec. 3, 2021), vacated by Clementine Co. v. Adams, No. 21-3070, 2022 WL 4113100 (2d Cir. July 11, 2022) (rejecting charge of discrimination against speech in light of exemptions for some businesses, but not for theaters); Tebbe, Equal Value, supra note 16, at 2455–57 (suggesting "it would not be surprising to see" the Roberts Court apply its new rule of equality for religion to speech in the censorship context). Indeed, at least one federal court has already lamented the lack of MFN-style free speech doctrine when it comes to speech. See supra note 189.

valuation of religion. This latter option could take the form of either attaching a specific, set value to all religious activity—as the religious liberty model once did before *Smith*'s admonitions[361]—or establishing an ex ante rule of *comparative* value of religion: that religious activity is always at least as valuable as the most valued secular activity.

The Court's new doctrine of religious equality adopts the last of these options.[362] Recall that the doctrine allows the government to apply laws to religious activities but not secular activities only if applying the law to the two would reap different benefits. The government may not differentiate between religious and secular activities on the basis of costs—that is, differentiating on the assumption that the cost of restricting the secular activities is greater than the cost of restricting the religious activities. Rather, whenever the government appreciates the costs of burdening a specific secular activity and, in light of that appreciation, exempts it from the law's coverage, the government must treat religious activities as if they would be just as costly to restrict and, as a result, exempt them from the law's coverage as well. If the government has exempted a secular activity because it has valued it at A, to value religious activity at anything less than A is to value religion wrongly; it is to treat that which is at least equal in value as of less value.[363]

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361. See supra notes 39–40 and accompanying text.

362. See supra section I.D. It is easy to be misled by the Court's ostensible epistemic humility about the value of religion and its disclaiming any valuation of religion when employing MFN religious equality. (Recall that the Court in *Tandon* instructs that reasons for engaging in the compared activities—secular and religious—are irrelevant and are not to be included—that is, comparatively *evaluated*—in the calculus.) But it avoids valuing religion only by evaluating it to be no less *valuable* than anything secular. One might think this is reasonable. If we do not know the value of something, maybe it is best to err on the side of assuming maximum value. But upon closer inspection, such an argument—suggested by Professor Laycock, as it happens—is fairly absurd. See Laycock & Collis, supra note 66, at 23–24 (explaining that all a court needs to "know [is if] the rule maker found a religious exception undeserving, and secular exceptions deserving" and, if it did, "that is the value judgment that the Free Exercise Clause prohibits"). Imagine a student asking a school principal for permission to miss school to visit her sick grandmother. The principal does not know the value of such a visit. So, should he assume it has the *maximum* possible value and exempt the student from the school's strict attendance policy, so long as he has allowed a student to miss school for surgery to remove a cancerous tumor? But—one can anticipate the retort—visiting grandmothers is not specified in and privileged by the Constitution, whereas religion is. So if a seventeen-year-old student with a gun license asks for an exemption to practice shooting at a gun range, should the public school principal assume the activity has the maximum possible value and grant the exemption so long as he has allowed absences for surgery? Surely not.

363. Again, taking this rule seriously would suggest that the government cannot pursue *any* interests without also seeking to advance religion. If the government exempts self-defense from a murder statute, it has privileged (and thereby valued) the "necessity" of killing in order to save one's own life over the "necessity" of killing in order to obey a religious command. Indeed, when probed by Justice Scalia at oral argument in *Lukumi*, even Professor Laycock admitted that an exception for self-defense from an otherwise "absolute" rule against killing animals would trigger strict scrutiny because that exemption puts the

To put this logic in starker terms with the aid of an illustration, if a local government extends grants to buildings over one hundred years old because it values preserving history, it must also extend the grant to all religious buildings (even newly built ones); otherwise, the government is devaluing religion vis-à-vis historical preservation. To be sure, this hypothetical does not concern exemptions. But why should that matter? The new rule of religious equality requires that religion be treated as well as that which is secular.[364] So why should it matter if the benefit at issue is an exception or a monetary grant? And if one insists that religious equality does and should apply only for exceptions, there is little that stands in the way of conceiving the grant as just that: The government's baseline is "no funding," yet it makes an exception for historical buildings.[365]

