FREE EXERCISE PARTISANSHIP

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This Article presents new data demonstrating that, in contrast to earlier periods, recent judicial decision-making in free exercise cases tracks political affiliation to a significant degree. The trend toward increased free exercise partisanship is starkly manifested by free exercise cases borne out of the COVID-19 pandemic: a survey of federal court decisions pertaining to free exercise challenges to prohibitions of religious gatherings during the pandemic reveals that 0% of Democratic-appointed judges sided with religious plaintiffs, the majority (66%) of Republican-appointed judges sided with religious plaintiffs, and 82% of Trump-appointed judges sided with religious plaintiffs. But while religious challenges to COVID-19 lockdown orders have thrown free exercise partisanship into sharp relief, the trend of increased partisanship in free exercise jurisprudence actually predates the onset of the pandemic.

This Article makes several contributions. One is empirical: it offers an original dataset that tracks every free exercise case from 2016 (the endpoint of previous surveys of free exercise cases) until 2021. Another is historical: it tells the story of how free exercise became politically controversial. A third is doctrinal: it reveals the deep ambiguity at the heart of free exercise doctrine, which this Article argues has enabled the rise in free exercise partisanship. A final one is jurisprudential: it shows the relationship between doctrinal clarity and partisanship, which has implications for constitutional law writ large.

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INTRODUCTION

The COVID-19 pandemic ushered in a spate of free exercise challenges to local governments' stay-at-home orders. A close examination of over one hundred federal court adjudications of these challenges reveals a telling phenomenon: in deciding free exercise challenges by religious plaintiffs to COVID-19 lockdown orders, 0% of Democratic-appointed judges sided with religious plaintiffs, 66% of Republican-appointed judges sided with religious plaintiffs, and 82% of Trump-appointed judges sided with religious plaintiffs.[1]

Such data belie a notion commonly voiced by Supreme Court Justices of all stripes—that politics has no bearing on their judicial decision-making. Justice Breyer, previewing a sentiment he would soon advance in a book defending the institution of the Court,[2] explained in a 2021 Harvard Law School lecture that Justices are anything but "junior-level politicians" and it is "jurisprudential differences" alone that "account for most, perhaps almost all, judicial disagreements."[3] Months later, Justice Barrett made it known to an audience at the University of Louisville that the "[C]ourt is not comprised of

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1 *See infra* note 72 and accompanying text.

2 STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS (2021).

3 Harvard Law School, *The Authority of the Court and the Peril of Politics with Stephen G. Breyer, Associate Justice of the Supreme Court of the United States*, YOUTUBE (Apr. 6, 2021), https://www.youtube.com/watch?v=BHxTQxDVTdU [https://perma.cc/LYZ8-BDWP].

a bunch of partisan hacks,"[4] and Justice Thomas clarified in a Notre Dame lecture that it is merely a myth, perpetuated by the "media," that judges decide cases according to "personal preference."[5]

These statements espouse what is known as the "legal model's"[6] view that judges "stick to law, judgment, and reason in making their decisions and . . . leave politics, will, and value choice to others."[7] At the opposite end of the spectrum is the view that proclamations of judicial objectivity and neutrality are empty at best. The "attitudinal model," long touted by political scientists,[8] propounds that judges' decisions should be understood primarily—if not exclusively—as expressions of political preference, with little to no regard for law.[9]

Previous empirical studies that tested whether and to what extent judges decide cases based on their political prefer-

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4 Mary Ramsey, *Justice Amy Coney Barrett Argues US Supreme Court Isn't 'a Bunch of Partisan Hacks,'* LOUISVILLE COURIER J. (Sept. 12, 2021), https://www.courier-journal.com/story/news/politics/mitch-mcconnell/2021/09/12/justice-amy-coney-barrett-supreme-court-decisions-arent-political/8310849002/ [https://perma.cc/663M-WXTR].

5 University of Notre Dame Center for Citizenship and Constitutional Government, *Justice Clarence Thomas: 2021 Tocqueville Lecture*, YOUTUBE (Sept. 20, 2021), https://www.youtube.com/watch?v=2r8mYBcvG58&t=1s [https://perma.cc/QBD4-9M73]. Also consider Chief Justice Roberts's famous remark made during his confirmation hearing that the judicial role is one of a neutral umpire "call[ing] balls and strikes." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee for Chief Justice of the United States Supreme Court). And how at Justice Sotomayor's confirmation hearing, she consistently rejected the notion that her personal experiences or perspectives would play any role in her work. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 70–72, 78, 123–27, 406 (2009) (statements of Sonia Sotomayor, Nominee for Associate Justice of the Supreme Court of the United States). And finally, how, when pressed about her politics, Justice Kagan was adamant that "it's . . . law all the way down." Paul Kane, *Kagan Sidesteps Empathy Question, Says 'It's Law All the Way Down,'* WASH. POST (June 29, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/06/29/AR2010062903935.html [https://perma.cc/W2U5-4NJ7].

6 *See infra* notes 26–28.

7 Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 64–65 (1992).

8 *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 17, 86 (1993) (describing the attitudinal model and the related "myth" that judges are "objective, dispassionate, and impartial").

9 *See, e.g., id.* at 86 (describing the Civil Rights Cases as a mechanism for legitimating the Justices' own beliefs in white supremacy).

ences[10] usually opted not to focus on free exercise cases,[11] and the select few that did focus on them concluded that free exercise jurisprudence is devoid of partisanship. For example, a 2013 study by two noted legal empiricists, Professors Gregory Sisk and Michael Heise, showed that, between the mid-1990s and mid-2000s, there was no discernible difference between how Republican- and Democratic-appointed judges decided free exercise cases.[12] And Professors Sepehr Shahshahani and Lawrence Liu, who later expanded on Professors Sisk and Heise's dataset, found that "partisan affiliation is . . . nowhere near significant in [free exercise] cases."[13]

Yet the tide seems to have turned. Free exercise is no longer uncontroversial, and recent judicial decision-making in this space tracks political affiliation to a significant degree.[14] This Article explains how and why free exercise partisanship[15] has increased so drastically and identifies a potential pathway

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10 *See, e.g.*, C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355, 355 (1981) (analyzing Supreme Court split decisions in cases involving "civil rights and liberties, and economics"); Jeffrey A. Segal, *Judicial Behavior*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 19, 19 (Gregory A. Caldeira, R. Daniel Kelemen & Keith E. Whittington eds., 2008) (discussing "judicial behavior, *stare decisis*, text and intent, judges' attitudes, the behaviour of the U.S. Supreme Court, judicial decisions in the lower courts, and separation of powers"); Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. POL. 1212, 1212 (2010) (providing an empirical explanation of the "'hierarchy postulate': that the effect of judges' policy preferences on their decisions increases as one moves up the judicial hierarchy").

11 *See infra* notes 33–43 and accompanying text.

12 Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1374 (2013) [hereinafter Heise & Sisk, *Free Exercise*]; *see also infra* note 50.

13 Sepehr Shahshahani & Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeals*, 14 J. EMPIRICAL LEGAL STUD. 716, 731 (2017).

14 *See infra* notes 68–74 and accompanying text.

15 Of course, other terms could be used instead of "partisanship," including and perhaps especially "ideology." What I mean by partisanship here is merely the correlation of adjudicative outcome and the political party of the president who appointed the judge in question. There well might be other factors at play for these outcomes other than "political" views in the narrower sense of the word, such as general interpretive philosophy. *See* Carol Sharp & Milton Lodge, *Partisan and Ideological Belief Systems: Do They Differ*, 7 POL. BEHAV. 147, 147 (1985) (defining the terms "partisan" and "ideological" and concluding based on an empirical study that the meanings of these terms tend to be similar for most people, especially "sophisticated subjects"); *see also* Leah Litman, *"Hey Stephen,"* 120 MICH. L. REV. 1109, 1117–18 (2022) ("Judges track the values of the governing regime, particularly the regime that appointed them . . . . It doesn't really matter why a justice is reaching those decisions—be it jurisprudential philosophy or political views.").

toward decreased judicial partisanship in lower courts.[16] Though free exercise partisanship has been thrown into sharp relief by cases challenging lockdown orders, the trend toward partisanship in the free exercise space actually predates the onset of the pandemic. This Article argues that the devolution towards partisanship has been enabled by ambiguity in the relevant free exercise doctrine—specifically, confusion concerning the meaning of "religious discrimination."[17] It shows how religious opponents of recent progressive initiatives, such as LGBTQ rights and contraception mandates, have invoked free exercise as a means for securing exemptions from any enforced participation in the progressive initiatives.[18] The Article further highlights how, in doing so, religious plaintiffs have availed themselves of an expansive interpretation of "religious discrimination" under the Free Exercise Clause. Left unconstrained by indeterminate doctrine, judges adjudicating these cases have been able to decide them according to their political preferences.

Many scholars and jurists have lauded the concept of judicial minimalism. They urge courts to resolve cases by issuing narrow rulings, determining as little as is required to resolve the action at hand.[19] Proponents of this "increasingly popular view" often argue that it serves a stabilizing force in the law.[20] The law will not radically shift if judges commit to evolving it only incrementally. Another justification—indeed, "the single most widely emphasized argument for [m]inimalism"—is that minimalism protects the judiciary from politicization, "leav[ing] sovereignty to the democratic branches of government."[21] Often missing from the accounts of minimalism advanced by its advocates is the recognition that when higher courts leave

16 *See infra* Part V.

17 *See infra* Part IV.

18 *See infra* subparts IV.A–B.

19 *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–4 (1999) [hereinafter ONE CASE AT A TIME] (defining judicial minimalism and describing its potential benefits); CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS 38, 41–43 (2009) ("If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more." (quoting Chief Justice John Roberts, Commencement Address at the Georgetown University Law Center (May 21, 2006))); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 16–20 (2007) (describing Professors Michael Dorf, Michael Seidman, Rachel Barkow, Reva Siegel, Robert Post, Mark Tushnet, and others as constitutional minimalists).

20 Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347, 347, 359 (2010) (describing how judicial minimalism can "foster[ ] predictability and stability").

21 *Id.* at 361.

important doctrine in a state of ambiguity, those courts may in fact be *perpetuating* partisanship in judicial decision-making. This Article shows how.[22] In light of that showing, it argues that engaging in judicial minimalism should not be taken for granted as the preferred approach when the doctrine at issue is unsettled and affects highly politicized cases.[23] Informatively, after the Supreme Court eventually weighed in on the COVID-19 free exercise controversy and provided some—even if muddied—direction, the partisanship between Republican- and Democratic-appointed judges dropped by over half.[24]

This Article proceeds in five Parts. Part I reviews previous scholarship on the role judges' political leanings play in their decision-making. Part II comprises the results of my survey of every federal court decision involving a constitutional free exercise challenge from the beginning of 2016 until 2021. Part III delves into the history of the general perception of free exercise to understand how it transformed from an uncontroversial doctrine to the more provocative issue it has become today. Part IV examines the history of free exercise's interpretation to understand how it (a) became ambiguous;[25] (b) permitted plaintiffs to wield an expansive definition of religious discrimination to challenge progressive initiatives; and (c) allowed judges to inject heightened levels of partisanship into their decision-making. It then explores how these phenomena have manifested in the context of COVID-19 free exercise cases. Finally, Part V argues that the recent COVID-19 free exercise cases provide valuable lessons in the consequences of leaving important doctrine in a state of ambiguity.

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22 *See infra* section IV.C.3.

23 *See infra* notes 344–358 and accompanying text.

24 After *South Bay United Pentecostal Church v. Newsom* was decided in May 2020, the differential between Republican-appointed and Democrat-appointed judges shrunk from 94% to 29%. *See infra* notes 311–318 and accompanying text.

