# FREE EXERCISE IN THE COVID ERA: THE NEW COURT'S KANTIAN APPROACH TO RELIGION

**MACKENZIE KARBON**

TABLE OF CONTENTS

The issue of religious freedom has been hotly contested since public health and government officials announced prohibitions on in-person gatherings in March of 2020. Since then, mask mandates and vaccine requirements have created tension between public health and individual choice that has frequently sought resolution in the courts. It may be unsurprising that the Supreme Court has been largely deferential to religious claimants since the beginning of the COVID pandemic—the current ideological composition of the bench coupled with religion's status as a central tenet of contemporary conservatism appears to command no other outcome.[1] However, when viewed in the greater context of free exercise jurisprudence since *Employment Division, Department of Human Resources of Oregon v. Smith,* the Supreme Court's COVID-era treatment of religious liberty represents a discreet renaissance of free exercise interpretation.[2] The most puzzling aspect of this shift is also its most conspicuous: it has materialized during the COVID pandemic, when one would imagine the government's authority to enforce public health measures to be at its zenith. Nonetheless, the Court has managed to usher in a new era of Free Exercise jurisprudence in two phases. First, the Court conferred Most Favored Nation[3] status to the right to free exercise and begun treating neutral state policies as proof of hostility toward religion.[4] The Court then graduated to a categorical imperative approach, wherein a neutral law offering no exemptions will be struck down for not carving out a favorable exemption for religion.

---

1. The Supreme Court issued seven emergency injunctions pending appeal between November 2020 and April 2021. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (striking down New York's occupancy limits on houses of worship in zones with high rates of COVID transmission, claiming that the law "singled out" houses of worship because no comparable restrictions were placed on essential businesses); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (blocking California's ban on religious gatherings in private homes). Before November 2020, it had been five years since the Court issued an emergency injunction.

2. 494 U.S. 872 (1990).

3. Vikram David Amar & Alan E. Brownstein, *Exploring the Meaning of and Problems With the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach to Protecting Religious Liberty Under the Free Exercise Clause: Part One in a Series*, VERDICT (Apr. 30, 2021), https://verdict.justia.com/2021/04/30/exploring-the-meaning-of-and-problems-with-the-supreme-courts-apparent-adoption-of-a-most-favored-nation-approach-to-protecting-religious-liberty-under-the-free-exercise-c [https://perma.cc/GQ93-TDDD].

4. The Court's treatment of free exercise claims in the COVID-era has frequently assumed bad faith on the part of government actors, apparently relying upon an analytical framework in which favorable treatment of secular businesses amounts to *de facto* animus towards religion. This approach is essentially a workaround of *Smith,* which held that the incidental burdening of religion—*absent evidence of targeted animus*—does not violate the Constitution. The present Court's creative interpretation of the Free Exercise clause, however, conveniently equates "incidental burdening" with anti-religious sentiment in instances in which a secular comparator exists and is perceived to be treated more favorably than its religious counterpart (this is, of course, the catch—a law completely unburdened by a single secular exception is a rare law, indeed).

The COVID era has ushered in a bevy of Supreme Court rulings on free exercise, the first of which upheld occupancy limits and deferred largely to state legislatures to execute reasonable safety procedures.[5] But with the unexpected death of Justice Ginsburg and the rapid installment of Justice Barrett, the Court's interpretation of the Free Exercise Clause underwent a radical shift. Decisions handed down after Justice Barrett's arrival constitute the newest additions to a body of jurisprudence that has grown extremely deferential to religious practitioners while remaining internally inconsistent. The present Court—though aggressively vigilant of even hypothetical threats to religious liberty[6]—has yet to give into the jeers and explicitly overrule *Smith,* opting instead to present paradigm-shifting decisions in short, cryptic opinions through the suspect apparatus known as the shadow docket.[7]

This development alone is remarkable, but the modern shift in free exercise jurisprudence is shocking. Imagine a line: at Point *A* there is the Court's decision in *Smith,* which "appeared to herald the end of constitutionally compelled religious exemptions."[8] At Point *B*, there is *Tandon v. Newsom,* in which the court struck down a neutral California law limiting in-home gatherings because the law failed to make an exception for religion.[9] The two points are plotted far apart and connected by a sinuous line.

I would love to say that, in writing this article, I ironed out that line and

---

5. *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) [hereinafter *South Bay I*] (upholding California's limits on indoor gatherings). Chief Justice Roberts's concurrence (no opinion was written by the majority) explained that the complainants did not meet the extremely high standard required to show that an injunction is appropriate. *See id.* (Roberts, C.J., concurring). An injunction, he explained, as opposed to a stay, "demands a significantly high[] justification" because it "grants judicial intervention that has been withheld by lower courts," and that the evidence supporting the issuance must be "indisputably clear." *Id.* at 1613–14 (Roberts, C.J, concurring) (quoting Respect Maine PAC v. McKee, 562 U.S. 996 (2010)). Furthermore, under the California law, comparable secular institutions like movie theaters and spectator sports were subject to "similar or more severe restrictions" than houses of worship, indicating that no hostility toward religion was the cause of the restrictions.

6. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020) (determining that irreparable harm would occur absent an injunction, even though complainants were no longer subject to the challenged restrictions). The majority justified this apparent paradox by stating that "[t]he Governor regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." *Id.*

7. As Professor Baude, who coined the term, has explained, the "shadow docket" is a term that captures the obscurity of everything the Supreme Court does besides issuing signed decisions in argued cases—orders granting or denying certiorari; granting or denying applications for emergency relief; and so on. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015); *see also* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019).

8. James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 718 (2019); *see also* Angela C. Carmella, *Exemptions and the Establishments Clause*, 32 CARDOZO L. REV. 1731, 1731 (2011) ("The [*Smith*] decision immediately provoked reaction (almost entirely negative) from the legal academy.").

9. *See* Tandon v. Newsom, 141 S. Ct. 1294 (2021).

recovered a guide to its oddities and vacillations. Had I done so, I would happily offer to you, now, a comprehensive account of the Court's rationale. However, I can make no such claim, and I doubt anyone can. Indeed, over the last thirty years, the Court's relationship with the Free Exercise Clause has beguiled and bewitched many a deft constitutional scholar. Let us start from this understanding, and we may reach a sound end.

## A KANTIAN APPROACH TO FREE EXERCISE

In lieu of a legal explanation for the Court's tumultuous relationship with the Free Exercise Clause, I offer a philosophical one: the present Court's treatment of religion should be viewed as an extension of Kant's theory of morality. Immanuel Kant (1724–1804) posited that there exists a universal theory of morality that rests upon the so-called categorical imperative. Kant explained in his 1785 classic, *Groundwork of the Metaphysics of Morals,* that "[t]he categorical imperative . . . declares the action to be of itself objectively necessary without reference to some purpose."[10] People's behaviors, Kant urged, should be such that society would function even if everyone were to act the same way: "[t]here is, therefore, only a single categorical imperative and it is this: act only in accordance with that maxim through which you can at the same time will that it become a universal law."[11] Kant offers several acts that he viewed as necessary for the continued existence of society—truth-telling and refraining from suicide were two such acts.[12] He argued that everyone is bound to these principles, even under extenuating circumstances; deviation from them would necessarily result in the collapse of moral civilization.

This is precisely what the Court has done. It has determined that favoring religious claimants is an "objectively necessary" action legislators must undertake, lest they risk violating the Constitution. In so doing, the Court has abandoned traditional guiding principles in order to safeguard religion and elevated the rights of worshippers beyond that which the Constitution commands or tolerates. Its rulings "[have] to do not with the matter of the action and what is to result from it, but with the form and the principle from which the action itself follows."[13] Just as Kant praised certain behaviors as fundamental to a society's moral righteousness, so does the Court ennoble free exercise right as immutable, independent of the State's interest in curtailing them to achieve legitimate ends.

The relationship between Kant's theory and the Court's treatment of free

---

10. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 26 (Mary Gregor ed., Mary Gregor trans., Cambridge Univ. Press 1997) (1785).

11. *Id.* at xviii.

12. *Id.* at 38.

13. *Id.* at 27.

exercise is further evidenced by their shared defects. Kant's theory is dangerously prescriptive, downplays the value of individual choice, and does not lend itself to a diverse and pluralistic society.[14] Likewise, the Court's new approach to free exercise places a premium on religiosity, undermines the authority of the states, and creates a category of second-class rights that until recently, have long enjoyed equal footing with religion.

The present Court's new approach to free exercise is not driven by a desire to realize a specific end, but rather guided by an unshakeable commitment to religious liberty. It appears that the Court is no longer invested in balancing the interests of the states against the rights of worshippers—rather, it is committed to insulating religious entities from any interference by the government, even when such interference is necessary to preserve human life.