Perhaps surprisingly, this rule of religious equality has been adopted by the entire Supreme Court, including the Justices on the left, seemingly without recognition of its implications.[366] While the Justices on the left took to writing impassioned dissents in the Court's new MFN-style religious equality cases, these dissents always engaged with the doctrine on its own terms rather than denouncing it. As Justice Kagan put it, "the First Amendment['s] demand[] [of] 'neutrality'" is that the "government

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"purpose" of the animal killing into play and privileges a secular purpose over religious ones. See *Lukumi* Transcript of Oral Argument, supra note 69, at 21–22.

As mentioned earlier, the point is not that religious plaintiffs will actually succeed in challenging murder laws that include a self-defense exception but not a religious exception, or, to draw on a less hypothetical case, abortion bans that include exceptions when a mother's life is at risk. Courts can always find ways to avoid such results—as we have seen, the doctrine is certainly malleable enough. See supra section III.B. But this malleability and the fact that the current rule of religious equality allows extreme results are important in themselves. Indeed, as this Essay has shown, the new principle of equality already *has* led to extreme results, including invalidating vaccine mandates for religious objectors. See supra section II.A.1. Yet the doctrine, and certainly the theory of equality underlying it, continues to find support. See supra notes 229–238 and accompanying text; see also supra note 16. But a principle that readily lends itself to such beyond-the-pale applications is not worth defending even in the abstract, especially when it lacks a coherent conceptual and normative foundation and is built on an analytic contradiction. See supra note 28 and accompanying text.

364. See supra section II.B.

365. One can imagine a scenario in which a church requests government funding and the government responds that it lacks the budget. In saying so, the government has revealed that it has a general rule of no funding which is driven by its interest in preserving funds. Yet it undermines that interest by making an exception for historical buildings.

366. Similarly, according to Schwartzman and Schragger, what matters for determining whether the government has "flout[ed] the antidiscrimination principle . . . of equal value" is whether the "secular and religious exemptions would undermine [a law's] interest in the same (or similar) ways." See Schwartzman & Schragger, supra note 237, at 4. Thus, "equal treatment" between "secular and religious views" is "require[d]" when they "pose similar or comparable risks to a compelling state interest." Id at 2. Yet, as this Essay argues, see infra notes 366–369 and accompanying text, such a rule is sensible only so long as one assumes that religion is—and must be viewed by the government as—at least as valuable as all things secular (i.e., the very assumption Schwartzman and Schragger condemn).

cannot put limits on religious conduct if it 'fail[s] to prohibit nonreligious conduct that endangers' the government's interests 'in a similar or greater degree.'"[367] Thus, the dissents attempted to show how, vis-à-vis the state's interest in preventing COVID-19 contagion (the benefit sought by the lockdown order), houses of worship and home-based Bible study were different from dining at a restaurant, filming in a movie studio, or shopping at a hardware store.[368] The only criterion for determining wrongful discrimination was whether the religious activities and the secular activities were comparable vis-à-vis the law's intended benefits, never whether they were comparable vis-à-vis the *cost* of applying the law to them. These Justices seem to have accepted the assumption that governments may never find it more costly to restrict a secular activity than a religious one without wrongfully discriminating against religion.[369]

The assumption that religion is always at least as valuable as all things secular is troubling enough. But it also results in an asymmetry that renders "religious equality" a contradiction in terms. According to the Court's rule of religious equality, religion must be treated as well as all that is secular. Yet the same does not apply conversely; what is secular need not be treated as well as that which is religious. If a law gives special treatment to religion by exempting it, secular interests cannot be a basis for

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367. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720–21 (2021) (Kagan, J., dissenting) (fourth alteration in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 543 (1993)).