25 On some level, all law is ambiguous. But not all law is ambiguous to the same degree. *See* Sullivan, *supra* note 7, at 26 (noting that Supreme Court Justices often split "over the choice of rules or standards—over whether to cast legal directives in more or less discretionary form"). Other words could be used to describe the phenomenon of ambiguous law, such as "indeterminate," "malleable," and "unsettled." These other terms are either the cause ("unsettled") or the symptom ("malleable") of ambiguous law. *See also* Timothy Bath, *Ambiguity and Indeterminacy: The Juncture*, 38 COMPAR. LITERATURE 209 (1986) (discussing the intersection and connotations of the terms "ambiguous" and "indeterminate" in a literary context).

I
PREVIOUS APPROACHES TO JUDICIAL PARTISANSHIP

Two views of the relationship between adjudication and politics predominate. According to the "legal model," "decision-making [occurs] according to *rule*," which does not allow for individuating judicial factors.[26] Judicial decisions generally provide the same outcome, irrespective of the particular judge deciding the case, as judges are expected to rise above personal interests and political inclinations.[27] The model calls for judges to "objectively and impersonally decide[ ] cases by logically deducing the correct resolution from a definite and consistent body of legal rules."[28] At the opposite end of the spectrum is the view that judges' decisions must be understood as expressions of their political preferences, with little to no regard for "law,"[29] and that judges are for the most part "single-

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26 Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (discussing formalism as a legal model that revolves around rule-based decision-making).

27 According to the legal model, judges are "protected from political pressures" and therefore are able and expected to be "impartial and dispassionate." TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 15 (1999); *see also id.* ("Legitimacy results from the judge's adherence to this special process of dialogue and independence—in short, in behaving like a judge and not a legislator." (internal quotation marks omitted)); J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 167 (1981) ("[P]rofessional norms shield judges' decisions from policy and other personal preferences so that results conform to law.").

28 John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 87 (1995). Legal decision-making according to this model involves objectively and neutrally using various tools—including statutes, precedents, and logical reasoning—to reach legal conclusions. As Archibald Cox puts it, it means judges employ "disinterested and . . . objective standards" that pursue "impartial justice *under law*." ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 106, 109 (1976). Thus, "many [legal scholars and judges] would reject out of hand the idea that the justices' policy preferences are the primary basis for [their] decision[s]." STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 131 (1996); *see also* ROBERT A. CARP, RONALD STIDHAM & KENNETH L. MANNING, JUDICIAL PROCESS IN AMERICA 299 (8th ed. 2011) ("Most judges would sooner admit to grand larceny than confess a political interest or motivation."); Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307, 307–08 (1987) ("Legal doctrine is a real force, judges follow it, and they decide all but a small fraction of the cases that come before them in accordance with what they perceive to be the controlling legal rules."); Patrick Wiseman, *Ethical Jurisprudence*, 40 LOY. L. REV. 281, 293 (1994) ("Judges certainly do not experience the law as imposing no constraints.").

29 *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002) ("Th[e] model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 220–24 (1999) ("[A]ctual voting patterns of federal judges confirm the effects of partisan-

minded and self-interested, picking winners and losers in a political and moral vacuum."[30] Although those who subscribe to this model sometimes acknowledge that subconscious biases play a significant role,[31] the policy-motivated judge is nonetheless often understood to represent "the very definition of judicial tyranny."[32]

A study by Professor Cass Sunstein and colleagues in the mid-2000s sought to resolve the question of whether and to what extent judges decide cases based on political preference.[33] Professor Sunstein and his colleagues surveyed 4,958 published majority three-judge panel decisions[34]

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ship on judicial decisionmaking."). *See also* Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1640–42 (1998) (reporting ideological decision-making on en banc panels); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1718–19 (1997) (describing ideological decision-making in environmental appellate cases). Of course, these models are not the only ways that political scientists and legal scholars think about judicial decision-making. The attitudinal model's chief competitor in political science—the strategic model—suggests that judges behave strategically to achieve results as close as possible to their preferred outcome but do so operating according to constraints imposed by the need for agreement among colleagues and concerns about potential responses of other governmental actors. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 10 (1998). While somewhat more nuanced than the attitudinal model, the strategic model still assumes that judges are primarily motivated by ideological considerations, not law. Yet another view is that of the judicial utility function. For example, Richard Posner suggests that judges are influenced by

> personal dislike of a lawyer or litigant, gratitude to the appointing authorities, desire for advancement, irritation with or even a desire to undermine a judicial colleague or subordinate, willingness to trade votes, desire to be on good terms with colleagues, not wanting to disagree with people one likes or respects, fear for personal safety, fear of ridicule, reluctance to offend one's spouse or close friends, and racial or class solidarity.

RICHARD A. POSNER, OVERCOMING LAW 130–31 (1995). For a helpful overview of the judicial utility function, see LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 23 (1997).

30 PERETTI, *supra* note 27, at 134.

31 *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2174–75 (1998) (discussing how empirically observable tendencies do not necessarily imply conscious action by judges and may be the product of subconscious tendencies).

32 PERETTI, *supra* note 27, at 73.

33 Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 302–03 (2004); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

34 *See* Sunstein, Schkade & Ellman, *supra* note 33, at 311. On the factors and influences motivating judges not to publish a decision, see Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 112 (2001).

and the 14,874 associated individual judges' votes to test whether their votes correlate with the prevailing preference of the political party of the president who appointed them.[35] Professor Sunstein and his colleagues hypothesized that if such correlation were detectable, it would most likely manifest in "controversial" cases.[36] They therefore reviewed cases involving issues ranging from racial discrimination (obviously controversial) to piercing the corporate veil (less obviously controversial). In total, Sunstein and his colleagues covered fourteen subsets of "controversial" categories of cases.[37]

The study concluded that in controversial cases, Democratic-appointees issued a "liberal vote" 51% of the time, whereas Republican-appointees did so 38% of the time, a difference of 13%—a difference Professor Sunstein and his colleagues rightly called "not huge."[38] At its most extreme, in affirmative action cases, the differential between Republican- and Democratic-appointed judges was 26%—Republican-appointees cast a vote in favor of affirmative action 48% of the time and Democratic-appointees cast a vote in favor of affirmative action 74% of the time.[39]

Others have corroborated the results generated by Professor Sunstein and his colleagues. For example, legal empiricist Professor Frank Cross summed up his comprehensive study of federal appellate judges with the observation that while ideology does sometimes correlate with judicial decision-making, "the measured effect size for ideology is always a fairly small one."[40] Similarly, Professor Sisk, another legal empiricist, did not find that "any extralegal factor—ideology, judicial background, strategic reaction to other institutions, the nature of

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35 Sunstein, Schkade & Ellman, *supra* note 33, at 311.

36 *Id.* at 304 ("[The authors] examine[d] a subset of possible case types, focusing on a number of controversial issues that seem especially likely to reveal divisions between Republican and Democratic appointees."); *see id.* at 306 ("The pool of cases studied here is limited to domains where ideology would be expected to play a large role.").

37 The cases involved

> abortion, capital punishment, the Americans with Disabilities Act, criminal appeals, takings, the Contracts Clause, affirmative action, Title VII race discrimination cases brought by African-American plaintiffs, sex discrimination, campaign finance, sexual harassment, cases in which plaintiffs sought to pierce the corporate veil, industry challenges to environmental regulations, and federalism challenges to congressional enactments under the Commerce Clause.

Id. at 311–13 (footnotes omitted).

38 *Id.* at 307.

39 *Id.* at 319.

40 FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 38 (2007).

litigants, or the makeup of appellate panels—explains more than a very small part of the variation in outcomes" in the cases he studied.[41]

While these studies speak to the extent to which politics influence judicial decision-making in general, they say little about free exercise cases. Indeed, none of them contains any focused analysis of such cases. They instead collapse related categories of cases together,[42] or, as in the case of Professor Sunstein and his colleagues, they divide cases by category but omit free exercise cases as a category altogether (presumably on the theory that they are not "controversial," which was their metric for including specific categories of cases in their study).[43]

The exception is Professors Sisk and Heise.[44] In one study, Professors Sisk and Heise surveyed Establishment Clause

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41 Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 877 (2008) (reviewing CROSS, *supra* note 40); *see also* Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 856–57 (2006) (finding no significant ideological influence in a study of all non-unanimous cases decided by one federal circuit over a several-year period).

42 *See, e.g.*, Robert A. Carp, Donald Songer, C.K. Rowland, Ronald Stidham & Lisa Richey-Tracy, *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 299 (1993) (grouping cases into "three broad issue dimensions common to social science research: criminal justice, civil rights and liberties, and labor and economic regulation"); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 50–51 (1986) (grouping cases according to whether they involve "defendants' or prisoners' rights; females or members of racial minorities in cases of alleged sexual or racial discrimination; claimants of First Amendment protection . . . ; labor unions in labor-management disputes; claimants of welfare or disability benefits in cases . . . ; and the personally injured or the estates of wrongful death victims in personal injury and wrongful death suits"); Ronald Stidham, Robert A. Carp & Donald R. Songer, *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16, 19–20 (1996) (grouping cases involving "criminal justice, civil rights and liberties, and labor and economic regulation").

43 *See* Sunstein, Schkade & Ellman, *supra* note 33, at 304.

44 *See* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 544 (2004); Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1026–28 (2005); Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1204 (2012) [hereinafter Sisk & Heise, *Ideology*]; Heise & Sisk, *Free Exercise*, *supra* note 12, at 1374. Other important studies focus on the influence of judges' personal religious background on their decision-making. *See, e.g.*, Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 505 (1975) (reporting that Catholic judges tended to be more liberal than Protestant judges on economic issues, although the correlation was weak); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Crimi-*

cases;[45] in another, they analyzed free exercise cases;[46] and in a third, they examined religious education cases.[47] They concluded that while there is a statistically meaningful difference in how Democratic-appointed versus Republican-appointed judges decide Establishment Clause cases[48]—"Democratic-appointed judges [are] predicted to uphold Establishment Clause challenges at a 57.3% rate, while the predicted probability of success f[alls] to 25.4% before Republican-appointed judges"[49]—there is no meaningful difference between how Democratic- and Republican-appointed judges decide free exercise cases.[50] Based on a survey of all free exercise and religious accommodation decisions by federal district court and

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nal Cases: 1947–1956 Terms, 17 AM. J. POL. SCI. 622, 625 (1973) (finding three factors, "age at appointment, federal administrative experience, and religious affiliation," have some explanatory value for decision variance in a sample of fourteen Justices).

45 Sisk & Heise, *Ideology*, *supra* note 44, at 1204.

46 Heise & Sisk, *Free Exercise*, *supra* note 12, at 1374.

47 Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 79. U. CHI. L. REV. 185, 189 (2012) [hereinafter Heise & Sisk, *Religion*].

48 Sisk & Heise, *Ideology*, *supra* note 44, at 1201, 1216–17. Similarly, in the context of education, Professors Sisk and Heise concluded that "Republican-appointed judges were more likely than their Democratic-appointed counterparts to reach a proreligion decision[.]" Heise & Sisk, *Religion*, *supra* note 47, at 189. Professors Heise and Sisk's findings in the religious schooling context comports with their findings in the general Establishment Clause context for good reason: religious schooling cases almost always involve the Establishment Clause.

49 Sisk & Heise, *Ideology*, *supra* note 44, at 1201.

50 Heise & Sisk, *Free Exercise*, *supra* note 12, at 1374. For this study, they used a

> database of the universe of digested decisions by the federal district courts and courts of appeals from 1996 through 2005 in which a religious believer or institution sought accommodation by the government or asserted that a governmental action burdened the free exercise of religion, inhibited religious expression, or discriminated on religious grounds.

Id. at 1376. As with their prior study of decisions from 1986–1995, they defined

> "Religious Free Exercise/Accommodation" cases to include (1) claims arising directly under the Free Exercise Clause of the First Amendment of the United States Constitution; (2) claims under the Free Speech Clause of the First Amendment involving alleged governmental suppression of expression that was religious in content; (3) claims based on federal statutes designed to promote freedom of religious exercise and speech, such as the Religious Freedom Restoration Act (RFRA), the Equal Access Act (EAA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA); and (4) [claims that governmental entities discriminated against or inequitably treated] individuals or organizations based on their religious nature or identification, including equal protection constitutional claims and employment discrimination claims against public employers.