The first question this paper addresses is simple—how did we get here? Part I discusses the two types of religious constitutional claims that emanate from the First Amendment and how the Court has blurred the line between them. Part II details the free exercise doctrine as it existed prior to *Smith.* Part III delves into *Smith* and its numerous shortcomings. Part IV discusses *City of Boerne v. Flores,*[15] in which the Court snaps back at Congress for its attempt to reinstate *Sherbert*-era analysis and supplant *Smith*.[16] Here, we will also examine the concepts of neutrality and general applicability, see how they changed in the years leading up to the COVID era, and discuss how their reimagining by the Court managed to breathe new life into *Smith.* Part V outlines the most important free exercise cases of the COVID era ending with the Court's application of Kant's categorical imperative approach in the 2021 case of *Tandon v. Newsom.* Part VI discusses the long and short-term changes to the Court's treatment of the Free Exercise Clause and the resulting effects on Establishment principles. Part VII concludes with a final plea for change.

---

14. *See* Saul Newman, *Stirner and Focault: Toward a Post-Kantian Freedom*, POSTMODERN CULTURE (Sept. 19, 2013), http://www.pomoculture.org/2013/09/19/stirner-and-foucault-toward-a-post-kantian-freedom/ [https://perma.cc/MSQ5-P6UQ]. Newman expands on Max Stirner's and Michel Foucault's criticism of Kantian morality, stating that "absolute categories of morality and rationality sanction various forms of domination and exclusion and deny individual difference." *Id.*

15. 521 U.S. 507 (1997).

16. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the Free Exercise Clause required the government to demonstrate both a compelling interest and that the law in question was narrowly tailored before it denied unemployment compensation to someone who was fired because her job requirements substantially conflicted with her religion).

## I. THE FIRST AMENDMENT AND RELIGION

The first sixteen words of the Bill of Rights comprise the Constitution's entire commentary on religion. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[17] Two types of religious concerns emanate from this language: establishment claims and free exercise claims.

Establishment claims ask, "What *may* the government do?" They attempt to determine if the government is impermissibly endorsing or promoting religion. Free exercise claims, on the other hand, scrutinize individual acts and provide successful claimants exceptions from otherwise valid laws. These claims ask, "What *must* the government do?" Consider, for example, an Orthodox Jewish family which is at a severe economic disadvantage because it cannot open its business on the weekend. The business cannot open on Sunday, as that would run afoul of the state's Sunday closing law.[18] But unlike other businesses, this business cannot open on Saturday, because Saturday—*Shabbat*—is a day of rest mandated by the family's religious principles. Is forcing individuals to choose between honoring a central practice of their faith or securing economic viability a constitutionally permissible choice?[19] *Must* the government make an exception to the Sunday closing law and allow Orthodox Jews to open businesses on Sundays?[20]

This paper will focus primarily on the Free Exercise Clause. It is important to note, however, that the two types of religious claims often brush up against one another in constitutional analysis. For instance, imagine a public university declines to permit a devoutly religious student group to hold meetings in campus spaces that are generally available to other student organizations. The religious students sue, claiming that the university policy unconstitutionally burdens their free exercise rights. The school, in response, claims that allowing religious students to use the facilities would amount to an endorsement of religion, which would violate establishment principles.[21]

---

17. U.S. CONST. amend. I.

18. Sunday closing laws, otherwise called Blue Laws, originated as compulsory observance of the Sabbath. Many of these laws are still in place, and have taken on a secular purpose—typically, a day of rest for society's benefit. *See Blue Laws By State 2023*, WORLD POPULATION REVIEW, https://worldpopulationreview.com/state-rankings/blue-laws-by-state [https://perma.cc/4B7T-KRTQ].

19. According to Justice Stewart's dissent in Braunfeld v. Brown, 366 U.S. 599 (1961), the answer is unshakably *no. Id.* at 616 ("[This] is a cruel choice" which "no State can constitutionally demand.") (Stewart, J., dissenting).

20. *See id.* (Warren, C.J.)

21. Such was the issue in Widmar v. Vincent, 454 U.S. 263 (1981), in which the Supreme Court held that a state may not exclude a group from a generally available public forum based on the religious content of the group's speech if the regulation excluding the group is not narrowly drawn to achieve a compelling state interest.

The Court's COVID-era religion cases are rife with this push-and-pull. In *Gateway City Church v. Newsom,*[22] the state of California argued that the relief sought by the religious practitioners—an exemption from California's occupancy limits—would amount to an unconstitutional endorsement of religion.[23] In turn, the practitioners argued that the State's *failure* to provide such a remedy would trample their free exercise rights.[24] This instance and many others illustrate the tension that often undergirds religious constitutional analysis.[25]

## II. PRE-*SMITH*: THE *SHERBERT* ERA

The Free Exercise Clause was incorporated against the states in 1940[26] and enjoyed a life of uncomplicated application for the next half-century.[27] The contentious mid-century debates involving school prayer and the siphoning of public funds to private Catholic education implicated only establishment concerns.[28] Before 1990, "[f]ree exercise doctrine in the courts was stable, the noisy pressure groups from the ACLU to the religious right were in basic agreement, and most academic commentators were content to work out the implications of the doctrine rather than to challenge it at its roots."[29] This doctrine was an analytical framework set forth by the Court in the 1963 case *Sherbert v. Verner*[30] and upheld nine years later in *Wisconsin v. Yoder*.[31] Together, these cases set the stage for how the Court approached the issue of free exercise when *Smith* landed on the Court's docket in 1989.

The *Sherbert* balancing test, as it came to be called, while not free of

22. 141 S. Ct. 1460 (2021) (mem.).

23. Br. for Newsom, as Amici Curiae Supporting Resp'ts, Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021) (mem.) (No. 20A138).

24. *Id.*

25. *See* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020) (rejecting the State's claim that allowing a scholarship program to be used to send students to private religious schools would violate the Establishment Clause, and instead holding that a failure to do so violated students' Free Exercise rights).

26. The Free Exercise Clause was incorporated against the states in Cantwell v. Connecticut*,* 310 U.S. 296, 303 (1940).

27. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

28. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (holding that a New York state school prayer program that was optional and non-denominational nonetheless violated the Establishment Clause because it amounted to an endorsement of religion and had the power to coerce non-observing individuals into participating); Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947) (upholding a New Jersey program insofar as it reimbursed parents of children who attended parochial schools for funds expended by those parents for bus transportation); Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968) (upholding a New York program of lending secular textbooks to private religious schools in compliance with the compulsory education law).

29. McConnell, *supra* note 27, at 1109.

30. Sherbert v. Verner, 374 U.S. 398 (1963).

31. Wisconsin v. Yoder, 406 U.S. 205 (1972).

criticism,[32] essentially accomplished its purpose: to weigh the relative interests and burdens of the parties and determine if the state could constitutionally deny the requested religious exemption. In *Sherbert*, a Seventh-day Adventist was fired from her job when she was asked to work on Saturday—the Sabbath Day for Adventists—and refused, citing her religious convictions.[33] Upon seeking unemployment compensation benefits, which she was ultimately denied, the unemployment commission held that the plaintiff's religious objection to working on Saturday did not satisfy the "good cause"[34] language in the South Carolina Unemployment Compensation Act.[35] On appeal, the South Carolina Supreme Court found that the "appellant's ineligibility infringed no constitutional liberties" because the unemployment statute "place[d] no restriction upon the appellant's freedom of religion."[36]

The Supreme Court reversed, holding first that the disqualification of benefits constituted a burden on the appellant's religion,[37] and second, that the government's interest in enforcing the eligibility provisions was neither sufficiently compelling nor narrowly tailored to justify the deprivation of the appellant's First Amendment rights.[38] The Court invoked the unconstitutional conditions doctrine, the theory that the state may not condition the availability ofbenefits on one's willingness to abstain from practicing a constitutionally protected right.[39] The Court in *Sherbert* held that the government is not *required* to pay for the costs of exercising a constitutional right—for instance, no one is *owed* a government-issued printing press just because one would like to engage in free speech. However, the government may not *deny* an individual a benefit that he would otherwise receive, on account of his choice to exercise a particular

32. Oleske, *supra* note 8, at 707. The "critical flaw" in Justice Brennan's *Sherbert* analysis is that "he skips over the threshold question of what *type* of government action implicates the Free Exercise Clause, simply assuming that it makes no constitutional difference whether a burden flows from an intentionally discriminatory law or a neutral one." *Id.*

33. *Sherbert*, 374 U.S. at 399.

34. *Id.* at 401. *See also* South Carolina Unemployment Compensation Act (stating that if the Unemployment Commission finds that the individual seeking benefits has failed to accept work "*without good cause*," the individual will remain ineligible for benefits for at least five weeks) (emphasis added). S.C. CODE ANN. § 41-35-120(5)(a) (West 2022).