368. See, e.g., id. at 722 (arguing that "California's choices make good sense" in light of the fact that "[f]ilm production studios in California, for example, must test their employees as many as three times a week—a requirement that 'could not feasibly be applied to the congregation of a house of worship'" (quoting Declaration of Dr. George Rutherford ¶ 121 & n.8, *S. Bay United*, 141 S. Ct. 716 (No. 3:20–cv–865))); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting) ("Unlike religious services . . . stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time." (citing Motion for Leave to File Brief as *Amici Curiae* and Brief of the American Medical Association and the Medical Society of the State of New York as *Amici Curiae* in Support of Respondent at 7, *Roman Cath. Diocese*, 141 S. Ct. 63 (No. 20A87))).

369. To determine that the cost of burdening a secular interest is more valuable than the cost of burdening a religious interest is, under the current doctrine, to (unconstitutionally) devalue religion. As *Tandon* makes clear, only "risks" associated with the two sets of activities (the risks being what the law seeks to reduce, which is the "interest" of the law, or, put differently, the benefit it pursues) may be taken into consideration; the *reasons* people engage in those activities (i.e., the nature of the activities themselves and why people engage in them), may not be taken into consideration. See Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. Comparability is concerned with the risks various activities pose, not the reasons why people gather." (citation omitted) (citing *Roman Cath. Diocese*, 141 S.Ct. at 67 (per curiam); id. at 66 (Gorsuch, J., concurring))).

challenging the law, even if the law's interest would be similarly undermined.[370]

Note, then, that under the current rule of religious equality, religion is *not* equal in value to the secular. If it were, that would imply the reverse as well: that the secular is equal in value to religion. If religion and the secular were truly equal in value, an exemption for anything secular would necessitate an exemption for all that is religious *and*, conversely, an exemption for anything religious would necessitate an exemption for all that is secular. Yet exempting all that is religious and all that is secular—in a word, everything—would eradicate the very law from which either would be exempted. There could be no religious equality for exemptions because there would be no laws from which there could be exemptions.

Ultimately, religious equality requires giving religion preferential treatment over the secular, which is why the current doctrine insists that only religion is at least as valuable as (and thus must be treated as well as) all that is secular. The secular, meanwhile, is not always as valuable as that which is religious; indeed, the secular very well could be of less value than religion. And not only could it be of less value—it is. For to ordain that religion is at least as valuable as all that is secular but not the reverse is to value religion more than—and to treat religion better than—the secular.

In essence, then, the current doctrine of religious equality helps put into relief that for a rule of religious equality to be possible, it must either be a tautological rule that religion must be valued (and thus treated) equally to what it equals in value or, as all Justices on the Court and a coterie of scholars have unwittingly assumed, the radical supposition that religion is at least as valuable as all things secular and thus must be treated as well as all things secular, but not vice versa—the very opposite of equality.

IV. AN ALTERNATIVE

These problems render the Court's current doctrine of religious equality incoherent. Consequently, we must ask: Where can free exercise doctrine go from here? Is there an alternative to the rule of religious equality that now governs free exercise jurisprudence?

A natural candidate would be the religious liberty model the Court jettisoned in *Smith*. Indeed, returning to religious liberty might seem sensible given that the Court's equality "upgrade" remains mired in many of the same conceptual and doctrinal problems the Court recognized in

370. Unsurprisingly, courts refused to hear claims that interests other than religion should be treated "equally" during the pandemic. Charges of inequality among *secular* interest were dismissed out of hand. See, e.g., Nat'l Ass'n of Theatre Owners v. Murphy, No. 3:20-cv-8298 (BRM) (TJB), 2020 WL 5627145, at *1 (D.N.J. Aug. 18, 2020) (holding that the government may place more stringent social gathering requirements on movie theaters than on political gatherings).

Smith over three decades ago. But the fact that religious equality has not proven better than religious liberty does not mean *Smith* should be abandoned, especially considering the enduring relevance of the problems with the religious liberty paradigm that the *Smith* Court identified—including the difficulty (if not impossibility) of assessing religious burdens and balancing them.[371]

A second candidate worth considering picks up on an important strand in *Smith* itself, albeit one that has fallen by the wayside: the rule of anti-intentional religious discrimination. While this Part cannot fully defend that rule as the basis for a workable and conceptually sound free exercise doctrine, it gestures toward its advantages and justifications.