Id. at 1376–77 (footnotes omitted).

courts of appeals judges from 1996 through 2005,[51] Professors Sisk and Heise concluded that "judicial ideology did not emerge as a significant influence in the Free Exercise context."[52] And Professors Shahshahani and Liu, who expanded on Professors Sisk and Heise's database by adding to it all federal appellate adjudications of religious freedom claims from 2006 through 2015, found that "partisan affiliation is . . . nowhere near significant in [free exercise] cases."[53] These results suggest that Professor Sunstein and his colleagues did not err in assuming that free exercise cases were not "controversial" and thus would not result in a finding of judicial partisanship.[54]

However, as this Article shows, the tide has turned. Free exercise cases are no longer uncontroversial, and recent judicial decision-making in such cases now tracks political affiliation to a significant degree. In the last five years, judicial partisanship in free exercise cases has crescendoed. And when the pandemic struck, resulting in widespread lockdowns of religious houses of worship, the unprecedented number of constitutional free exercise cases brought in such a condensed span of time forced that partisanship into even sharper relief.[55]

Given the general state of political polarization in America,[56] one might hope that constitutional law, and the

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51 Their dataset consisted of 1,631 judicial participations: 395 by district court judges and 1,236 by courts of appeals judges. *Id.* at 1377.

52 *Id.* at 1374.

53 Shahshahani & Liu, *supra* note 13, at 731. As this Article went to press, Professors Sisk and Heise uploaded to SSRN a new study using an updated dataset ending in 2015. Their findings were similar to those of Professors Shahshahani and Liu. *See* Michael Heise & Gregory C. Sisk, *Approaching Equilibrium in Free Exercise of Religion Cases? Empirical Evidence from the Federal Courts*, ARIZ. L. REV. (forthcoming 2022). Since I focus only on constitutional free exercise cases, my study does not entirely parallel these previously studies. Nonetheless, the stark differential in findings between my study and these previous studies suggests not only that there currently *is* judicial partisanship in the free exercise space (whereas based on previous studies, the conclusion was that there is none) but also that there has likely been a *shift* in judicial partisanship from when these studies were conducted.

54 Sunstein, Schkade & Ellman, *supra* note 33, at 304 ("[The authors] examine[d] a subset of possible case types, focusing on a number of controversial issues that seem especially likely to reveal divisions between Republican and Democratic appointees."); *see also id.* at 306 ("The pool of cases studied here is limited to domains where ideology would be expected to play a large role.").

55 *See* Mark L. Movsesian, Law, Religion, and the COVID-19 Crisis, 37 J.L. & RELIGION 9, 9 (2022) ("The COVID-19 crisis has revealed a cultural and political rift that makes consensual resolution of conflicts over religious freedom problematic, and perhaps impossible, even during a once-in-a-century pandemic.").

56 *See* Levi Boxell, Matthew Gentzkow & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26669, 2020) (finding that Americans' feelings toward members of the opposite political party have become harsher, especially as compared to citizens of Euro-

judges who interpret and apply it, would rise above politics[57] and serve as neutral arbiters.[58] Yet, while it may have been true that free exercise jurisprudence was not yet infected with partisanship when Professor Sunstein and his colleagues set out to test judicial partisanship in the mid-2000s, when Professors Sisk and Heise examined free exercise cases from roughly the same period, or even when Professors Shahshahani and Liu later supplemented Professors Sisk and Heise's dataset, the same can hardly be said today. As detailed in the next Part, free exercise partisanship has increased dramatically.

II
FINDINGS

A. Methodology

Before proceeding, a few words about methodology are in order. Consistent with a growing body of research on judicial decision-making, and as Professors Sisk and Heise did for their survey of free exercise cases,[59] I focus on "judicial participation."[60] Each instance of "judicial participation" consists of a single judge's ruling in a single case. Thus, just as I examine

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pean countries); Gordon Heltzel & Kristin Laurin, *Polarization in America: Two Possible Futures*, 34 CURRENT OP. BEHAV. SCIS. 179, 179 (2020) ("The rise of polarization over the past 25 years has many Americans worried about the state of politics.").

57 According to some at least, constitutional law is meant to serve as a bulwark *against* "politics." *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1441 (1987) (explaining that the ratification of the new Constitution imposed limitations on state powers); Keith S. Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 U. MIAMI INTER-AM. L. REV. 1, 10 (1994) (describing that "the Framers of the U.S. Constitution considered" the separation of powers doctrine "an important bulwark against tyranny by the majority"); *see also* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

58 *See, e.g.*, Schauer, *supra* note 26, at 511 ("urg[ing] a rethinking of the contemporary aversion to formalism").

59 *See* Heise & Sisk, *Free Exercise*, *supra* note 12, at 1377.

60 *See, e.g.*, James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 L. & SOC'Y REV. 565, 576 (2001) (defining "[e]ach judicial participation" as "one judge's vote on a specific issue in a case appealed from the [National Labor Relations] Board"); James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1696, 1700 (1999) (same); *see also* Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 511 (1999) (discussing use of judges' votes in cases as points of analysis).

each district judge's ruling separately, I also do so for each vote of the multiple judges on courts of appeals panels.[61]

To ensure I did not miss any cases involving a challenge under the Free Exercise Clause, I cast a wide net, using the following search on Westlaw: "Y,DI("free exercise") or lukumi or ((oregon or employment) /10 smith /5 (110 or 494)) and DA(aft 12-30-2015 & bef 01-01-2021)."[62] Because the most recent survey of free exercise cases ends in 2015, I limited my search to federal court decisions[63] from January 1, 2016 through December 31, 2020.[64]

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61 "Most empirical studies of ideology in decisionmaking use the political party of the judge's appointing president as a proxy for the judge's own political ideology," and I do the same here. Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1479 (2003). *See also* Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U.J.L. & POL'Y 133, 174–76 (2009) (discussing alternatives to the appointing president's party proxy, including, for example, the commonly used "composite proxy," but finding that it is "subject to many of the same inherent limitations as simpler proxy measures[,]" plus additional ones).

62 *See infra* notes 109–127 and accompanying text for more on the two cases included in the Westlaw search—*Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)—and how current free exercise jurisprudence rests on them.

63 In addition to courts of appeals and Supreme Court decisions, I also surveyed appealable district court decisions. The courts of appeals have jurisdiction on appeals from final decisions and interlocutory orders of the district courts. 28 U.S.C. §§ 1291–92. The last study of free exercise cases surveyed only courts of appeals, so, by definition, it considered only judicial actions on appealable matters. Shahshahani & Liu, *supra* note 13, at 717. To ensure more comparability between my study and the most recent study of free exercise cases, I likewise limited consideration to appealable decisions.

64 Shahshahani & Liu, *supra* note 13, at 717. Examining these five years of cases also makes sense as this period covers free exercise cases decided after *Obergefell*, in which the Supreme Court held same-sex marriage to be a constitutional right and put a spotlight on the brewing tension between progressive initiatives and freedom of religion. Obergefell v. Hodges, 576 U.S. 644 (2015). I limited my survey to cases involving free exercise constitutional claims. I did not include cases that rested entirely on either RFRA or RLUIPA, which have different (and lower) standards than does the Free Exercise Clause under its current interpretation. The questions a survey of those cases would tackle would be—or at least, in my view, *should* be—different from the questions this study explores, because the relevant doctrine is different. The lynchpin of a RFRA or RLUIPA case is whether a federal law substantially burdens religious activity. Courts differ regarding whether behaviors motivated by religion have been substantially burdened. Whether judges appointed by Republican versus Democratic presidents come out differently on that determination in a meaningfully correlative way would be useful to know. But any findings on that score could be different from how they adjudicate free exercise constitutional cases, the specific question I take up in this Article. I also did not include cases involving the "ministerial exception" defense, where free exercise is an affirmative defense rather than the basis of a challenge and the exception is largely grounded in the Establishment Clause. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195 n.4

The free exercise cases I examine from 2016 until 2021 can broadly be grouped into two categories: COVID-19 cases and non-COVID-19 cases. The former is deserving of its own category because the more the legal arguments and underlying facts in the cases surveyed are alike, the more suitable they are for a study of judicial partisanship—given that there will be less basis to attribute diverging outcomes to differences between the legal arguments made or the specific facts alleged. The COVID-19 cases involving free exercise claims addressed relatively similar stay-at-home orders. The legal arguments advanced in these cases were also highly similar: that states or cities were discriminating against religion by exempting secular entities from stay-at-home orders while declining to exempt religious entities to the same degree.[65]

While the category of COVID-19 cases has the special advantage of similar facts and legal arguments, it also has the disadvantage of being a unique subgroup of cases. This uniqueness stems from the fact that these cases share COVID-19 as a variable. One might argue that they reveal little about the nature of freedom of religion and rather speak to COVID-19 itself, and the extent to which the virus has been politicized.[66] To this end, in addition to COVID-19-related free exercise cases, I also surveyed all free exercise cases from the roughly four years that preceded the pandemic, from when Professors Shahshahani and Liu's database ends in 2015.[67] The results of the survey indicate that free exercise partisanship was already brewing—and increasing—for several years before it was so starkly foregrounded in the flurry of free exercise cases decided during the pandemic.

B. Results

Altogether, between the beginning of January 2016 and the end of December 2020, there were 339 instances of free exercise judicial participations in federal courts. Of these,

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(2012). And I did not include cases that rested entirely on procedural issues, not engaging the merits at all (of which there were scant few).

65 *See infra* notes 189–197 and accompanying text.

66 *See Republicans, Democrats Move Even Further Apart in Coronavirus Concerns*, PEW RSCH. CTR. (June 25, 2020), https://www.pewresearch.org/politics/2020/06/25/republicans-democrats-move-even-further-apart-in-coronavirus-concerns/ [https://perma.cc/2676-BN4W] ("As the number of coronavirus cases surges in many states across the United States, Republicans and Democrats increasingly view the disease in starkly different ways, from the personal health risks arising from the coronavirus outbreak to their comfort in engaging in everyday activities.").

67 *See supra* note 13.

216 were non-COVID-19-related and 123 were COVID-19-related. During these five years, Democratic-appointed judges sided with the government 93% of the time and with religious plaintiffs 7% of the time, while Republican-appointed judges sided with the government 44% of the time and with religious plaintiffs 56% of the time (a 49% differential). Judges appointed by Donald Trump in particular[68] sided with the government 23% of the time and with religious plaintiffs 77% of the time (a 70% differential with Democratic-appointed judges).[69]

Accounting for only non-COVID-19 free exercise cases over these five years, Democratic-appointed judges sided with the government 90% of the time and with religious plaintiffs

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68 I decided to examine Trump-appointed judges separately given the general hypothesis, if not consensus, that these judges are especially partisan. *See* Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [https://perma.cc/YX7X-SYHL] (finding that the Trump-appointed judges "were more openly engaged in causes important to Republicans, such as opposition to gay marriage and to government funding for abortion" and more typically "donated money to political candidates and causes"); *see also* Li Zhou, *Study: Trump's Judicial Appointees Are More Conservative Than Those of Past Republican Presidents*, VOX (Jan. 25, 2019), https://www.vox.com/2019/1/25/18188541/trump-judges-mconnell-senate [https://perma.cc/WF2J-9HVF] (finding that Trump's judicial appointees are 20% more conservative than former President George W. Bush's appointees). According to Professor Stephen B. Burbank, the reason for the increased partisanship among Trump-appointed judges is that "the [judicial] search has been for hard-wired ideologues because they're reliable policy agents." Ruiz, Gebeloff, Eder & Protess, *supra*. Further, during the Trump administration, the Republican-controlled Senate adopted procedural changes that made it more difficult for Democrats to block some of the judicial nominations to which they had objections. Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 265 (2019) ("[T]he Republican Senate has begun ignoring the 'blue slip,' a Senate procedure that allowed home-state senators to block judicial nominations to which they objected."). As a result, today's judges and Justices are more likely to be ideologically aligned with, and less likely to drift from, the political party of their appointing president. Hasen, *supra*, at 267; Nina Totenberg, *Republicans' 'Nuclear Option' Could Have Lasting Effects on Federal Judiciary*, NPR (Apr. 6, 2017), https://www.npr.org/2017/04/06/522826521/republicans-nuclear-option-could-have-lasting-effects-on-federal-judiciary [https://perma.cc/KH2R-3S5M] (discussing how the removal of the Senate filibuster would likely "mean more ideological nominees on both the right and the left"). For those interested in the breakdown of judicial participations of non-Trump Republican judges: of the 166 Republican-appointed judge participations over the five-year period, 113 were non-Trump-appointed. These judges sided with the government 54% of the time and with religious plaintiffs 46% of the time.