35. S.C. CODE ANN. § 41-35-120 (West 2022).

36. *Sherbert*, 374 U.S. at 401.

37. *Id.* at 406 ("[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").

38. *Id.* at 406–07 ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation[.]' . . . No such abuse or danger has been advanced in the present case.") (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

39. *See* Speiser v. Randall, 357 U.S. 513, 518 (1958) ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech.").

right—which, in *Sherbert*, was the claimant's right to freely exercise her faith by observing the Saturday Sabbath.

Nine years later, the Court upheld this framework in *Wisconsin v. Yoder,* where parents in an Amish community were fined for violating a compulsory school attendance law that applied to all children aged sixteen and younger.[40] The Court held that Amish parents should be exempted from the statute. It offered two grounds for its decision: first, that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability[;]"[41] and second, that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[42] These ideas were later codified in 1993 in the Religious Freedom Restoration Act.[43]

For a so-called "balancing test," the *Sherbert* framework is markedly binary, asking its users to follow a string of yes-or-no questions before making a final determination.[44] Is there a substantial burden on the claimant's religious exercise? If not, the claimant loses. If yes, the next question is whether the law serves a compelling state interest. If not, the claimant wins. If yes, strict scrutiny applies. Is the challenged law the least restrictive means of advancing the government's interest? If so, the claimant loses. If not, the claimant wins.[45]

Despite the discrepancy between its "binary language and its balancing reality[,]" the *Sherbert* test proved workable.[46] The initial inquiry into the claimant's burden followed by a weighing of interests effectively protected individual religious liberty without handcuffing governing bodies to the whims of zealots. It is an homage to the foundational writings of John Locke[47] and the Court's initial contact with religious liberty in the late nineteenth century.[48] The parties in *Smith* made their arguments within this

40. Wisconsin v. Yoder, 406 U.S. 205 (1972).
41. *Id.* at 220.
42. *Id.* at 215.
43. Religious Freedom Restoration Act of 1993, H.R.1308, 103rd Cong. (1993).
44. Oleske, *supra* note 8, at 712–13.
45. *See id.* at 713.
46. *Id.*
47. *See* John Locke, *A Letter Concerning Toleration* (1689), *reprinted in* LOCKE ON TOLERATION, 25–26 (Richard Vernon ed., Micharl Silverthorne trans., Cambridge University Press 2010) ("You will say: so, if they want to sacrifice a child or – as was once said falsely of the Christians – engage in promiscuous conduct, should the ruler tolerate these things simply because they take place in a church service? I reply: these things are not permitted at home or in civil life, and therefore they are not permitted in a religious gathering or ritual, either. If, however, they should want to sacrifice a calf, that (I say) should not be forbidden by law. . . . [The] owner of the beast[] may kill his calf at home and burn in the fire any part of it he wishes. That does no harm to anyone, takes nothing from any other man's possessions. Hence cutting a calf's throat is likewise permitted in divine worship; it is for the worshippers to decide whether it pleases God. The ruler's only concern is to ensure that it does no harm to the commonwealth, and causes no loss to anyone else's life or property.").
48. *See* David v. Beason, 133 U.S. 333, 342 (1890), *abrogated by* Romer v. Evans, 517 U.S. 620

framework before the Court in 1989. But despite the *Sherbert* test's storied history and application, the Court in *Smith* took an unforeseen turn that permanently altered both the discrete elements of free exercise analysis and our societal approach to religion as it relates to secularism, government responsibility, individuality, and fairness.

## III. *SMITH:* ASHES BEFORE FLIGHT

> *Like many important cases,* Smith *was an unlikely vehicle for reconsideration of fundamental doctrine.* –Michael W. McConnell[49]

In *Employment Division v. Smith*,[50] two members of the Native American Church were fired from their jobs at a drug rehabilitation clinic for ingesting peyote, a strong hallucinogen used for sacramental purposes in religious ceremonies. The men applied for unemployment but were found ineligible for benefits because their firing was the result of "misconduct."[51] They sued, claiming that the Oregon law impermissibly impinged upon their right to free exercise and that the State's refusal to make an exemption for sacramental peyote use violated the First Amendment.[52] Oregon argued that its interest in regulating and prohibiting powerful narcotics was central to its responsibility of promoting public health and safety and that this interest was compelling enough to survive strict scrutiny.[53] The Oregon Supreme Court sided with the petitioners, and Oregon appealed.

Justice Scalia's majority opinion in *Smith* is widely considered to be one of the more confounding rulings by the Court, both at the time of its

---

(1996) ("The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights or others, and to prohibit legislation for the support of any religious tenets, or the modes of worthip of any sect.").

49. McConnell, *supra* note 27, at 1111.

50. 494 U.S. 872 (1990).

51. *Id.* at 874.

52. Claimants relied on the sacramental peyote exemption adopted by many states and codified in the federal Controlled Substances Act of 1970 (CSA), which provides in pertinent part:

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

21 C.F.R. § 1307.31. Claimants in this case sought an analogous exception from the Oregon State law, which itself was analogous to the federal Act.

53. McConnell *supra* note 27, at 1113 ("The briefs and arguments in the Supreme Court focused entirely on whether the state has a sufficiently compelling interest in controlling drug use to overcome the free exercise rights of Native American Church members. This may be considered a close question. Drug laws are undoubtedly important, and it is intuitively plausible that even closely cabined exemptions would seriously erode enforcement of the law.").

publication as well as today. It received instantaneous backlash and seemed to signal the death of the Free Exercise Clause.[54] Its major holding was that the Free Exercise Clause does not insulate individuals from neutral and generally applicable laws, even those that substantially burden one's religious exercise.[55] In *Smith*, this meant that the law at issue would be subject to rational basis review—the lowest tier of judicial scrutiny—absent a showing that it was intentionally hostile to the complainants' faith. Laws found not to be neutral or generally applicable, on the other hand, would be subject to strict scrutiny, the most demanding teir of judicial review.

This directly contradicted the Court's prior precedent and substantially lowered the likelihood of success for free exercise complainants.[56] While strict scrutiny requires a state to show that its interest is compelling and its method of achieving that interest is narrowly tailored, courts applying rational basis review seek only to determine whether a law is rationally related to a legitimate government interest.[57] Because most government laws are neutral towards religion and generally applicable, this doctrinal shift skews heavily in favor of governing bodies.

Attempting to square its decision with precedent, the Court carved out two categorical exceptions to its holding. The first category, and possibly the most notorious oddity of the decision, involved "hybrid rights."[58] The Court asserted, unconvincingly, that previous cases that turned on the traditional burden-balancing schema were distinct from *Smith* because they invoked a cocktail of constitutional rights, whereas *Smith* brings into question only free exercise.[59] Justice O'Connor rejected this premise, stating that the Court "endeavors to escape from [its] decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause[.]"[60] In the years following *Smith*, Justice Scalia's "hybrid rights" theory produced a slew of unanswerable questions that have hamstrung lower courts and been the subject of widespread criticism from the legal community.[61]

Cases involving unemployment compensation constitute the second category of exemption. And yet, the Court determined that *Smith* was not

54. *See generally*, Oleske, *supra* note 8.

55. *See generally Smith*, 494 U.S. 872 (1990).

56. In his article, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 11, Douglas Laycock discusses the *Smith* Court's abandonment of the *Sherbert* balancing test: "[t]he lines to be drawn [in *Smith*] do not depend on any balance of competing interests…it makes no difference what the state's policy is or what the religious practice is . . . [i]t makes no difference whether Oregon has forbidden peyote, or wine, or unleavened bread."

57. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

58. *Smith*, 494 U.S. at 882.

59. *Id.*

60. *Id.* at 896 (O'Connor, J., concurring).

61. See David L. Hudson, Jr. & Emily H. Harvey, *Dissecting the Hybrid Right Exception: Should It Be Expanded or Rejected?*, 38 U. ARK. LITTLE ROCK L. REV. 449 (2016).

such a case, despite its central unemployment compensation issue.[62] The Court explained that its "decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[63] This assumed that, if a state or state actor were to harbor animus toward a religious group, a system of individualized exemptions would be a convenient mechanism for exacting adverse treatment of that group.[64]

The glaring issue with this analysis is that cases involving individual exemptions comprise most of the Court's commentary on free exercise.

> In *United States v. Lee*,[65] for example, a procedural mechanism already existed for administering religious objections to social security taxation. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[66] the Forest Service was already required to study and consider the impact of the logging road on Native American religious practices as well as on the environment. Indeed, every decision to build a road must be made on a case-by-case basis. In *O'Lone v. Estate of Shabazz*,[67] prison officials had informally accommodated the religious needs of the Muslim prisoners but stopped doing so, apparently because the officials interpreted a prison directive to disallow the accommodation. These cases are typical.[68]

Perhaps to soften its (untenable) position, the Court concedes that it *had* employed the *Sherbert* test in contexts other than unemployment. However,

---

62. *Smith*, 494 U.S. at 885. According to the Court, Smith was not an employment compensation case because Smith sought to determine whether Oregon acted unconstitutionally in refusing to carve out an exception for sacramental peyote use in the criminal code. *Id.* at 876. This is true, the Court asserts, even though the fact pattern of Smith was uncannily similar to that of Sherbert—an unemployment case—and unemployment compensation was nexus of the issue in Smith. *Id.* at 884–85.