Prohibitions on intentional discrimination serve as the lynchpin of the vast majority of American antidiscrimination laws.[372] Philosophers and legal scholars debate extensively—and legislators and courts delineate—the specific bases the government and other actors may and may not use when making decisions. These are, at bottom, normative questions. The question of when it is wrong to discriminate is really a question of when it *should* be wrong to discriminate—and, like all questions of moral theory, answering it is hardly easy.[373]

Although based on normative judgments, the legal rule against intentional discrimination is fairly standardized. It has been codified in constitutional jurisprudence and in statutes and ordinances at all levels of American government, spanning practically all aspects of public-facing life, from education to employment and from healthcare to housing.[374] The prohibition is relatively straightforward: Certain predetermined characteristics, such as race, gender, and age cannot be the but-for cause of adverse treatment.[375] Of course, intentional discrimination can be hard

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371. See supra notes 38–45 and accompanying text.

372. See, e.g., David A. Strauss, Discriminatory Intent and the Taming of *Brown*, 56 U. Chi. L. Rev. 935, 939 (1989) ("[T]he discriminatory intent standard came to be the central principle of the Equal Protection Clause.").

373. See Richard A. Posner, Reply to Critics of *The Problematics of Moral and Legal Theory*, 111 Harv. L. Rev. 1796, 1802 (1998) ("The discourse of moral theory is interminable because indeterminate.").

374. See, e.g., Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2018) (sex discrimination); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (age discrimination); Civil Rights Act of 1964, 42 U.S.C. § 2000e–e-17 (2018) (employment discrimination); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (same); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (gender discrimination); Loving v. Virginia, 388 U.S. 1, 2 (1967) (racial discrimination in marriage); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (racial discrimination in schools).

375. See, e.g., Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose[]' . . . implies more than intent as volition . . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

to ferret out as an evidentiary matter[376] and is susceptible to conceptual and normative contestation.[377] But the Supreme Court has elaborated tests for weighing direct and circumstantial evidence of discriminatory intent, and in various statutory contexts it has developed a burden-shifting test that helps the factfinder determine discriminatory causation.[378]

A prohibition against religious discrimination could be defined along similar lines, which, in fact is how it was defined for nearly a century before the new rule of religious equality took hold.[379] For example, in one of the Religion Clauses' foundational cases, *Everson v. Board of Education*, the Supreme Court instructed that the "command[] that [a state] cannot hamper its citizens in the free exercise of their own religion" means a state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[380] The Court in numerous other pre-*Smith* cases applied this norm of anti-intentional religious discrimination.[381]

The historical context of the First Amendment supports such an interpretation. Justice Robert Jackson perhaps put it best. The "First Amendment separately mention[s] free exercise of religion," he explained in 1943, because of "[t]he history of religious persecution"—that is, "because [religion] was [often] subject to attack" and thus needed specific protection.[382] At least some historians agree. Professor Vincent Munoz, for

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376. See Suzanne B. Goldberg, Discrimination by Comparison, 120 Yale L.J. 728, 751–61 (2011) (discussing five ways in which proving intent by way of comparators can be difficult).

377. See Aziz Z. Huq, What Is Discriminatory Intent?, 103 Cornell L. Rev. 1211, 1265 (2018) ("The boundaries between conceptions of unlawful intent are ambiguous and contestable.").

378. See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803–04 (1973) (establishing a burden shifting framework).

379. See supra sections I.A–.D.

380. 330 U.S. 1, 16 (1947).

381. See Bd. of Educ. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Free Exercise Clause . . . [says that] one's religion ought not affect one's legal rights or duties or benefits."); McDaniel v. Paty, 435 U.S. 618, 629 (1978) (invalidating law that disqualified members of the clergy from holding certain public offices); Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (opinion of Harlan, J.) ("[We] must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."); Fowler v. Rhode Island, 345 U.S. 67, 69–70 (1953) (invalidating a law which discriminated among religious sects); Niemotko v. Maryland, 340 U.S. 268, 271–73 (1951) (finding discrimination following Maryland's decision not to grant Jehovah's Witnesses a license to access a space that other religious groups had access to).