69 Based on the dataset compiled for this Article, in 2016, the year immediately following the last year surveyed in the most recent survey of free exercise cases (which concluded there is no meaningful judicial partisanship), and the only year within my survey not to include any Trump-appointed judges, there was a 24% differential between how Democratic- and Republican-appointed judges decided free exercise cases. The following year, the differential was 26%. In 2018, the differential was 56%; in 2019, it was 30%; in 2020, it was 66%.

in 10% of the cases, while Republican-appointed judges sided with the government 51% of the time and with religious plaintiffs 49% of the time (a 39% differential). Of the Republican-appointed judges, when accounting for those judges appointed by Donald Trump in particular, these judges sided with the government 28% of the time and with religious plaintiffs 72% of the time (a 62% differential with Democratic-appointed judges).[70]

COVID-19-related free exercise cases had the most jarring results.[71] In these cases, Democratic-appointed judges sided with the government 100% of the time, while Republican-appointed judges sided with the government 34% of the time and with religious plaintiffs 66% of the time (a 66% differential). Trump-appointed judges, meanwhile, sided with the government 18% of the time and with religious plaintiffs 82% of the time (an 82% differential with Democratic-appointed judges).[72]

Thus, we can surmise that it is not only or mainly COVID-19 that is driving the newly politicized charge in the free exercise cases.[73] Rather, as I explain, free exercise *itself* has be-

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70 For those interested in the breakdown of judicial participations of non-Trump Republican judges in non-COVID-19 cases: of the 96 Republican-appointed judges, 71 were non-Trump appointed. These judges sided with the government 59% of the time and with religious plaintiffs 41% of the time.

71 These cases pertained to lockdown orders. For a follow-up analysis of vaccine mandate free exercise cases and the judicial partisanship in those cases, see Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1109 n.13 (2022), https://www.yalelawjournal.org/pdf/F9.RothschildFinalDraftWEB_x8cvr6hg.pdf [https://perma.cc/9SH2-PYLU] (finding that, as of publication, "in free exercise vaccine-mandate cases in federal courts (district and appellate), Democratic-appointed judges (twenty-five total) [ ] sided with the government 80 percent of the time (twenty times total) and with the religious plaintiff 20 percent of the time (five times total); Republican-appointed judges (twenty-six total) [ ] sided with the government 23 percent of the time (six times total) and with religion 77 percent of the time (twenty times total)").

72 A total of 123 federal court adjudications pertaining to free exercise challenges to stay-at-home orders occurred between the outbreak of the pandemic in the United States in January 2020 and December 31, 2020. For those interested in the breakdown of judicial participations of non-Trump Republican judges in the COVID-19 cases: of the 70 Republican-appointed judges, 42 were non-Trump appointed. These non-Trump Republican judges sided with the government 45% of the time and with religious plaintiffs 55% of the time.

73 If COVID-19 and the extent to which trust in the government and its response to a nationwide pandemic were primarily responsible for more deference to government by Democratic-appointed judges and less deference by Republican-appointed judges, one would not expect to find such stark partisanship in free exercise cases preceding the pandemic. Moreover, free exercise COVID-19 cases are unique among COVID-19 cases with respect to judicial partisanship. *See* Kenny Mok & Eric A. Posner, *Constitutional Challenges to Public Health Orders in Federal Courts during the COVID-19 Pandemic* 3 (Aug. 1, 2021), https://ssrn.com/abstract=3897441 [https://perma.cc/V27S-J3SK] (finding that "judi-

come politicized over the last decade. It has become politicized, at least in part, because it has become intertwined with culture war issues like LGBTQ rights and access to contraception.[74]

III
THE CHANGING PERCEPTION OF FREE EXERCISE

In the early 1990s, religious freedom was considered a bipartisan issue.[75] When the Supreme Court in 1990 narrowed the meaning of free exercise in *Employment Division, Department of Human Resources v. Smith*,[76] it was met with outrage from Republicans and Democrats alike.[77] That outrage fueled the passage of the Religious Freedom Restoration Act (RFRA), which was designed to resurrect the interpretation of religious freedom the Court rejected in *Smith*.[78] Among its sponsors was Representative Jerrold Nadler, a Democrat from New York.[79]

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cial partisanship was not as pronounced for non-religion cases as it was for religion cases" during the COVID-19 pandemic).

74 The term "culture wars" is borrowed from James Hunter who introduced it in JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA xi (1991).

75 *See* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 157–58, 160–61 (2008); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 248 (1994) (explaining that RFRA was widely supported when it passed); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 845–46 (2014) (noting that religious accommodations and RFRA have "become far more controversial than [they] used to be"); *see also* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518–22 (2015) (explaining that complicity-based claims are different and more controversial than traditional claims for religious accommodation, and that complicity-based claims have increased in recent years).

76 *See infra* notes 109–13 and accompanying text for more on this seminal case.

77 *See* Laycock, *supra* note 75, at 845 ("When Congress passed the federal RFRA in 1993, it acted unanimously in the House and 97–3 in the Senate.").

78 In 1997, the Supreme Court struck down the Act insofar as it applied to state and local law. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding Congress exceeded the scope of its power under Section 5 of the Fourteenth Amendment). However, unless expressly excluded, RFRA continues to apply to federal law. 42 U.S.C. § 2000bb-3(a)–(b). A narrower federal statute was passed in 2000 under Congress's spending and commerce powers and restored pre-*Smith* free exercise law to cases involving claimants residing in or confined to government institutions such as prisons. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5. Twenty-three states have enacted state RFRAs. *See Religious Freedom Restoration Acts*, STATE OF SECULAR STATES, https//states.atheists.org/issue-map/religious-freedom-restoration-act [https://perma.cc/R3N6-MAJW] (last visited July 7, 2022) (listing the 23 states with RFRA statutes).

79 Tom Gjelten, *How the Fight for Religious Freedom Has Fallen Victim to the Culture Wars*, NPR (May 23, 2019), https://www.npr.org/2019/05/23/

"Unless the *Smith* decision is overturned," Nadler declared on the House floor, "the fundamental right of all Americans to keep the Sabbath, observe religious dietary laws, [and] to worship as their consciences dictate will remain threatened."[80] RFRA passed the House unanimously and was approved in the Senate by a vote of 97–3.[81]

Such collaboration on religious freedom is unimaginable today. The Supreme Court's 2015 legalization of same-sex marriage in *Obergefell v. Hodges*[82] proved to be a turning point, sparking alarm among conservatives that America was shifting toward becoming a more progressive nation.[83] Conservative groups saw this shift as a threat to their religious freedom,[84] as they feared that religious wedding vendors would be forced to assist wedding celebrations of same-sex couples and religious corporations would be compelled to facilitate contraceptive medical care.[85] They rallied around religious views of sexuality and marriage, invoking their right to religious freedom in seeking to ensure that progressive attitudes not be foisted upon them.[86]

724135760/how-the-fight-for-religious-freedom-has-fallen-victim-to-the-culture-wars [https://perma.cc/N5FG-U93W].

80 *Id.*

81 *Id.*

82 576 U.S. 644, 675 (2015) (holding that the Fourteenth Amendment requires states to issue marriage licenses to same-sex couples and to recognize lawful out-of-state same-sex marriages).

83 *See, e.g.*, David A. Graham, *What Can the Right Do After Gay Marriage?*, THE ATLANTIC (July 9, 2015), https://www.theatlantic.com/politics/archive/2015/07/conservatives-gay-marriage/397973/ [https://perma.cc/67EA-8K4T] (describing fears from conservatives regarding the implication of same-sex marriage on religious freedom); Sam Frizell, *Why Conservatives Are Nervous About Church Tax Breaks*, TIME (June 29, 2015), https://time.com/3940376/supreme-court-gay-marriage-church-tax-breaks/ [https://perma.cc/3EFE-KT9R] (describing fears from conservatives regarding the implication of same-sex marriage on the tax-exempt status of religious entities).

84 *See* Thomas Messner, *Same-Sex Marriage and the Threat to Religious Liberty*, HERITAGE FOUND. (Oct. 30, 2008), https://www.heritage.org/marriage-and-family/report/same-sex-marriage-and-the-threat-religious-liberty [https://perma.cc/N52R-UZ7R] (contending that defining marriage to include same-sex couples would impinge on the religious freedoms of those who believe marriage to be limited to opposite-sex couples).

85 Warren Richey, *For Those on Front Lines of Religious Liberty Battle, a Very Human Cost*, CHRISTIAN SCI. MONITOR (July 16, 2016), https://www.csmonitor.com/USA/Justice/2016/0716/For-those-on-front-lines-of-religious-liberty-battle-a-very-human-cost [https://perma.cc/ECJ6-QHTU]; Angela Cave, *Marriage Ruling Said to Leave Unanswered Questions for Religious Groups*, NAT'L CATH. REP. (Dec. 21, 2015), https://www.ncronline.org/news/politics/marriage-ruling-said-leave-unanswered-questions-religious-groups [https://perma.cc/52LD-CR37].

86 Emma Green, *How Will the U.S. Supreme Court's Same-Sex-Marriage Decision Affect Religious Liberty?*, THE ATLANTIC (June 26, 2015), https://

For example, the contraceptive mandate under the Affordable Care Act immediately faced a host of religious challenges, including from Catholics and evangelical Protestants who argued that the Act's accommodations for religious institutions were insufficient,[87] and from for-profit and non-profit businesses and organizations operated by religious objectors who sought exemptions from the mandate.[88] At the state level, religious pharmacists sought exemptions from requirements that they dispense contraceptives.[89]

Some of the "bitterest battles over religious accommodation," as Kathleen Brady has explained, "have been in the context of same-sex marriage."[90] Religious objectors have "fought with proponents of gay rights over the recognition of same-sex marriage, and as same-sex marriage has been recognized, they have fought each other over exemptions from antidiscrimination laws benefiting LGBT individuals."[91] Conservatives worked to secure such exemptions at the state level through state statutes and constitutional amendments, and at the fed-

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www.theatlantic.com/politics/archive/2015/06/how-will-the-us-supreme-courts-same-sex-marriage-decision-affect-religious-liberty/396986/ [https://perma.cc/5NP3-5AWJ]; Patrik Jonsson, *Kim Davis: Kentucky Clerk Refuses Federal Order to Marry Gay Couples*, CHRISTIAN SCI. MONITOR (Aug. 13, 2015), https://www.csmonitor.com/USA/Justice/2015/0813/Kim-Davis-Kentucky-clerk-refuses-federal-order-to-marry-gay-couples [https://perma.cc/T5ZZ-6F97]; Adam Freedman, Obergefell*'s Threat to Religious Liberty*, CITY J. (July 1, 2015), https://www.city-journal.org/html/obergefell's-threat-religious-liberty-11613.html [https://perma.cc/52XU-2J8N].