63. *Id.* at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

64. Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. REV. 913, 942 (2018) ("[C]ourts could presume an excessive risk of discrimination against religion from a law's system of individualized exemptions.").

65. 455 US 252, 260 (1982).

66. 485 US 439, 442 (1988).

67. 482 US 342, 346 (1987).

68. McConnell *supra* note 27, at 1123. McConnell goes further in his analysis and asserts that the individual governmental assessment distinction proffered by the *Smith* court cannot even explain the result in *Smith* itself:

> If *Smith* is viewed as an unemployment compensation case, the distinction is obviously spurious. If *Smith* is viewed as a hypothetical criminal prosecution for peyote use, there would be an individual governmental assessment of the defendants' motives and actions in the form of a criminal trial. The purported distinction thus has no obvious connection to either the circumstance of *Smith* or to the Court's precedents. Like the distinction of *Yoder*, it appears to have one function only: to enable the Court to reach the conclusion it desired in *Smith* without openly overruling any prior decisions.

*Id.* at 1124.

the Court explained that this should hold no weight because the plaintiffs in those cases were unsuccessful.[69] The counter to this argument is that one should not judge the robustness of a constitutional argument by calculating the "win-loss record of the plaintiffs" before the Court.[70]

The Court goes on to make a slew of transparently false statements regarding prior precedent and the ramifications of the *Sherbert* test.[71] It states that the *Sherbert* test is inapplicable to the present case[72] and that the Court had *never* applied the test in the context of an otherwise applicable law.[73] This is plainly false.[74] The Court in *Yoder* held that even a facially neutral law may "offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[75] The Court also upheld the compelling interest test three times in the year preceding Smith, including in two unanimous opinions.[76] Nonetheless, the Court in *Smith* found the exemption right urged by the complainants to be constitutionally anomalous,[77] and stated that any society that applied the *Sherbert* test "across the board"[78] would surely be "courting anarchy."[79]

Another curious defect in *Smith* is that it condemns only transparent hostility toward religion. But as Justice O'Connor points out in her concurrence, this situation would rarely occur:

> [F]ew states would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a

69. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 883 (1990).

70. *Id.* at 897 (O'Connor, J., concurring).

71. *See* Laycock, *supra* note 56, at 2–3 ("[T]he Court's account of its precedents in Smith is transparently dishonest.").

72. *Smith*, 494 U.S. at 885.

73. *Id.* at 878–79, 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation.").

74. *See* Laycock, *supra* note 56, at 2–3.

75. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

76. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990); Hernandez v. Comm'r, 490 U.S. 680 (1989); Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989).

77. *Smith*, 494 U.S. at 886. *See also* Oleske, *supra* note 8, at 719 ("*Smith* not only misrepresented the Court's free exercise precedent, it engaged in a misleading discussion of the Court's free speech precedent in order to bolster its claim that a religious-exemption right would be a 'constitutional anomaly.'").

78. *Smith*, 494 U.S. at 888.

79. *Id.* In her concurrence, Justice O'Connor derides the majority's melodrama, calling it a "parade of horribles" that "fails as a reason for discarding the compelling interest test" *Id.* at 902 (O'Connor, J., concurring). Justice Scalia snapped back in a footnote, saying, "It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.* at 889 n.5.

religious practice.[80]

Finally, the Court's decision is *Smith* is not just a departure from prior precedent, but from the Court's own limiting principles. *Smith*—"[t]he most important decision interpreting the Free Exercise Clause in recent history"—was rendered in "a case in which the question presented was entirely hypothetical, irrelevant to the disposition of the case as a matter of state law, and neither briefed nor argued by the parties."[81] The Court fundamentally changed the landscape of free exercise rights without being asked to do so. This decision by the Court was not just unusual; it shocked the conscience of the legal academy, as it runs afoul of the Court's commitment to judicial restraint.[82] On top of that, no additional briefing or reargument was requested by the Court, which is standard practice when the Court is considering departing from precedent.[83]

*Smith* stands for the proposition that, under the First Amendment, an individual whose exercise of faith has been burdened by a generally applicable state law has no legal recourse to escape the choice between faith and civic righteousness. It was for this reason that the legal community, the general public, and Congress acted strongly and swiftly to restore individual religious liberty to the highest ranks of constitutional protection. And it worked—until the Court stepped in once again.

## IV. IN THE AFTERMATH OF *SMITH*

### *A. Restoration*

The Religious Freedom Restoration Act of 1993 (RFRA) was passed shortly after and in direct response to *Employment Division v. Smith*.[84] It was an attempt by Congress to restore the compelling interest test established in *Sherbert* and "guarantee its application in all cases where free exercise of religion was substantially burdened."[85] RFRA garnered uncommonly large bipartisan support (passing the Senate by a vote of 97–3),[86] and was signed into law by President Clinton in 1993.[87]

---

80. *Id.* at 894 (O'Connor, J., concurring).

81. McConnell, *supra* note 27, at 1114.

82. *See* Carmella, *supra* note 8, at 1731 ("The [*Smith*] decision immediately provoked reaction (almost entirely negative) from the legal academy.")

83. McConnell, *supra* note 27, at 1113 (citing Patterson v. McLean Credit Union, 485 U.S. 617 (1988) and San Antonio Metropolitan Transit Authority v. Garcia, 469 U.S. 528 (1985)).

84. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-2000bb–4.

85. 42 U.S.C. § 2000bb(b)(1).

86. Religious Freedom Restoration Act of 1993, H.R.1308, 103rd Cong. (as passed by Senate, Oct. 27, 1993).

87. Religious Freedom Restoration Act of 1993, H.R.1308, 103rd Cong. (as signed by President Nov. 16, 1993). The goal of RFRA was to

[p]rohibit[] any agency, department, or official of the United States or any State (the

RFRA succeeded in returning free exercise analysis to its pre-*Smith* iteration, insofar as it stripped generally applicable laws—*most* laws, that is—of the heightened deference they enjoyed under *Smith.* In passing RFRA, Congress rebalanced the scales and gave religious claimants a better chance at succeeding in court.[88]

This was, however, short-lived. RFRA's reign came to an end in 1997 when Archbishop Flores of San Antonio sued local zoning authorities for denying him a permit to expand his church.[89] The zoning authorities cited the location of the Archbishop's church—a historic preservation district in which new construction was not allowed, as mandated by local ordinance—as grounds for denial of their permit.[90] More substantively, though, they argued that RFRA was unconstitutional insofar as it sought to override the preservation ordinance.[91]

In an opinion marked by judicial supremacy and hostility toward lawmakers,[92] the Court in *City of Boerne v. Flores* held that Congress exceeded its Fourteenth Amendment authority when it enacted RFRA.[93] The Court invalidated the statute as it applied to the states, citing its internal inconsistencies and contradiction of Separation of Powers principles.[94]

The implications of the Court's holding in *City of Boerne* are twofold. First, Congress's Section Five enforcement power is narrow. "The Fourteenth Amendment's history," the Court reasoned, "confirms the remedial, rather than substantive, nature of the Enforcement Clause."[95] Second, the Court rearticulated the role of the judiciary as the "illuminator of constitutionally protected rights."[96] Crucially, this second consequence has the added benefit of placing state legislatures at a significant advantage over religious claimants, once again.

---

> government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

*Id.*

88. Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits Brought by Private Plaintiffs*, 99 VA. L. REV. 343, 343 (2013) ("[I]ndividuals may rely upon RFRA to vindicate core religious rights not otherwise protected by the Constitution.").

89. City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

90. *Id.*

91. *Id.*

92. *Id.* at 517–20.

93. *See generally* City of Boerne, 521 U.S. 507 (1997).

94. *Id.* at 536.

95. *Id.* at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment. . . . The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause.").

96. R. Brent Hatcher Jr., City of Boerne v. Flores: *Defining the Limits of Congress's Fourteenth Amendment Enforcement Clause Power*, 49 MERCER L. REV. 565, 579 (1998).