382. Douglas v. City of Jeannette, 319 U.S. 157, 179 (1943) (Jackson, J., concurring in the result). Furthermore, adopting an anti-intentional religious discrimination interpretation of free exercise—asking whether, as Justice Scalia put it at oral argument in *Lukumi*

instance, has recently made the case that "the very core of the Founders' understanding of religious freedom" was limited to the principle that the government should not "hurt, molest, or restrain individuals on account of their religious worship, beliefs, or affiliation."[383] The Free Exercise Clause—which, from a "robust historical perspective" marked "a revolution in political philosophy and political authority"[384]—precluded the government from "outlawing a practice *on account* of its religious character";[385] it prevented the government from "punish[ing] or compel[ling] religious exercises and professions *as such*."[386]

The Supreme Court has repeatedly underscored this history. As the Court explained in 1947, the Founders knew well that the "centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their . . . religious supremacy."[387] For example, as Justice Hugo Black recounted, Catholics and Puritans in sixteenth century England were subjected to laws enacted "to destroy dissenting religious sects and force all the people of England to become regular attendants at [the] established church."[388] While these religious conflicts played a significant role in spurring emigration to colonial America,[389] some colonies took to precisely the same persecution against "undesired" religions—a fact that was surely on the Founders' minds and one that the Supreme Court often noted in earlier times.[390] And not only in earlier times: Just a few years before *Smith* was decided, a plurality of the Court explained that it was the

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over thirty years ago, there is "any attempt to suppress the religion as such"—would more accurately reflect the doctrine the Court established in *Smith*, or, at the very least, the doctrine that lower courts, most scholars, and the Court itself in at least some of its cases for over three decades understood *Smith* as establishing. See *Lukumi* Transcript of Oral Argument, supra note 69, at 20; supra note 82.

383. See Vincent P. Munoz, Religious Liberty and the American Founding 56 (2022).

384. Id. at 58–59.

385. Id. at 59 (emphasis omitted in part).

386. Id. at 58 (emphasis added).

387. See Everson v. Bd. of Educ., 330 U.S. 1, 8–9 (1947); see also Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 n.10 (1982) ("At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control." (citing Bernard Bailyn, Ideological Origins of the American Revolution 98–99 n.3 (1967))); Engel v. Vitale, 370 U.S. 421, 432–33 (1962) ("Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.").

388. See Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 149 (1961) (Black, J., dissenting).

389. See Carl H. Esbeck, Protestant Dissent and the Virginia Disestablishment, 1776–1786, 7 Geo. J.L. & Pub. Pol'y 51, 57 (2009).

390. See *Everson*, 330 U.S. at 9–10.

"historical instances of religious persecution and intolerance [specifically] that gave concern to those who drafted the Free Exercise Clause."[391]

Finally, the text of the Free Exercise Clause itself—"Congress shall make no law . . . prohibiting the free exercise [of religion]"—lends support to this antipersecution interpretation of free exercise.[392] While much has been made of the term "free exercise,"[393] "prohibiting" has been mostly neglected by Justices and scholars.[394] But "prohibiting" is an important clue for unlocking the meaning of the Clause's sparse ten words. This muscular word implies intent and purpose.[395] To say that Congress shall not make any law "prohibiting the free exercise" of religion suggests that Congress is forbidden from making laws whose overt content prohibits one from engaging in religious conduct qua religious conduct. The government may not persecute religious sects by *prohibiting* their practice. In other words, those who drafted the First Amendment sought to ensure that the government would, as James Madison, the Amendment's principal architect, put it, be prevented from "proscribing all difference in Religious opinion."[396]

Additionally, "Congress shall make no law" sounds in absolutism. Recognizing its absolutist connotation, Justice Black (eventually) found it necessary to shrink the Free Exercise Clause's coverage to restrictions of religious practices qua religious practices.[397] Justice Jackson, who also

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391. See Bowen v. Roy, 476 U.S. 693, 703 (1986).