87 *See, e.g.*, *A Statement of the Administrative Committee of the United States Conference of Catholic Bishops*, U.S. CONF. CATH. BISHOPS (Mar. 14, 2012), http://www.usccb.org/issues-and-action/religious-liberty/upload/Admin-Religious-Freedom.pdf [https://perma.cc/SHS5-Y4QX] (arguing that ACA's "extremely narrow" exceptions for religious employers would exclude many religious entities and force them to "violate their own teachings within their very own institutions"). The contraceptive mandate requires that group health plans include coverage for women's contraceptive services at no cost to plan participants. *Women's Preventative Services Guidelines*, HEALTH RES. & SERVS. ADMIN., (Oct. 2020), http://www.hrsa.gov/womensguidelines/ [https://perma.cc/AX4S-VU2U]. Regulations finalized in early 2012 by the U.S. Department of Health and Human Services, together with the Departments of Labor and of the Treasury, provided an exemption for churches and their integrated auxiliaries, but this exemption left out other religious nonprofits. *See* 45 C.F.R. § 147.130(a)(1)(iv) (2012); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2012); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (2012).

88 *See* Zubik v. Burwell, 578 U.S. 403, 405–08 (2016) (per curiam) (involving religious nonprofits); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 683, 689–91 (2014) (involving for-profit businesses).

89 *See* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071 (9th Cir. 2015) *cert. denied*, 579 U.S. 942 (2016); Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160, 1163 (Ill. App. Ct. 2012).

90 Kathleen A. Brady, *The Disappearance of Religion from Debates About Religious Accommodation*, 20 LEWIS & CLARK L. REV. 1093, 1097 (2017).

91 *Id.*

eral level through the federal Defense of Marriage Act and various proposed amendments to the Constitution.[92]

Meanwhile, progressives began to see exemptions for religious individuals and entities as fronts for discrimination against people deserving protection, such as members of the LGBTQ community and women seeking contraceptive medical care.[93] Democrats pushed for stronger LGBTQ rights and for deactivating RFRA's potential to block them.[94] With their control of the House, Democrats in 2019 approved the Equality Act which would prohibit almost all discrimination based on sexual orientation and gender identity;[95] a specific provision would preempt the possibility of RFRA being employed as a defense against a discrimination allegation.[96] Representative Nadler—the strong RFRA advocate of just two and a half decades prior—co-sponsored the new legislation as Chairman of the House Judiciary Committee.[97]

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92 *See, e.g.*, Patrick J. Shipley, *Constitutionality of the Defense of Marriage Act,* 11 J. CONTEMP. LEGAL ISSUES 117, 117 (2000) (describing the constitutionality of the Defense of Marriage Act); Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 81 (2008) (arguing that legislative accommodation models developed for religious objection to abortion should be adopted by religious objectors to same-sex marriage).

93 *See* NeJaime & Siegel, *supra* note 75, at 2520 (explaining that complicity-based claims are different and more controversial than traditional claims for religious accommodation and that complicity-based claims have increased in recent years); Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U.L. REV. 1469, 1481–82 (2013) (arguing that an employer refusing to cover contraception not only discriminates against women but also imposes its religious views on them); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1457–58 (2015) (arguing that the basis for business religious exemptions lies not in religious liberty, but in free-market libertarianism); Alex Reed, *RFRA v. ENDA: Religious Freedom and Employment Discrimination*, 23 VA. J. SOC. POL'Y & L. 2, 4 (2016) (contending that religious employers may discriminate against LGBTQ employees).

94 *See* Reed, *supra* note 93, at 4–7.

95 Equality Act of 2019, H.R. 5, 116th Cong. (2019); *see* Jeremy W. Brinster, *Taking Congruence and Proportionality Seriously*, 95 N.Y.U. L. REV. 580, 591 (2020) (discussing the Equality Act); Kelsey Dorton, *Who Is Going to Protect the LGBTQ Community from Discrimination—Congress or the Courts?,* 42 CAMPBELL L. REV. 257, 259 (2020) (mentioning the Equality Act as a means of legislative protection for LGBTQ individuals).

96 H.R. 5; Do No Harm Act, S. 2918, 115th Cong. § 2(3) (2018); *see* Stephanie H. Barclay, *First Amendment "Harms,"* 95 IND. L.J. 331, 349 (2020) (discussing the Do No Harm Act).

97 *See* Gjelten, *supra* note 79 (Nadler argued that "[r]eligion is no excuse for discrimination in the public sphere, as we have long recognized when it comes to race, color, sex, and national origin . . . and it should not be an excuse when it comes to sexual orientation or gender identity." Co-sponsor Democrat Bobby Scott of Virginia, explained that "RFRA was originally enacted to serve as a safeguard for religious freedom . . . but recently it's been used a sword, to cut down the civil rights of too many individuals.").

RFRA, it would seem, morphed in the eyes of many: while it had first been viewed as a statute that might assist Native Americans who use peyote as part of their religious exercise and adult Jehovah's Witnesses who object to blood transfusions,[98] it later was interpreted as giving license to landlords to discriminate on the basis of sexual orientation, corporations to discriminate against women by denying them medical care, and storeowners to discriminate in providing generally available services and products.[99] This shift has led to statements, such as that of Martin R. Castro, Chairman of the U.S. Commission on Civil Rights, declaring that "[t]he phrases 'religious liberty' and 'religious freedom' . . . stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance."[100]

The judiciary has played a central role in religious opponents' efforts to challenge progressive initiatives. When legislative protections for religious objectors have come up short, religious opponents have sought vindication in the constitutional right of freedom of religion.[101] Yet religious opponents of

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98 *Congress Defends Religious Freedom*, N.Y. TIMES (Oct. 25, 1993), https://www.nytimes.com/1993/10/25/opinion/congress-defends-religious-freedom.html [https://perma.cc/KU9Z-WNB6].

99 *See* NUSSBAUM, *supra* note 75, at 164 (arguing that religion is special); Corbin, *supra* note 93, at 1481; Alan E. Garfield, *The Contraception Mandate Debate: Achieving a Sensible Balance,* 114 COLUM. L. REV. SIDEBAR 1, 2 (2014). According to one progressive scholar, for example, "RFRA has increasingly revealed itself as a tool for the conservative 'traditional values' agenda," and civil rights groups "that initially supported RFRA have split off and now actively oppose it." Marci Hamilton, *The Court After Scalia: The Complex Future of Free Exercise*, SCOTUSBLOG (Sept. 13, 2016), https://www.scotusblog.com/2016/09/the-court-after-scalia-the-complex-future-of-free-exercise/ [https://perma.cc/48VZ-TJK6].

100 U.S. COMM'N ON C.R., PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (2016), https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.pdf [https://perma.cc/B396-ZDH3]. In contrast, Professor Laycock has described such articulations as progressives believing that freedom of religion "should be interpreted extremely narrowly, confined to a bare right to believe whatever crazy and bigoted things you like. But it cannot mean a right to act on those beliefs, a right to actually *exercise* a religion." Laycock, *supra* note 75, at 870 (emphasis in original); *see also* Thomas C. Berg, *Religious Freedom and Nondiscrimination*, 50 LOY. U. CHI. L.J. 181, 183 ("Progressives are . . . failing to give equal freedom to Christian conservatives . . . .").

101 RFRA was initially applicable to both state and federal laws, but after the Supreme Court struck it down insofar as it applies to state and local law, it applies only against the federal government. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997). *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 683, 690–91(2014) (holding that the HHS contraceptive mandate violates RFRA and substantially burdens the exercise of religion); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020) (holding that

progressive initiatives faced what appeared to be a roadblock. In 1990, the Court decided in *Employment Division v. Smith* that the Free Exercise Clause provides no protection for neutral and generally applicable laws.[102] Whether a law incidentally burdens one's religious exercise is of no consequence; the only relevant question is whether the law *discriminates* against religion.[103] Nonetheless, religious opponents of progressive initiatives managed to transform this impediment into an asset. The precise meaning of religious discrimination has remained ambiguous since the day the Court decided *Smith*,[104] and religious opponents of progressive initiatives have been able to leverage that ambiguity in their favor by strategically wielding a broad interpretation of religious discrimination that arose in reaction to the doctrinal ambiguity left in *Smith*'s wake.

IV
FREE EXERCISE'S AMBIGUOUS DOCTRINE

The First Amendment guarantees religious freedom by providing that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[105] Before 1990, the Court had taken a variety of approaches to assessing the constitutionality of laws claimed to burden the free exercise of religion. In a few cases, notably *Sherbert v. Verner*[106] and *Wisconsin v. Yoder*,[107] the Court had examined laws burdening religiously motivated activity under strict scrutiny, on the ground that even a general law that inadvertently substantially burdens religious practice must be narrowly tailored to serve a compelling state interest. In most other cases, both before and after *Sherbert*, the Court upheld laws and governmental actions challenged under the

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HRSA and HHS had the statutory authority to craft a religious exemption from the contraceptive mandate).

102 *See* 494 U.S. 872, 879 (1990). For an overview of *Smith* and its aftermath, see Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 66–67 (1996) (describing the "almost universal displeasure with the Court's *Smith* ruling among religious groups, civil libertarians, and academics," the "[t]orrents of legal criticism" the decision inspired, and the fact that Congress "joined the hue and cry against *Smith*").

103 494 U.S. at 885–87. *See also infra* note 109.

104 *See infra* notes 109–127 and accompanying text.

105 U.S. CONST. amend. I. My discussion of free exercise's ambiguous doctrine, particularly as it relates to neutrality and general applicability, in footnotes 106–160 and the accompanying text draw from my discussion in Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CAL. L. REV. ONLINE 282, 283–86 (2020), https://www.californialawreview.org/free-exercises-lingering-ambiguity [https://perma.cc/22L4-6TP7].

106 374 U.S. 398, 403–09 (1963).

107 406 U.S. 205, 219–29 (1972).

Free Exercise Clause, often without bothering to apply strict scrutiny.[108]

In *Employment Division v. Smith*, the Court announced a rule: religious beliefs do not excuse noncompliance with generally valid laws.[109] The government may not regulate religious beliefs by compelling or punishing their affirmation.[110] And it may not target conduct for regulation only because it is undertaken for religious reasons.[111] But "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[112] To permit religious beliefs to excuse acts contrary to law, the *Smith* Court reasoned, "would be 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."[113] Three years later, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court reaffirmed *Smith*, reiterating "the general proposition that a law that is neutral and of general applicability need not be justified by a

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108 *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988) (holding that the government does not need to demonstrate a compelling interest when constructing a road through land that has traditionally been used for religious purposes); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (holding that courts must give great deference to the military's judgment when evaluating whether military needs justify a particular restriction on religiously motivated conduct); Braunfeld v. Brown, 366 U.S. 599, 606–07 (1961) (holding that a law indirectly burdening religious observance is valid when its purpose and effect is to advance the government's secular goals); Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (holding that persons who practice polygamy as part of their religion cannot be exempted from a criminal statute prohibiting polygamy); *see also* Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 279–84 (2017) (detailing the Court's application, and lack thereof, of the strict scrutiny standard in free exercise cases); Kenneth Marin, Employment Division v. Smith*: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U.L. REV. 1431, 1446–51 (1991) (discussing free exercise cases in which the Court did not apply strict scrutiny).

109 494 U.S. 872, 878–82 (1990). For a general overview of *Smith*, see Carol M. Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1045–46 (2000). *See also* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 697–98, 719 (2019) (arguing that *Smith* broke with precedent without acknowledging as much). *But see* Nelson Tebbe, Smith *in Theory and Practice*, 32 CARDOZO L. REV. 2055, 2060 (2011) (arguing that in light of the Court's previous practice, *Smith* was not revolutionary).

110 *Smith*, 494 U.S. at 877.

111 *Id.*

112 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J. concurring in judgment)).