To be clear, RFRA still exists today at the federal level. It is the mechanism by which Hobby Lobby argued for an exemption from the Affordable Care Act contraception mandate in 2014.[97] Interestingly, Congress could have restructured RFRA after *City of Boerne* in a way that was not violative of the Fourteenth Amendment, but it failed to do so, likely because of the 1996 landmark gay rights case, *Romer v. Evans*.[98] During this time, shifting social attitudes towards same-sex marriage and the LGBTQ+ community as a whole presented a challenge to lawmakers who had been previously enthusiastic about the passage of RFRA, as it grew clear that increasing protections for religious claimants could undermine the fledgling gay rights movement.[99]

In 2000, Congress passed a watered-down version of RFRA called the Religious Land Use and Institutionalized Persons Act (RLUIPA)[100] to "protect individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws."[101] Today, several states have passed their own state-level RFRAs.[102] And interestingly, it is the states *without* RFRAs—blue states, typically—that have become the target of the Court's ire since the beginning of Covid.

### *B. If You Can't Change the Game, Change the Rules*

The concepts of general applicability and neutrality as articulated in *Smith* are perhaps the most contentious component of the present Court's free exercise analysis. Specifically, much of the Court's division in the Covid-era cases has been over whether challenged laws are generally applicable. The paradigmatic case that examines these concepts is *Church of the Lukumi Babalu Aye v. City of Hialeah.*[103]

---

97. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

98. Romer v. Evans, 517 U.S. 620 (1996).

99. *See* Chaganti, *supra* note 88, at 367 ("The Left-Right coalition that secured enactment of RFRA disappeared as the gay rights movement began to make inroads into mainstream American consciousness and politics.") (footnote omitted). Notably, the ACLU switched sides between the passage of RFRA and the proposal of the Religious Liberty Protection Act (RLPA), which never went into law. While originally in support of RFRA, the ACLU changed course out of concern that "some courts may turn RLPA's shield for religious exercise into a sword against civil rights." Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. 81 (1999) (testimony of ACLU).

100. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc–5.

101. *Religious Land Use and Institutionalized Persons Act*, U.S. Dep't of Justice, https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act [https://perma.cc/MB66-TKQD] (last visited Feb. 16, 2023).

102. Twenty-three states have passed their own RFRAs, and nine states have created RFRA-like provisions through state-court decisions. *Religious Freedom Restoration Act Information Central*, BECKET LAW, https://www.becketlaw.org/research-central/rfra-info-central/ [https://perma.cc/YV9S-HEHB] (last visited Feb. 16, 2023).

103. Church of the Lukumi Babalu Aye v. City of Hialeah., 508 U.S. 520 (1993).

In the early 1990's, practitioners of the Santería faith—known as *creyentes*, or "believers"—announced plans to construct a church, museum and cultural center in the South Florida city of Hialeah.[104] Creyentes were known to engage in ritualistic animal sacrifice, which concerned local authorities. The Hialeah city council held an emergency meeting during which several derogatory comments were directed towards Santería and the creyentes.[105] The city then passed an ordinance prohibiting animal sacrifice and the possession of animals to be used in sacrificial ceremonies. The law contained several exemptions for restaurants, kosher slaughter, fisherman, and other handlers of animals and animal carcasses.[106] The resulting ordinance was applicable only to the creyentes.[107] The church sued.

The Court applied the new framework set forth in *Smith* dictating that any law found to be not neutral or generally applicable can survive strict scrutiny only if it is narrowly tailored and advances a compelling government interest.[108] According to the Court, the question of neutrality is meant to determine if the government is targeting religious conduct for discriminatory treatment.[109] General applicability asks if the government is attempting to advance a legitimate interest by burdening only religious conduct.[110]

The Court found that Hialeah's ordinance failed on both counts.[111] The government's interest was being advanced only through the suppression of religious conduct, with the intent to make unlawful a central practice of Santería. Crucially, the Court stated that the mere presence of an "adverse impact" upon a religious group "will not always lead to a finding of impermissible targeting."[112] I will address that argument later.

The claimants in *Lukumi* enjoyed an unexpected post-*Smith* victory at a time when *Smith* was thought to be the nail in the coffin of Free Exercise Clause. This makes the Court's present treatment of free exercise claims—which should, ostensibly, be operating under the same case law—even more confounding. One of the rallying calls in the aftermath of *Smith* was that most laws are neutral and generally applicable, and therefore, the likelihood of success weighs heavily in the government's favor. However, as the Court has demonstrated over the last two years, the concepts of neutrality and general applicability are much more vulnerable to debate than the harshest

104. *Id.* at 525-526.
105. *Id.* at 541.
106. *Id.* at 526–28.
107. *Id.* at 535 ("No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.").
108. *Id.* at 546.
109. *Id.* at 540.
110. *Id.* at 542–43.
111. *Id.* at 545 ("We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief.").
112. *Id.* at 535.

critics of *Smith* had imagined.

A notable development in the meaning of "neutrality" came in the form of a cake—or rather, the absence of one. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[113] the Court contorted the neutrality analysis from *Church of Lukumi* to determine if the relevant actors exhibited hostility towards religion—not whether *the law itself* had the intent or effect of burdening religion.[114] The Court never considered the question of whether the anti-discrimination law at issue was neutral or generally applicable—just whether the baker's beliefs were treated with due respect.

The Court answered this more abstract inquiry in the negative. The Colorado Civil Rights Commission, which had issued an intitial judgment in this case, demonstrated animus towards the religious defendant's beliefs, which formed the basis of his refusal to bake a wedding cake for the complainants, a gay couple.[115] The Court cited statements from the hearing transcript which included an assertion that religious belief alone could not outweigh any person's right to basic dignity when engaging in commerce.[116] Another commissioner stated that religion had historically been used to justify genocide and slavery, and that using religion to hurt others was a despicable practice.[117] The Court concluded that these statements disparaged religion to the point where Commission was not sufficiently neutral to meet the commands of the Free Exercise Clause.[118]

Interestingly, the only dissenting opinion rests its neutrality analysis solely upon the commissioners' comments, rather than the law itself.[119] Writing for the dissent, Justice Ginsburg, joined by Justice Sotomayor, argued that the comments were too far removed from the substantive elements of the proceedings to have any prejudicial effect.[120]

This was an oversight. Nothing in the cited precedent indicates that the subjective feelings of involved actors should bear on the question of whether an individual's free exercise rights were burdened by the law. And while the Court in *Lukumi* made clear that "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt,"[121] it is hard to imagine that the "masked" hostility to which the Court refers encompasses the comments of a commission lacking authority to promulgate law. It seems clear, given the facts of *Lukumi*, that "masked"

113. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Com'n, 138 S. Ct. 1729 (2018).

114. *Id.* at 1729 ("The neutral and respectful consideration to which Phillips was entitled was compromised here, however. 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.").

115. *Id.* at 1729–30.

116. *Id.* at 1729.

117. *Id.*

118. *Id.* at 1731.

119. *Id.* at 1748 (Ginsburg, J., dissenting).

120. *Id.* at 1751–52 (Ginsburg, J., dissenting).

121. Church of the Lukumi Babalu Aye v. City of Hialeah., 508 U.S. 520, 534 (1993).

hostility refers to the private feelings of legislators, who—armed with the power of the state and the electorate—may enact legislation targeting members of a protected class, merely because of their membership in that class.

There are whispers of Kant's categorical imperative framework in *Masterpiece Cakeshop*. Any disfavoring of religious interests is unacceptable, independent of the other interests at play. *Masterpiece Cakeshop* stands for the proposition that owing ultimate deference to religious actors is an "action to be of itself objectively necessary" for the continued functioning of society.

The Court bemoans the Commission's disparagement of religion, but conspicuously leaves the other injury—the baker's denial to produce a wedding cake for a couple on the basis of their sexual orientation—almost entirely untouched:

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.[122]

That the Court purports to have awareness of and appreciation for the dignity of gay persons at the beginning of its opinion, but nonetheless finds that the weightier injustice was the abstract mistreatment of religion by the Commission, perfectly forecasts the shift in the Court's attitude toward religion that has, until recently, been a jurisprudential black box. It would appear that even in 2018—before the pandemic, and absent two of the present Court's conservative members—hints that free exercise would eventually enjoy a status superior to that of other rights were present in the Court. And in no case were these hints as explicit as they were in *Fraternal Order of Police v. Newark.* [123]

In an opinion penned by then-Third Circuit Judge Samuel Alito, the court in *Fraternal Order* concluded that the police department's decision to permit a medical exemption from its no-beard policy and subsequently deny a religious exemption for two Muslim officers was "sufficiently suggestive of discriminatory intent" to trigger strict scrutiny analysis.[124] "[T]he medical exemption raises concern," Alito explains, "because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its

122. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.
123. 170 F.3d 359 (3d Cir. 1999).
124. *Id.* at 365.

general interest in uniformity but that religious motivations are not."[125]