392. U.S. Const. amend. I.

393. For example, that it "makes clear that the clause protects religiously motivated conduct." See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1488 (1990) [hereinafter McConnell, Origins]. And since religiously motivated conduct can be inhibited even without intent, so the word "exercise," it is argued, supports a religious *liberty* interpretation.

394. The word has gotten some attention, but only regarding the *kind* of liberty the Clause covers. According to the Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, for example, given the word "prohibiting," the Clause covers only claims that one's religious beliefs require one to do or not do what the law commands, not just that the law "may make it more difficult to practice certain religions." See 485 U.S. 439, 450 (1988); see also McConnell, Origins, supra note 393, at 1486 (discussing the historical evidence for the *Lyng* Court's definition of prohibiting).

395. Of course, when a general regulation incidentally restricts religiously motivated activity, that activity has been prohibited. But it is a stretch to read the Clause's command passively, as: "Congress shall make no general laws that prohibit general conduct if its general prohibition sweeps in conduct that is religiously motived for select individuals such that, incidentally, some individuals' religiously motivated activity is 'prohibited.'"

396. Memorial and Remonstrance Against Religious Assessments, reprinted in Everson v. Bd. of Educ., 330 U.S. 1, 63, 69 (1947) (Rutledge, J., dissenting).

397. See Tinsley E. Yarbrough, The Constitutional Faith of Mr. Justice Black, 15 J. Pol. Sci. 1, 76 (1987) (describing Justice Black's limiting of free exercise to religious beliefs and communications).

understood the First Amendment as a categorical limitation,[398] shared a similar view—general "activities," he explained, are "Caesar's affairs and may be regulated by the state so long as it does not discriminate against one *because* he is doing them for a religious purpose."[399] These Justices' interpretations of the First Amendment, motivated by its textual absolutism, make good sense. The Clause cannot be absolute—no ifs, ands, buts, or balancing—*and* apply to all laws that incidentally burden religiously motivated conduct, which is potentially every law. In contrast, a narrower prohibition on intentionally discriminating against religious exercise because it is religious exercise could be absolute, fitting well with the plain meaning of "shall make no law."

The point is not to provide a full-throated defense of interpreting the Free Exercise Clause as limited to forbidding intentional discrimination, premised on a principle of antireligious persecution. Nor does the Essay wish to suggest that such a norm would be perfectly workable and unquestionably desirable. This approach has its defects, too. But it is at least an alternative understanding of free exercise that seems more sensible than requiring that religion be valued equally to all that is secular.

CONCLUSION

Over three decades ago, the Supreme Court planted the seeds for a revolution in free exercise doctrine by abandoning religious liberty as the doctrine's touchstone and embracing religious equality in its stead. At first blush, this equality principle appeared modest. But in the hands of advocates and a motivated Court, the equality principle has been expanded radically: Now, if the government exempts from a vaccine mandate those who are medically contraindicated, it must also exempt those who are religiously contraindicated. Notwithstanding the radical reach of the current doctrine, its defenders maintain that the principle underwriting it is sound, while distancing themselves from some of its recent applications.

This Essay takes a different view. It argues that the equality principle is unworkable and incoherent. The Supreme Court will no doubt be forced to confront these defects, and, as this Essay has shown, it can always resort to leveraging the doctrine's malleability to ensure desired outcomes. But a more forthright approach would be to turn away from religious equality and adopt a straightforward rule of prohibiting religious persecution. Such a rule would be far from perfect, but, at the very least, it would be more coherent than the existing rule of religious equality. In

398. If the government was never authorized to have made such a law, Justice Jackson believed, the law was nullified. See Jay S. Bybee, Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment, 75 Tul. L. Rev. 251, 283 (2000).

399. See Prince v. Massachusetts, 321 U.S. 158, 178 (1944) (Jackson, J., dissenting) (emphasis added).

the confused world of free exercise doctrine, that shift would be a step forward.