113 *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).

compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[114]

Thus, under current free exercise jurisprudence, the government need not articulate a compelling interest to support a regulation that burdens religious exercise so long as the law is "neutral" and "generally applicable."[115] The meaning of "neutrality" is fairly clear: laws are not neutral when they are enacted "'because of,' not merely 'in spite of,' their suppression of . . . religious practice."[116] The meaning of "general applicability," however, remains mired in confusion.[117]

One possible interpretation of *Smith*'s general applicability requirement is that it is merely an extension of the concept of neutrality.[118] On this narrow view, asking whether a law is generally applicable is a method for smoking out discrimina-

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114 508 U.S. 520, 531 (1993).

115 The Court feared that it would be "courting anarchy" if every law that burdened religion were subject to strict scrutiny. *Smith*, 494 U.S. at 888. Thus, the majority determined that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id.* at 879 (quoting *Lee*, 455 U.S. at 263 n.3). In so holding, the Court allowed the State of Oregon to enforce its "across-the-board criminal prohibition" of peyote against members of the Native American Church who ingested it as a sacrament. *Id.* at 884; *cf.* Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1598–99 (2018) (arguing that Justice Scalia's anarchy concern has been empirically disproven).

116 *Lukumi*, 508 U.S. at 540.

117 Indeed, one could say that *Smith* not only fails to provide clarity, but confusingly suggests two divergent interpretations of general applicability, one that is broad and one that is narrow—although the "proof" for the broad reading is weak. On the one hand, *Smith*'s very example of a neutral and generally applicable law was of an "*across-the-board* criminal prohibition," *Smith*, 494 U.S. at 884 (emphasis added), which could be interpreted to mean a prohibition with no exemptions whatsoever. Yet on the other hand, *Smith*'s example of a non-neutral, non-generally applicable law was of *singling out* religion. *Id.* at 877–78. It is worth noting that a second cousin of "general applicability" is "individualized exemption" schemes, also discussed in *Smith*. Individualized exemption schemes trigger strict scrutiny (when a religious party is not extended an exemption) as a prophylactic safeguard against religious discrimination in situations that easily lend themselves to religious discrimination and where the discrimination otherwise stands to go undetected. *See* Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion) ("If a state creates such a mechanism [for 'individualized exemptions'], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent." This reasoning distinguishes cases involving individualized exemption schemes from those where "there is nothing whatever suggesting antagonism by [the government] towards religion generally or towards any particular religious beliefs."). Yet the Court adopted a different view of individualized exemptions in *Fulton*, one that I argue elsewhere is best understood as a subsidiary of the "most favored nation" theory of discrimination against religion. *See* Rothschild, *supra* note 71, at 1118–22.

118 *See, e.g.*, Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 71 n.3, 72 (2001) (discussing how states are not required to accom-

tory intent. A law can be non-neutral even if it is not facially discriminatory, since it is possible to discern discrimination not only from the law's text but also from its application. If a facially neutral law is applied almost exclusively to religious activity, such exclusive application suggests the law in fact has a discriminatory purpose.[119] The upshot of this interpretation is that a law is not generally applicable only in the rare circumstance where religion is not just treated differently from some secular activities but is treated differently from *all* (or at least nearly all) secular activities.[120] Only extremely disparate application is sufficient to show that a law was gerrymandered with religious practice in mind.[121]

Another interpretation of *Smith*'s general applicability test is that it is essentially a variant of the disparate impact test.[122] On this broad view, the general applicability test requires that religious interests be treated as well as virtually all secular interests. The animating rationale of this "most favored na-

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modate neutral statues of general applicability to religious practices under the Free Exercise Clause).

119 The paradigmatic example of such discrimination is the Florida regulations that were at issue in *Lukumi*. 508 U.S. 520, 524 (1993). In *Lukumi*, the City of Hialeah outlawed animal slaughter, but its rule was riddled with exceptions, including for hunting and slaughter for food. The exceptions were so extensive—aside from for a certain type of religious slaughter—that the Court concluded that the exemption scheme suggested that the law's true motivation was animosity toward religion rather than other purported interests.

120 *See, e.g.*, Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 114 (2000) ("[T]he law must be so dramatically underinclusive that religious conduct is virtually the only conduct to which the law applies."); *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, 876 (2001) ("[T]he degree of underinclusion [must] appear to be substantial.").

121 *See, e.g.*, *Lukumi*, 508 U.S. at 542 ("The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings.").

122 Disparate impact can be found when a seemingly neutral law affects one group differently than it does others. An example of disparate impact is when all applicants are required to take a single test, but the results of the test practically eliminate an entire group of minority applicants. *See* Lewis v. City of Chicago, 560 U.S. 205, 206 (2010) (holding that a written test required by city for firefighter jobs had disparate impact on African American applicants). For a convincing argument that the broad interpretation of *Smith*'s general applicability test is *not* a disparate impact test—most importantly because disparate impact does not require any exemptions—see Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2429–31 (2021). When I say the interpretation is "essentially a variant of the disparate impact test," I mean only that in many respects it functions as a disparate impact test.

tion"[123] view of religious discrimination is that legislatures should "[not] place a higher value on some well-connected secular interest group with no particular constitutional claim than [they] place[ ] on the free exercise of religion."[124] Under this approach, identifying almost any secular exemption will give rise to a constitutional right to a religious exemption.[125]

While both interpretations of general applicability agree that *Smith* transformed free exercise into an equality right, they differ on the precise brand of equality that is required. According to the first view, general applicability requires only that religion not be treated worse than practically *all* secular activities under a given law—or, put differently, that religion not be singled out for adverse treatment. According to the second view, general applicability demands that religion not be treated worse than almost *any* secular activity under the law[126]—or, put differently, that religion be given superior treatment vis-à-vis all secular interests that are not extended exemptions.[127]

A. Leveraging Free Exercise's Ambiguity

When *Smith* was decided, proponents of religious freedom immediately criticized it for converting free exercise from a liberty right into an equality right.[128] But some scholars and jurists recognized an opportunity to seize upon a broad "relig-

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123 *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–50 (arguing that religious interests should receive a "most favored nation status").

124 Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 35 (2000).

125 *See, e.g.*, *id.* at 28 (providing examples of how unequal treatment of religious and secular animal killings required compelling justification in *Lukumi*). Granting general applicability a broad meaning along these lines is not meaningfully different from overturning *Smith* since practically every law has at least one exception for a secular entity or activity. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1540 (1999) (citing secular exceptions in federal employment discrimination laws, statutory-rape laws, breach of contract law, and trespass law).

126 Laycock, *supra* note 124, at 35 ("If there are exceptions for secular interests, the religious claimant has to be treated as favorably as those who benefit from the secular exceptions.").

127 It is my position that the "most favored nation" reading of general applicability is unsound. *See infra* note 355. I hope to develop this argument more fulsomely in future work.

128 *See, e.g.*, Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 885–86 (1994) (discussing the core of the debate between the two inconsistent methods of defining religious liberty or government neutrality towards religion); *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1137 (1990) (arguing the Free Exercise Clause is "framed in terms of a substantive liberty" and has a different logical structure than the Equal Protection Clause).

ious equality" interpretation of free exercise and leverage it as a powerful source of constitutional religious protection. While the focal point of religious freedom proponents for years was overturning *Smith*,[129] these scholars and jurists—chief among them Professor Douglas Laycock and then-Judge Samuel Alito—simultaneously channeled an incredibly expansive view of religious discrimination to achieve not only what pre-*Smith* free exercise doctrine would have accomplished, but more.[130]

Just months after *Smith* was decided, Professor Laycock published an influential article laying out the broad interpretation of religious discrimination discussed above.[131] This broad interpretation slowly but steadily gained traction with litigants, and, eventually, the courts.

For example, in 1999, Judge Alito adopted Professor Laycock's view in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*.[132] At issue in *Fraternal Order* was a Newark Police Department policy prohibiting police officers from growing beards. The policy included exemptions for medical reasons and for undercover officers but did not include an exemption for religious reasons.[133] Reasoning that "the medical exemption raises concern 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 general interest in uniformity but that religious motivations are not," Judge Alito wrote for the Third Circuit that the policy was not generally applicable and therefore trig-

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129 Whitney Travis, *The Religious Freedom Restoration Act and* Smith*: Dueling Levels of Constitutional Scrutiny*, 64 WASH. & LEE L. REV. 1701, 1724 (2007).

130 While under pre-*Smith* free exercise jurisprudence, the free exercise claimant must prove that the law at issue substantially burdens her religious practice, that is not so under *Smith*'s general applicability rule. Further, under the previous doctrine, courts would meaningfully apply heightened scrutiny. But under a broad general applicability test, strict scrutiny essentially always fails—how can a discriminatory, underinclusive exemption scheme be narrowly tailored, if the analysis is undertaken in the first place? *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018); *see also* Rothschild, *supra* note 71, at 1113–14 ("[The] 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. The very logic that implicates strict scrutiny—that a secular interest or entity is exempt, but a religious one is not—automatically locks in the conclusion that the lack of an exemption for religion is either not compelling, not narrowly tailored, or both.").

131 Laycock, *supra* note 123, at 49–51. For a later defense of a relatively similar interpretation of religious discrimination, see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 126 (2007).

132 170 F.3d 359, 365–66 (3d Cir. 1999).

133 *Id.* at 360.

gered strict scrutiny.[134] According to Judge Alito, if the state is willing to undermine the purpose for which it enacted the policy at issue by extending an exception for a secular activity, it demonstrates an undervaluation of religion when it does not also include a carve-out for religious activity.[135]

Eight years later, relying on Professor Laycock and Judge Alito's interpretation of religious discrimination, pharmacists in *Stormans, Inc. v. Selecky* challenged on religious grounds a Washington regulation that required pharmacies to dispense Plan B emergency contraceptives.[136] The religious pharmacists argued, and the district court agreed, that because the regulation provided pharmacies with exemptions from the requirement to dispense contraceptives for certain "logistical reasons," including if a pharmacy lacked necessary equipment or the medication was out of stock,[137] it was discriminatory under *Smith*'s general applicability test for the state to not also provide an exemption for pharmacists who objected to dispensing Plan B on religious grounds.[138]

The expansive view of religious discrimination has notably also been adopted in the LGBTQ rights context. In *Masterpiece Cakeshop Ltd., v. Colorado Civil Rights Commission*,[139] a case decided in the summer of 2018, plaintiffs argued (among other things) that the Colorado Civil Rights Commission discriminated against religion because it allowed cake artists to refuse requests for cakes expressing opposition to same-sex marriage but not to decline requests supporting it.[140] In its 7-2 decision, the Court anchored much of its reasoning in the "hostile" re-

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134 *Id.* at 366.

135 Unless one understands undervaluation as intentional discrimination—which would be hard to justify since the former is implicated even when the government extends a single exemption (which certainly cannot be said to constitute deliberate discrimination against the potentially myriad entities and activities not extended exemptions)—this view essentially sees general applicability as a disparate impact test, though couched in different terminology. Although there may be no indication of deliberate discrimination against religion, the underlying logic is that religious entities should not be impacted differently than secular entities that receive special carve-outs.

136 524 F. Supp. 2d 1245, 1248 (W.D. Wash. 2007), *rev'd*, 586 F.3d 1109 (9th Cir. 2009).

137 *Id.* at 1261–62.

138 *Id.* at 1262–63.

139 138 S. Ct. 1719 (2018).