The argument that any law which permits a secular exemption must also permit a religious exemption is referred to as a "Most Favored Nation" (MFN) approach. The term is borrowed from economics and originally referred to international agreements "in which a country enjoys to the best trade terms given by its trading partner(s)."[126] Today, it also refers to any system which mandates that all privileges bestowed upon one entity must also be awarded to another, regardless of circumstance.[127] The MFN framework is fueled by the assumption that rights enshrined in the Constitution deserve to be treated at *least* as well as other rights *in all situations*. This notion is not immediately troublesome, but can quickly become problematic upon application:

> Assume a court upholds a city ordinance requiring private parades traveling through city streets to obey traffic rules and stop at stop signs and red traffic lights. Assume also that the court has recognized that ambulances driving patients to the hospital are not subject to these limitations. Certainly the Free Speech Clause would not require that a caravan of car protestors receive the same favored traffic-law treatment provided to ambulances. Yet under a MFN approach, if the caravan consisted of religious worshippers—say, on the way to a funeral—would we conclude that unless the hearse and other mourners were allowed to speed through red lights that their religious liberty would be constitutionally disrespected and impermissibly demeaned on account of the relatively superior treatment of emergency medical vehicles?[128]

According to the present Court, the answer would have to be *yes.*

## V. THE COVID CASES

### *A. Phase One:* South Bay I and Calvary Chapel

The first Covid cases concerning free exercise hit the Court's docket before the confirmation of Justice Barrett. In what became known as "*South Bay I*,"[129] South Bay Pentecostal Church in Chula Vista, California, asked the Court for an emergency writ of injunction pending appeal. The Court, in an unsigned order, denied the Church's request over four dissenting

125. *Id.* at 366.

126. Kimberly Amadeo, *Most Favored Nation Status: Pros and Cons*, THE BALANCE (Nov. 29, 2020), https://www.thebalance.com/most-favored-nation-status-3305840 [https://perma.cc/7XJF-GYN4].

127. *Id.*

128. Amar & Brownstein, *supra* note 3.

129. *South Bay I*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).

justices, who interpreted California's decision not to place capacity limits on grocery stores, but instead on houses of worship, as clear evidence of discrimination against religion.[130]

An emergency writ of injunction pending appeal is an "extraordinary remedy"[131] that, in the words of Justice Scalia, "demands a significantly higher justification" than, for instance, an emergency stay.[132] According to the statute from which the Court's authority to issue such writs is sourced—the All Writs Act of 1789—the Court may *only* grant an emergency injunction in those rare cases in which the right to relief is "indisputably clear."[133]

Two months after its decision in *South Bay I*, the Court again denied a request for injunctive relief from a church—this time, Calvary Chapel in rural Nevada.[134] Nevada's indoor restrictions exempted casinos but not churches. This distinguishes it from *South Bay I,* in which it was argued that small businesses are of a different ilk than large churches, and thus should be subject to different rules. Casinos, on the other hand, are entirely like large churches insofar as people are sitting in close quarters for long periods of time.[135] The dissenting voices in *Calvary Chapel* were particularly incensed on this front ("There is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.").[136] Luckily for them, this would be the last time they would find themselves in the minority of a free exercise case.

Justice Ginsberg died 56 days after the Court's decision in *Calvary Chapel*, on September 18, 2020. Thirty-nine days later, Justice Amy Coney Barrett took her seat on the nation's highest court and its newly-minted conservative majority. Less than a month later she joined that majority in the first of many opinions that would eventually challenge much of what we knew about the Free Exercise Clause.

130. *Id.* at 1614–15 (Kavanaugh, J., dissenting).

131. Nken v. Holder, 556 U.S. 418, 428 (2009) (quoting Weinberger v. Romer-Bero-Barcelo, 465 U.S. 305, 312 (1982)).

132. Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n, 479 U.S. 1312, 1313 (1986) (Scalia, Circuit Justice, 6th Cir.1986).

133. *Id.*

134. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (Kagan, J.).

135. *Id.* at 2615 (Kavanaugh, J., dissenting).

136. *Id.* at 2609 (Gorsuch, J., dissenting).

### *B. Phase Two: Roman Catholic Diocese, the Comparator Dilemma, and an Overview of the Shadow Docket*

It was widely held that the law at issue in *Roman Catholic Diocese v. Cuomo* singled-out religion—that was not the problem.[137] The problem in this case, and in every free exercise case that came after it, hinged on one pesky word: *comparator.*

The New York law at issue in *Roman Catholic Diocese* imposed an occupancy limit—either 25% of maximum occupancy or ten people, whichever was fewer—on houses of worship in geographical areas with the highest rates of Covid infection.[138] This was more favorable than complete closure, which was the reality for all non-essential secular businesses in those areas, no matter the size.[139] Essential businesses, however, were permitted to remain open under a different, more lenient set of restrictions. The Roman Catholic Diocese of Brooklyn and the Agudath Israel Synagogue filed lawsuits, claiming that the state violated their free exercise rights by placing occupancy limits on houses of worship that were more restrictive than those placed on essential secular businesses.[140]

The requests for temporary restraining orders were denied by two Brooklyn district judges[141] as well as the Second Circuit Court of Appeals.[142] The Second Circuit's opinion adopted the perspective that the challenged law actually treated houses of worship *more* favorably than their non-essential comparators, and thus, it did not violate the Free Exercise Clause.[143] The Diocese, later joined by the Synagogue, appealed to the Supreme Court.

Their central claim was that the New York law violated the Free Exercise Clause because it treated *any* secular business—in this case, businesses deemed essential—more favorably than places of worship.[144] The lower courts erred, they argued, in comparing places of worship to non-essential businesses, instead of essential businesses.[145]

This case has two unique elements, each signaling a departure from the Court's past practices. The first lies in the case's procedural posture. By the time *Roman Catholic Diocese* reached the Court, New York had lifted the challenged restrictions so that neither the Diocese nor the Synagogue were

137. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).
138. *Id.*
139. N.Y. Exec. Order No. 202.68.
140. *Roman Cath. Diocese*, 141 S. Ct. at 65–66.
141. *See* Roman Cath. Diocese v. Cuomo, 495 F.Supp. 3d 118 (E.D.N.Y. Oct. 16, 2020).
142. *See* Agudath Israel of Am. v. Cuomo, 980 F.3d 222 (2nd Cir. 2020).
143. *Id.*
144. Emergency Application for Writ of Injunction at 25–29, Agudath Israel of Am. v. Cuomo, (2020) (No. 20A90).
145. *Id.*

subject to them.[146] To most, the complaining parties' request for an emergency injunction had become moot.

The Court's conservative bloc took a different view. Over two strongly-worded dissents, a majority agreed that not only was immediate relief essential,[147] but that New York's regulation violated the requirement of neutrality when it "single[d] out houses of worship for especially harsh treatment."[148] The Court rejected the mootness argument on the grounds that the Governor could change the occupancy restrictions at any time (the Diocese, in its reply brief, referred to this threat as the "Sword of Damocles").[149]

The second unique element of this case is the Court's apparent commitment to vagueness. One vital function of the Court is its role as the ultimate definer of terms. When a contested term or phrase comes before the Court, it behooves the Justices to offer a definition or application of that term as it relates to the case's specific facts. This practice allows for precision and consistency in future rulings, and signals to lower courts the boundaries and applicability of contested terms.

This was not the approach taken by the majority in *Roman Catholic Diocese.* Throughout its opinion, the Court manages to avoid defining the term "comparator" while implicitly rejecting the term's most logical application—that is, to refer to venues of similar risk.[150] New York's color-coded framework was, after all, a system of risk assessment. It delineated geographical regions by infection rates and subjected essential businesses in those areas to tiers of occupancy limits. Tiers were determined by each business's conduciveness to spreading the virus; relevant factors in this consideration included square footage, degree and type of ventilation, typical length of stay of each visitor, opportunity for social distancing, and others.

New York's law permitted houses of worship to remain open but subjected them to stricter occupancy limits than those imposed upon essential secular businesses. The reason for this is clear: houses of worship, and the activities that occur within them, produce conditions more favorable to infection than those present in most commercial spaces.[151] Religious services are typically indoors and often in historic, poorly-ventilated spaces.

---

146. *See* Opposition to Application for Writ of Injunction, *Roman Cath. Diocese*, 141 S. Ct. 63 (2020).

147. *Roman Cath. Diocese*, 141 S. Ct. at 66.

148. *Id.*

149. Reply Brief in Support of Emergency Application for Writ of Injunction, *Roman Cath. Diocese*, 141 S. Ct. 63 (2020) (No. 20A87), https://www.supremecourt.gov/DocketPDF/20/20A87/161295/20201119164437704_Diocese%20Reply%20TO%20FILE.pdf [https://perma.cc/TU9J-N363].

150. *Roman Cath. Diocese*, 141 S. Ct. at 76 (Breyer, J. dissenting).

151. *Id.* at 79 (Breyer, J. dissenting).

Services may last for extended periods of time. During this time, practitioners are likely seated close together and engage in chanting or singing, activities known to increase the risk of infection.[152] As Justice Breyer writes in his dissent "bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time."[153] Religious services, on the other hand are "among the riskiest activities" in terms of the likelihood of viral transmission."[154]

The Court's opinion and Justice Gorsuch's concurrence emphasize that the First Amendment prohibits treating houses of worship less favorably than comparable secular activities.[155] Justice Breyer agrees that this is the proper analysis, but nonetheless reaches the opposite conclusion. He argues that New York *had* treated houses of worship equally or more favorably than comparable secular activities.[156] Comparable activities are activities of comparable risk—for instance, "public lectures, concerts or theatrical performances"—which, under New York law, were subject to greater restrictions than houses of worship.[157] Like religious services, lectures and performances involve large gatherings of people in close quarters for extended periods of time. New York's law prohibited the operation of entertainment venues and academic halls while permitting houses of worship to remain open. Thus, the law treated religion *more* favorably than comparable secular businesses.

This was not the position of the Court's conservative majority. *Roman Catholic Diocese* makes clear that when the Court refers to a secular comparator, it does not mean an activity or venue of comparable risk, size, or kind. The Court is not concerned with whether grocery stores, with their ample square footage and industrial ventilation, carry a small risk of infection relative to churches and synagogues. The only thing that matters is that houses of worship are not treated as favorably as the *least* restricted businesses. It took the Court's conservative majority one case to confer Most Favored Nation status upon religious institutions.

After *Roman Catholic Diocese*, the Court issued six more emergency injunctions pending appeal, all involving alleged violations of the Free Exercise Clause.[158] Notably, the Court issued each decision from the

152. *Id.* (Breyer, J. dissenting).
153. *Id.* (Breyer, J. dissenting).
154. *Id.* (Breyer, J. dissenting).
155. *Id.* at 69 (Gorsuch, J., concurring).
156. *Id.* at 76 (Breyer, J., dissenting).
157. *Id.* Ironically, the Court in *Tandon* ended up using Breyer's rationale to strike down a California restriction on in-home gatherings. *See* Tandon v. Newsom, 141 S.Ct. 1294, 1296 (2021) ("Comparability is concerned with the risks various activities pose, not the reasons why people gather.").
158. *See* Agudath Israel v. Cuomo, 141 S. Ct. 889 (2020) (mem.); Harvest Rock v. Newsom, 141 S. Ct. 889 (2020) (mem.) [hereinafter *Harvest Rock I*]; South Bay Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.) [hereinafter *South Bay II*]; Harvest Rock v. Newsom, 141 S. Ct. 1289 (2021) (mem.) [hereinafter *Harvest Rock II*]; Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021) (mem.);

"shadow docket."

Although this paper will not delve extensively into the shadow docket, it is worth explaining what it is and how the Court has used it to subvert its own rules. Perhaps the best introduction to the shadow docket is a quick run-down of its counterpart, the merits docket. Cases on the merits docket typically receive extensive briefing and oral argument before the Court. Orders arising from the merits docket are often lengthy, thorough opinions detailing the Court's reasoning, along with any concurrences and dissents.[159]

The shadow docket, on the other hand, is a mechanism by which the Court rules on procedural matters, such as scheduling deadlines and issuing injunctions. Most orders from the shadow docket have little importance to anyone beyond the litigating parties and take the form of one-page rulings that offer little to no insight into the Court's reasoning.[160]

This is not a problem when the issue being addressed is a briefing deadline. However, it becomes problematic when the Court uses the shadow docket to issue decisions with major impact—for instance, reversing appellate court rulings, or striking down state laws—without more than a sentence addressing *why*.

The shadow docket has become more common in recent years. As Professor Steve Vladeck noted in his testimony before Congress, there were almost as many public 5-4 rulings on the shadow docket in the Supreme Court's October 2019 term (11) as there were on the merits docket (12).[161] Beyond its growing popularity among the justices, the shadow docket raises precedential concerns. As Professor Vladeck noted, "[n]ot only are these orders directly affecting millions of lives, but they're also starting to be cited as precedent by lower-court judges—even though the justices themselves have long insisted that they lack precedential value."[162]

The issue of the shadow docket would be entirely different if the orders arising from it were not consequential. But, as Professor Vladeck rightly states, "with more and more of these decisions affecting more and more of us on a regular basis, it would behoove the justices to do whatever they can to bring more of these rulings into the sunlight—and for Congress to consider more aggressive reforms if they don't."[163]

Use of the shadow docket in this way harms the credibility of the Court. It makes a process which was once transparent suddenly murky. One would

---

Tandon v. Newsom, 141 S. Ct. 1294 (2021) (mem.).

159. *See* Steve Vladeck, *The Supreme Court's Most Partisan Decisions Are Flying Under the Radar*, SLATE JURIS. (Aug. 11, 2020 12:12 PM), https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html [https://perma.cc/8YFR-RSBJ].

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

think that if the Court were to announce a new set of constitutional rules, it would do so with ample explanation. To do otherwise would put the Justices in danger of appearing motivated by personal beliefs rather than adherence to law. This would be especially unwise for an institution which derives much of its power from public perception, rather than the text of the Constitution.[164]

Or at least, that's what one would think.

### *C. Phase Three: Harvest Rock Through Tandon*

Although the primary focus of this section is on the Court's decision in *Tandon v. Newsom*, I first want to discuss an unprecedented procedural move made by the Court in *Harvest Rock Church v. Newsom*.[165] In *Harvest Rock I*, the Court turned the church's request for an emergency injunction into a writ of certiorari "before judgment"—that is, before an intermediate appeals court issues a judgment on the merits. A writ of certiorari before judgment is rare and typically reserved for only the most important cases—cases "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."[166]

But the Court did not stop there. It coupled the writ with a "GVR" order—that is, an order which *grants* the petition, *vacates* the judgment of the lower court, and *remands* the case for reconsideration. As Professor Vladeck writes,

> [I]n one (rather long) sentence, the Justices took the church's application for an emergency injunction, turned it into a petition for cert. before judgment, wiped away the district court's denial of a preliminary injunction, and commanded the lower courts to reevaluate whether *Harvest Rock Church* was entitled to such relief in light of the Supreme Court's cryptic (and New York-specific)

---

164. Stephen Breyer, Associate Justice of the United States Supreme Court, Keynote Address at the University of Pennsylvania Law School Commencement (May 19, 2003). In this speech, Justice Breyer alludes to this tension. He tells the famous tale of Andrew Jackson, who, after the Court ruled against the state of Georgia and in favor of the Cherokee nation in the famous case of Worcester v. Georgia, 31 U.S. 515 (1832), defiantly announced, "John Marshall has made his decision; now let him enforce it." Of course, Andrew Jackson notoriously went on to violate the Court's order and evict the Cherokees, thousands of whom died while traveling the Trail of Tears to Oklahoma.

In the same speech, Justice Breyer offers what I assume was an unknowing portent:

How did we get there—from Point A, 'John Marshall made his decision, now let him enforce it,' to Point B, widespread acceptance of the final decision even where we might whole-heartedly believe the decision is wrong? The answer lies in 200 years of a national history that has included a Civil War and many years of racial segregation. It lies as well in a legal profession that, over the years, has reached out to others, taught by example, instilled respect for the rule of law.

165. *Harvest Rock I,* 141 S. Ct. 889 (2020) (mem.).

166. SUP. CT. R. 11.

> analysis in *Roman Catholic Diocese*. Without issuing any relief directly or agreeing to take up the church's appeal, the Court effectively made the district court take a do-over—hinting, without actually saying, that *Roman Catholic Diocese* might require a different result.[167]

In addition to this unexplained decision, the Court also hints at a substantive, doctrinal shift: the Court's ruling in *Roman Catholic Diocese* was, as Professor Vladeck points out, specific to New York state. The ruling dealt with New York regulations classifying certain areas as "red" and "orange" depending on that area's calculated Covid risk and prescribing appropriate occupancy limits to businesses located in those areas. On the other hand, the California regulations challenged in *Harvest Rock I* have nothing at all to do with the Court's reasoning in *Roman Catholic Diocese,* and it is neither easy nor appropriate to superimpose the Court's brief, summary opinion in that case onto one that is wholly distinct in every salient way. Not to mention, it is generally understood—and the "Court has insisted for decades"[168]—that summary orders, "even those accompanied by short opinions, should be given far less precedential effect than merits rulings."[169]

The Court shed some light on this question after it handed down *South Bay II* and *Gateway Church*.[170] In *South Bay II*—another unsigned summary order—the Court struck down certain California state restrictions on indoor gatherings.[171] Weeks later, Gateway Church in San Jose challenged Santa Clara County's occupancy restrictions. The Court took offense to this, stating brusquely and without explanation[172] that the Ninth Circuit's decision to keep the County's regulations intact was both "erroneous" and "clearly dictated by *South Bay II,"*[173] despite the fact that two cases presented challenges to two distinct laws—one state, one county. As Professor Vladeck explains, "[h]ere, for the first time, the Court made explicit what its growing body of remand orders had only implicitly

---

167. Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 723–25 (2022).