140 Brief of Petitioners at 2, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111). The Colorado Court of Appeals upheld the Commission's decision despite the alleged disparate treatment. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727–28.

marks[141] toward religion made by two members of the Commission during its adjudication of the case.[142] But Justice Kennedy also drew upon the Commission's "disparate treatment" of the religious baker, Jack Phillips, compared to several "secular" bakers.[143]

In separate litigation, the Colorado Civil Rights Division (the enforcement arm of the Commission) had rejected claims brought by William Jack, an evangelical Christian who had asked three Colorado bakers to bake cakes including anti-same-sex marriage messages, concluding that these refusals were not made on the basis of religion under Colorado's Anti-Discrimination Act.[144] Drawing on the three William Jack cases, Jack Phillips argued that the Colorado officials treated claims of discrimination on the basis of sexual orientation more favorably than claims of discrimination on the basis of religion.[145] In other words, Phillips claimed that Colorado officials discriminated against religion in how they evaluated charges of discrimination brought by two different groups of plaintiffs, gay people and religious people. By finding that religious cake artists violated the antidiscrimination statute but that secular cake artists did not, the Colorado officials demonstrated they placed less value on religion-based decisions than they did on certain "speech-based decisions."[146] In Phillips's view, this lesser treatment amounted to discrimination against religion in contravention of the Free Exercise Clause.[147] According to Phillips, "[s]uch a one-sided application" of Colorado's antidis-

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141 Justice Kennedy chiefly quoted a statement made by Commissioner Raju Jairam, that "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust" and that "it is one of the most despicable pieces of rhetoric that people can use," in support of the conclusion that the Commission was "hostile" to religion. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30. *But see* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 139–40 (2018) (stating that it was clear Commissioner 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").

142 *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30.

143 *Id.* at 1730–31.

144 *See id.* at 1749 (Ginsburg, J., dissenting).

145 In Phillips's words, "[c]ake artists who support same-sex marriage may refuse requests to oppose it," but "people of faith who share Phillips's beliefs always lose." Brief of Petitioners at 15, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

146 *Id.*

147 *Id.* at 40.

crimination law "defie[d] the requirements of neutrality and general applicability."[148]

This argument prevailed.[149] Although it is usually overlooked in favor of his "animus" analysis,[150] Justice Kennedy agreed with the plaintiffs that Colorado officials discriminated against religious cake artists by not applying Colorado's antidiscrimination statute evenly. In addition to citing derogatory comments against religion made by certain commissioners,[151] Justice Kennedy found "[a]nother indication of hostility [in] the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission."[152] In short, Justice Kennedy accepted wholesale the plaintiffs' argument that the Colorado Civil Rights Commission failed to act neutrally and generally apply Colorado's antidiscrimination law when it allowed cake artists to refuse requests to make cakes expressing opposition to same-sex marriage but not to decline requests in support of it.

Professor Laycock—rightly, I believe—takes credit for the Court's free exercise reasoning in *Masterpiece*.[153] In an amicus brief authored with Professor Thomas Berg, Professor Laycock

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148 *Id.* at 15.

149 Interestingly, aside for two amicus briefs, none of the other amici (of which there were dozens) to my knowledge thought this was a winning argument. *See* Brief of William Jack & the Nat'l Ctr. for L. & Pol'y as Amici Curiae Supporting Petitioners at 3–4, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16–111) (contending that Colorado protects bakers who refuse to bake cakes criticizing same-sex marriage—thus constituting proof of the state's preference for nonreligion); Brief of Christian Legal Soc'y et al. as Amici Curiae Supporting Petitioners at 21–23, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (same). It is my supposition that the argument seemed too far-fetched at the time. Not so today: one repeatedly sees this argument among these same amici.

150 *See, e.g.*, Samuel A. Marcosson, Masterpiece Cakeshop *and Tolerance as a Constitutional Mandate: Strategic Compromise in the Enactment of Civil Rights Laws*, 15 DUKE J. CONST. L. & PUB. POL'Y 139, 159–62 (2020) ("Intolerance of unpopular views cannot be the basis of governmental decision-making without running afoul of constitutional protections . . . ."); James Esseks, *In* Masterpiece, *the Bakery Wins the Battle but Loses the War*, ACLU (June 4, 2018), https://www.aclu.org/blog/lgbt-rights/lgbt-nondiscrimination-protections/masterpiece-bakery-wins-battle-loses-war [https://perma.cc/53G4-6QXU] ("The court raised concerns about comments from some of the Colorado commissioners that they believed revealed anti-religion bias.").

151 Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018).

152 *Id.* at 1730.

153 *See* Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 182–83; Thomas Berg & Douglas Laycock, *Symposium:* Masterpiece Cakeshop*—Not as Narrow as May First Appear*, SCOTUSblog (June 5, 2018), https://www.scotusblog.com/2018/06/symposium-master-

urged the *Masterpiece* Court to adopt his expansive interpretation of general applicability.[154] Professors Laycock and Berg argued that although Colorado's antidiscrimination law does not explicitly provide any exemptions for secularly motivated objections to including specific messages on cakes, the Colorado Civil Rights Commission understood Colorado law to be providing such an exemption, which, in turn, rendered the law itself not generally applicable since it did not similarly exempt religiously motivated objections to servicing same-sex marriages.[155] In Professor Laycock's view, the Court all but adopted his and Professor Berg's reasoning to conclude that "the *law* at issue is not neutral."[156]

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piece-cakeshop-not-as-narrow-as-may-first-appear/ [https://perma.cc/EA65-ZFCQ].

154 *See* Brief of Christian Legal Soc'y et al. as Amici Curiae Supporting Petitioners, *supra* note 149 at 21–23. For critiques of their arguments in *Masterpiece*, see 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/TLL8-QMNT] and 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/F4N9-7PYE].

155 Brief of Christian Legal Soc'y et al., *supra* note 149, at 23.

156 *Id.* at 36 (emphasis added); *see also* Laycock, *supra* note 153, at 182–83 (noting that the Court relied on much of the same evidence to reach the same conclusion Professors Laycock and Berg reached). Among the vast sea of commentary *Masterpiece* has generated, Professors Laycock and Berg's interpretation of Justice Kennedy's majority opinion is unique. The majority of commentators read Justice Kennedy's opinion narrowly, as applying only to the "exceptional" facts presented in *Masterpiece* which are not likely to be replicated. *See, e.g.*, Murray, *supra* note 141, at 297 (describing the *Masterpiece* decision as "narrow and cabined"); Adam Liptak, *In Narrow Decision, Supreme Court Sides with Baker Who Turned Away Gay Couple*, N.Y. TIMES (June 4, 2018), https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html [https://perma.cc/CHZ4-649H] ("The breadth of the court's majority was a testament to the narrowness of the decision's reasoning."); David Cole, *This Takes the Cake*, N.Y. REV. BOOKS (July 19, 2018), https://www.nybooks.com/articles/2018/07/19/civil-rights-this-takes-the-cake/ [https://perma.cc/E9TG-KFUN] (describing *Masterpiece* as decided on a "case-specific ground"). *But see* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L.J.F. 201, 205 (2018) ("Those who characterize the Court's opinion in *Masterpiece Cakeshop* as narrow do not appreciate how the majority rejects certain familiar arguments for expansive religious exemptions from LGBT-protective laws."). Meanwhile, the few outliers who have read *Masterpiece* as standing for broader principles that have wider implications interpret these principles and implications as being in *favor* of LGBTQ rights and *against* religious freedom when the two conflict. These scholars, for example, highlight a passage in *Masterpiece* in which Justice Kennedy acknowledges that "it is a general rule that [religious] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law," and they draw attention to the majority's invoca-

According to Professors Laycock and Berg, the Court gestured toward a far broader rule than just holding that Colorado, in the unique facts of *Masterpiece*, violated the Free Exercise Clause.[157] As they had urged, the Court made clear that whenever a state allows business owners to deny *any* goods or services they find offensive on any grounds, the state must allow religious business owners to deny *all* goods and services they find offensive on religious grounds.[158] Differences between the goods and services denied by secular businesses owners and those denied by religious business owners are of no consequence.[159] In Professor Laycock's words, the Court in *Masterpiece* "[went] much further than is generally recognized toward protecting wedding vendors . . . [and took] a substantial step toward the protective understanding of *Employment Division, Department of Human Resources v. Smith*—that even *one* or a *few* secular exceptions make a law not neutral, or not generally applicable."[160]

B. Free Exercise as an Equality Right

Since *Masterpiece* was decided in 2018, the "most favored nation" interpretation of general applicability has become a staple of free exercise litigation, especially in culturally contro-

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tion of *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968), in which the Supreme Court upheld a Title II claim despite the argument that an act of racial discrimination was grounded in religious beliefs. *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (2018). On these scholars' view, citing *Piggie Park* was not accidental or coincidental; rather, Justice Kennedy meant to say that, *in general*, in LGBTQ cases, just as in racial discrimination cases, when LGBTQ antidiscrimination laws conflict with religious freedom, the latter must give way to the former. Professors Lawrence Sager and Nelson Tebbe, for example, argue that the Court's citation "should permanently end the argument that the structural injustice experienced by LGBTQ customers is somehow less worthy of concern or more vulnerable to dissent than racial subordination." Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 175 (2019); *see also* Kendrick & Schwartzman, *supra* note 141, at 161–62 (stating that Justice Kennedy's opinion indicates that sexual orientation discrimination will not receive different treatment than other types of discrimination prohibited by civil rights laws).

157 *See* Berg & Laycock, *supra* note 153; Laycock, *supra* note 153, at 167–68.

158 *Masterpiece Cakeshop*, 138 S. Ct. at 1730–32.

159 *Id.*

160 Laycock, *supra* note 153, at 187 (emphases added); *see also* Thomas C. Berg, Masterpiece Cakeshop: *A* Romer *for Religious Objectors?*, 2017 CATO SUP. CT. REV. 139, 170 (2018) ("*Masterpiece Cakeshop* starts that project [of protecting religious objectors to same-sex marriage in defined circumstances], which may expand just as gay-rights holdings expanded after *Romer*."); Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 744–45 (2019) (stating that Justice Kennedy found the government's failure to act neutrally in *Masterpiece Cakeshop* to be a per se violation, bypassing the compelling interest test from *Lukumi*).

versial cases. The leveraging of free exercise's equality interpretation has exploded, both in terms of its nature and its frequency.[161] Plaintiffs have become emboldened to use free exercise as a means for challenging nearly any state action that burdens their religious practice. It is not hard to see why. When conceived of as a liberty right, free exercise may be subordinated to the equality-based rights it is increasingly at odds with.[162] Yet when free exercise is reconceptualized as an equality right, it takes on a commensurate status to more conventional equality-based rights, such as LGBTQ rights.[163] Now that the equality conception of free exercise has taken hold, Justice Scalia's nightmare has in a sense come to fruition: plaintiffs can invoke free exercise of religion at any opportunity.[164]

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161 *See, e.g.*, *infra* notes 165–169, 177–184, 189–194 and accompanying text (for discussion about *Meriwether*, *Telescope Media*, and *Berean Baptist Church*).

162 Many 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 his majority opinion in *Obergefell* nodded to the importance of religious freedom for those opposing gay rights, two of the four dissenting opinions took issue with the decision's lack of serious engagement with religious liberty. *See* Obergefell v. Hodges, 576 U.S. 644 (2015). For instance, in his dissent Chief Justice Roberts warned that the decision "creates serious questions about religious liberty." *Id.* at 711 (Roberts, C.J., dissenting).

163 What the Justices in *Obergefell* who lamented free exercise's "demise" seemingly did not (and perhaps could not) predict is how swiftly religious opponents of LGBTQ rights would adapt and shift from focusing on liberty to demanding equality, pivoting from focusing on antidiscrimination laws' burdens on *their* religious exercise to the *government*'s unconstitutional discrimination against religion. *See Obergefell*, 576 U.S. at 711; *supra* note 162. The argument is no longer only that religion is special and therefore deserving of unique protection under the Free Exercise Clause. *See* Micah Schwartzman, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351, 1353 (2012). Rather, it is that irrespective of its specialness, religion is at least *equal* to secular activities and must be treated as such. And in light of that equality requirement, if secular interests are extended accommodations, so too must religious interests. Capitalizing on the ambiguity of "general applicability" and supplying it a capacious interpretation has held great promise for religious proponents, in part because the broad interpretation of religious discrimination is based in equality—the very meaning of free exercise so many religious freedom advocates have criticized—rather than liberty. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1410 (1990) (arguing that the Framers intended to offer greater protection to claims of burdens on religious belief and practice than secular claims of burdens on conscience).