168. *Id.* at 723.

169. *Id.* (citing Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 307 (1998) ("Although we have noted that '[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from,' we have also explained that *they do not* '*have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits*.'") (citation omitted) (emphasis added).

170. *South Bay II*, 141 S. Ct. 716 (2021) (mem.); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021) (mem.).

171. 141 S. Ct. 716 (2021) (mem.).

172. Vladeck, *supra* note 167, at 731 ("Although the Ninth Circuit had explained in detail why the county's rules were not subject to the same infirmities as those identified in the state's rules by the Justices' separate opinions in *South Bay II*, the Court, in (another) unsigned Friday night order, not only enjoined the county's restrictions without any detailed analysis, but criticized the Court of Appeals in the process.").

173. *Gateway City Church,* 141 S. Ct. at 1460.

assumed: Even unsigned emergency orders, like *South Bay II*, should be given precedential effect in the lower courts."[174]

In keeping with the novelty streak, the Court found yet another way to skirt doctrinal and procedural norms in its final Covid-era free exercise case. But before *Tandon v. Newsom* reached the Supreme Court, the Ninth Circuit, citing the Court's precedent in both *South Bay II* and *Gateway Church,* refused to issue an injunction barring California from imposing limitations on in-home gatherings.[175] No Covid-era precedent indicated that in-home gatherings, as opposed to gatherings in houses of worship, must be treated the same as or more favorably than commercial spaces.

California's restriction on in-home gatherings had *no exceptions.* All in-home gatherings, be it bible study, science club, or narcotics anonymous, were treated exactly the same under the law. Was this not what the Court had been vying for—honest, pure neutrality towards religion?

Apparently not. At this moment the Court graduated from a Most Favored Nation approach—which requires a comparator—to a categorical imperative approach—which does not.

In *Tandon*—yet another unsigned *per curium* opinion—the Court characterized the Ninth Circuit's ruling as "erroneous" and equated private homes to commercial spaces, despite evidence presented by the state that the two carry vastly different levels of risk.[176] Confoundingly, the Court attempted to rebuff the state's urging to treat only secular in-home gatherings as relevant comparators, stating that "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather."[177] There are two obvious problems with this. First, in-home spaces enable the spread of pathogens in ways that well-ventilated commercial spaces do not.[178] If the Court truly defined comparability by degree of risk, it would have ruled the other way. Secondly, this rationale echoes Justice Breyer's dissenting opinion in *Roman Catholic Diocese*, where the Court

174. *See* Vladeck, *supra* note 167, at 731.

175. Tandon v. Newsom, 992 F.3d 916, 920 (9th Cir. 2021) (mem.) ("[T]he record does not support that private religious gatherings in homes are comparable—in terms of risk to public health or reasonable safety measures to address that risk—to commercial activities, or even to religious activities, in public buildings.").

176. *Id.* at 1296–97. Confoundingly, the Court apparently attempts to rebuff the state's urging to treat only secular in-home gatherings as relevant comparators, stating that "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." *Id.* at 1298. There are two obvious problems with this. First, in-home spaces enable the spread of pathogens in ways that well-ventilated commercial spaces do not. If the Court truly defined comparability by degree of risk, it would have ruled the other way. Secondly, this rationale echoes Justice Breyer's dissenting opinion in *Roman Catholic Diocese*, in which the Court already dismissed the argument that religion was not being impermissibly disfavored because secular activities of comparable risk were subject to equal or more stringent restrictions than houses of worship.

177. *Id.* at 1296.

178. Answering Brief for Defendants-Appellees at 26–27, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (No. 20A151).

dismissed the argument that religion was not being impermissibly disfavored because secular activities of comparable risk were subject to equal or more stringent restrictions than houses of worship.[179]

Finally, the Court tacked one last hypocritical blow onto its opinion, noting that *Tandon* was "the *fifth* time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise."[180] Apparently the Ninth Circuit's unwillingness to breathe precedential value into unexplained summary orders—a practice, which, to reiterate, has *never* been done before, and can at times be so speculative as to become untenable—is, to the Supreme Court of the United States, quite annoying.

## VI. ANALYSIS

Several constitutional scholars have noted the Court's adoption of an MFN approach to free exercise; however, *Tandon* makes it clear that the Court no longer relies on comparators to justify its predilection for religious liberty. The Court has fully embraced the right to free exercise as a right superior to all others—in other words, it has taken a categorical imperative approach to religious liberty.

Three conclusions flow from this fact: first, we no longer know where the line separating free exercise and establishment should be drawn. Second, in treating the existence of any secular exemption as *de facto* proof of hostility toward religion, the Court has repurposed *Smith* to be a vehicle for free exercise redemption. And third, laws without exemptions may still be found to violate the Free Exercise Clause, as they do not provide for favorable treatment of religious institutions and practitioners.

### *A. What to Do About Establishment*

The Court is seemingly of the opinion that the absence of favorable treatment toward religion is proof of targeted animus.[181] This begs the question—how, then, will the Court treat establishment issues?

Establishment Clause doctrine is a distinct and complex realm of religious jurisprudence beholden to its own precedents, virtues, and inconsistencies. But because free exercise and establishment are coupled, significantly altering one doctrine necessarily disrupts the other. Theoretically, establishment claims begin at roughly the place where free exercise ends—save a small grey area in the middle where there is "play in the joints," i.e., where some actions are allowed under establishment, but

179. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).
180. *Tandon*, 992 F.3d at 1298 (emphasis added).
181. *See supra* text accompanying notes 151–56.

not mandated under free exercise.[182] The Court has consistently legitimized states' interests in avoiding entanglement with religion, even going so far as to say that this interest is substantial.[183]

Given the Court's new attitude toward religious liberty, an equally energetic take on the Establishment Clause seems unlikely, if not plainly impossible. The present Court is certainly less likely to declare that states have a "substantial" interest in avoiding establishment concerns—at the moment, it is unclear if the Court would admit that states have *any* interest in it. Indeed, the present Court seems content to force states to become entangled in religious issues. As stated above, the Court in *Tandon* found California's blanket in-home restriction to be unconstitutional simply because it did not affirmatively carve out an exemption for religious worship.[184] Similarly, the space for "play in the joints" has likely ossified, and whatever grey area once existed between free exercise and establishment has likely been given to the former. This is evidenced, too, by the Court's strict safeguarding of religious liberty. Given the Court's plain distrust of the states, it is unlikely that the Court would defer to them to draw constitutional lines implicating free exercise rights.

### *B. Smith: From Ashes, Flight*

*Smith's* transformation into a vehicle for free exercise exemptions is a dizzying turn of fact. Once bemoaned as the death of free exercise, *Smith* now has new life, thanks to seriously creative reinterpretation.

In the aftermath of *Smith*, the same sentiment was repeated over and over—practically *all* laws are neutral and generally applicable, so how will religious claimants *ever* prevail? The answer, apparently, was to change the terms. No longer can we assume that a law with reasonable secular exemptions (like the ambulance hypothetical) is neutral or generally applicable. Under present doctrine, that law would be proof of impermissible hostility toward religion if it did not include an equal or more favorable religious exemption.[185]

This new schema allows insincere claimants to shoehorn their way into a jurisprudentially sound religious exemption. The Court in *Smith* held that where there is a generally applicable law *absent animus toward religion*, a claimant would need to overcome the government-friendly standard of rational basis review in order to prevail.[186] It appears now, that the Court,

182. Locke v. Davey, 540 U.S. 712, 718–19 (2004).

183. *Id.* at 725 ("The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars.").

184. *See generally Tandon*, 992 F.3d 916 (9th Cir. 2021).

185. *See generally* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); *Tandon*, 992 F.3d 916 (9th Cir. 2021)*; Fraternal Order of Police*, 170 F.3d 359 (3d. Cir. 1999).

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

instead of picking a fight with low-level scrutiny, simply lowered the bar for animus.

## VII. CONCLUSION—AND A HUMBLE PLEA

There is no good answer to the oft-repeated question, "What can we expect of the Court now?" While the Court has always been a political institution (not the paragon of impartiality penned into Article III), the Court of today has succeeded in reaching new levels of partisanship. Indeed, the radical rise of the shadow docket, the unprecedented issuance of emergency injunctions, and the Court's apparent comfort with inventing judicial procedures (and flouting settled ones) would lead to no other conclusion.

My hope going forward is that the Court might course-correct and restore free exercise to its rightful place: high up on a shelf, nestled between other, equally fundamental rights.