164 *But see* Barclay & Rienzi, *supra* note 115, at 1631 (conducting an "empirical analysis" in part to answer whether there was merit to "Justice Scalia's concern that religious exemptions pose a special threat of a society 'courting anarchy'"). Professors Barclay and Rienzi surveyed RFRA claims and argued that the quantity of claims since *Hobby Lobby* has not grown dramatically. But Justice Scalia, writing for the Court in *Smith*, was not necessarily referring to the quantity of possible claims, but rather to their quality. He believed that constru-

A small sampling of recent cases illustrates the wide-ranging nature of the religious equality claims religious plaintiffs have recently used. In *Meriwether v. Trustees of Shawnee State University*, a case from 2019, a religious professor challenged a state university's policy requiring all professors to refer to students by their preferred pronouns.[165] The professor argued that because the university obviously would not force professors to refer to a student as "'Your Majesty' if the student announced a 'regagender' identity,"[166] it clearly countenanced some exceptions to its policy. And if the university allowed professors to decline *one* student's request, its policy is not generally applicable if it does not exempt professors who oppose on religious grounds referring to transgender students by their preferred pronouns.[167] If the university is to require professors to accommodate transgender students' requests regarding their preferred pronouns, not requiring them to accommodate *any* request by *any* student that the student be referred to by *any* preferred personal title demonstrates the policy's lack of genuine concern for students' pronoun preferences. And if the policy lacks such genuine concern, not exempting professors who on religious grounds oppose referring to students by gender pronouns that do not match their biological sex constitutes discrimination against religion.[168] The judge, appointed by Bill Clinton, dismissed the case.[169]

The nature of the plaintiffs' argument in *Meriwether*, which operates at an astoundingly high level of generality (at the level of *all* preferred personal titles), is now a commonplace in free exercise cases. In *Parents for Privacy v. Barr*, a case that was appealed to the Ninth Circuit in 2020 and garnered numerous amicus briefs in support of the plaintiffs-petitioners, religious parents brought a free exercise challenge to a public school's policy allowing transgender students to use restrooms, locker

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ing free exercise so robustly that it can be implicated any time a law burdens a religious preference would do injustice to ordered society as it would signal that any citizen could challenge any law. As I understand Justice Scalia's reasoning, it was the possibility and not necessarily the actuality of challenging essentially any law that concerned him.

165 No. 1:18-cv-753, 2019 WL 4222598, at *1 (S.D. Ohio Sept. 5, 2019).

166 Brief of Plaintiff-Appellant at 53, Meriwether v. Trs. of Shawnee State Univ., No. 1:18-cv-753, 2019 WL 4222598 (S.D. Ohio Sept. 5, 2019) (No. 20-3289).

167 *Id.*

168 *Meriwether*, 2019 WL 4222598, at *13.

169 *Id.* at *30. *Judge Susan J. Dlott*, U.S. DIST. CT. S. DIST. OF OHIO (updated Feb. 2018), https://www.ohsd.uscourts.gov/BioDlott [https://perma.cc/KF3V-VGAB]. This decision was subsequently overturned by a panel of all Republican-appointed judges. *See infra* note 184 and accompanying text.

rooms, and showers that matched their gender identity.[170] The plaintiffs argued that the locker room policy was underinclusive because it applied only to transgender students and not to *all* students.[171] According to the plaintiffs, the relevant comparison to transgender students wishing to use the locker rooms of the opposite sex was cisgender students also wishing to use the locker rooms of the opposite sex.[172] Because the policy did not allow *all* students to use the locker rooms of their opposite sex for *any* reason, it was underinclusive, and, thus, discriminatory against those students who for religious reasons preferred that no student of the opposite sex share a locker room with them.[173] The interest of the policy was again construed at a high level of generality: that children should be permitted to use the bathroom of their choice.[174] That high level of generality made it easy for the plaintiffs to argue that the policy was undermined by virtue of its limited scope. The policy allowed only those students who did not identify with their sex assigned at birth to use any bathroom of their choosing.[175] If the policy is capable of extending preferred treatment to a category of students, then by not extending preferred treatment to religious students—that is, by not accommodating religious students' preference to *not* share bathrooms with students of the opposite biological sex—the policy discriminates against religion. Put differently, if the school has exempted transgender students from the general backdrop policy that all students must use the bathrooms that have been designated for their sex, then religious students must be exempt *from the exemption*, that is, they must be granted their preference that they not share bathrooms with transgender students. An Obama-appointed district court judge dismissed the challenge, and a Ninth Circuit panel made up of three Democratic-appointed judges affirmed.[176]

In some instances, religious plaintiffs have even gone as far as arguing that a law that exempts *religious* institutions from

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170 949 F.3d 1210, 1217–18 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020).

171 *Id.* at 1236.

172 *Id.* at 1228.

173 *Id.* at 1234.

174 *Id.* at 1235.

175 *Id.* at 1236.

176 Parents for Privacy v. Dall. Sch. Dist. No. 2, 326 F. Supp. 3d 1075, 1082 (D. Or. 2018) (decided by Judge Marco A. Hernandez, appointed by Barack Obama); *Parents for Privacy v. Barr*, 949 F.3d at 1217–18 (decided by A. Wallace Tashima, appointed by Bill Clinton; Susan P. Graber, appointed by Bill Clinton; and John B. Owens, appointed by Barack Obama).

its coverage is not generally applicable vis-à-vis other religious objectors. For example, in *Telescope Media Group v. Lindsey*, religious wedding videographers challenged a Minnesota ban on discrimination based on sexual orientation in public accommodations, claiming that by prohibiting the videographers from turning away same-sex couples, the ban violated their free exercise rights.[177] The videographers took care to argue that the state was discriminating against religious videographers because the Minnesota Human Rights Act included exemptions for religious institutions and associations.[178] In other words, exemptions for some religious objectors were deemed evidence of discrimination against religion when the exemptions were extended only to religious organizations and not to *every* religious objector.[179]

The leveraging of free exercise as an equality right, which has rendered it even more powerful than the right of "religious liberty," has not only enabled plaintiffs to challenge essentially any government action incidentally burdening religious practice or preference—more importantly, it has allowed them to win.[180] While the district judge in *Telescope Media*, appointed by Bill Clinton, held that the plaintiffs' religious discrimination claim did not have legs, the majority of an Eighth Circuit panel reversed.[181] The two judges who voted to reverse were appointed by George W. Bush and Donald Trump;[182] the dissenter was appointed by Barack Obama.[183] And *Meriwether v. Hartop*—the case involving the professor who objected to using students' preferred pronouns on religious grounds that was dismissed by a Democratic-appointed judge—was overturned in mid-2021. The unanimous decision was issued by three

177 271 F. Supp. 3d 1090, 1097 (D. Minn. 2017) (decided by Judge John R. Tunheim, appointed by Bill Clinton), *rev'd sub. nom.* Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019).

178 *See* MINN. STAT. § 363A.26 (2013).

179 *Telescope Media*, 271 F. Supp. 3d at 1123 n.34.

180 *See* Rothschild, *supra* note 71, at 1114 ("Whereas pre-Smith, federal courts at every level regularly sided with the government when faced with challenges to incidental burdens on religion, in the post-Smith religious-equality world, religious plaintiffs win far more often.").

181 Telescope Media Grp. v. Lucero, 936 F.3d 740, 762 (8th Cir. 2019).

182 *See Shepherd, Bobby E.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/shepherd-bobby-e [https://perma.cc/6YT5-43CK] (last visited Apr. 9, 2022); *Stras, David Ryan*, FED. JUD. CTR., https://www.fjc.gov/history/judges/stras-david-ryan [https://perma.cc/96PS-5WM6] (last visited Apr. 9, 2022).

183 *See Kelly, Jane Louise*, FED. JUD. CTR., https://www.fjc.gov/history/judges/kelly-jane-louise [https://perma.cc/NWM2-AQ8K] (last visited Apr. 9, 2022).

Republican-appointed judges, two of whom—including its author—were appointed by Donald Trump.[184]

C. COVID-19 and the Contested Meaning of Religious Discrimination

Free exercise has become politicized because it has been increasingly used as a means for challenging progressive initiatives. Its politically charged valence has motivated judges to decide free exercise cases according to political preferences. The same ambiguity in the doctrine that has allowed plaintiffs to bring free exercise challenges despite *Smith*'s holding—by giving life to the "most favored nation" theory of religious discrimination—has also enabled judges to bring partisan preferences to bear when deciding free exercise cases that turn on the meaning of religious discrimination—the vast majority of recent free exercise cases.[185]

We may now be at the highwater mark of free exercise partisanship. Free exercise has become deeply politicized and the stakes of a broad interpretation of religious discrimination have never been more significant, especially for LGBTQ

184 992 F.3d 492, 498 (6th Cir. 2021).

185 Another possibility worth mentioning is that general applicability's ambiguity has not enabled partisanship as much as partisanship has enabled the ambiguity. On such a view, Democratic-appointed judges routinely side with the government because they read *Smith* and *Lukumi* straightforwardly and correctly, while those judges who adopted Professor Laycock's "most favored nation" interpretation of general applicability have done so only because they were dissatisfied with *Smith* and had found a way to effectively overturn it, and, in doing so, they did not leverage general applicability's ambiguity as much as they invented it. While Professor Laycock grounded his view of the meaning of religious discrimination in close textual readings of *Smith* and *Lukumi*, see Laycock, *supra* note 123, at 3; Laycock, *supra* note 153, at 175–77, I disagree with those readings. Nonetheless, it cannot be denied that the Supreme Court has avoided giving any clear test for determining when general applicability is violated. It is worth mentioning that some Democratic-appointed judges have also adopted Professor Laycock's "most favored nation" reading of general applicability. *See, e.g.*, InterVarsity Christian Fellowship/USA v. Univ. of Iowa, 408 F. Supp. 3d 960, 981–82 (S.D. Iowa 2019) (applying strict scrutiny because "the government decline[d] to grant religious exceptions to facially neutral rules for which secular exceptions are permitted").

rights[186] and access to contraception.[187] It should thus come as no surprise that when it comes to the question on which most free exercise cases rest—what general applicability under *Smith* means—judges' answers correlate highly with their politics. COVID-19 presented federal courts with an unprecedented number of cases resting on precisely that question, and courts have largely decided these cases along partisan lines. Indeed, the extent to which they have done so is jarring, putting into sharper relief the consequences of ambiguous doctrine.

1. *Lower Courts*

The ambiguity surrounding the meaning of religious discrimination under *Smith*, and the debate over its two competing interpretations, lay at the heart of the COVID-19-related free exercise cases. The vast majority of those cases involved churches challenging states' and cities' stay-at-home orders. Nearly every adjudication of such a challenge rested on the meaning of religious discrimination, and, more specifically, which of the two meanings of general applicability—the broad "most favored nation" interpretation or the "singling out" interpretation—should prevail.[188] To see how these two interpreta-

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186 To list one example of general applicability's potential impact, consider Title VII. The Court's recent decision in *Bostock v. Clayton County* purported to change the future of antidiscrimination employment law for LGBTQ employees by extending them protections under Title VII. 140 S. Ct. 1731, 1737 (2020). But if the broad interpretation of general applicability gains traction, *Bostock* will mostly have been for naught. Employers' objections to hiring LGBTQ employees, for example, are often connected to their religious beliefs. And Title VII has several exceptions, including the bona fide occupational qualification exception for disparate treatment and the exception for employment decisions that are tied to a "business necessity" for disparate impact. 42 U.S.C. §§ 2000e-2(k)(1)(A), 2000e-3(b). If any exception for a secular interest also necessitates under the Free Exercise Clause exceptions for all religious interests, then that rule would apply to Title VII. *See supra* notes 165–179 and accompanying text for other examples; *see also* Rothschild, *supra* note 71, at 1121; Zalman Rothschild, *'Religious Equality' is Transforming American Law*, THE ATLANTIC (Oct. 29, 2020), https://www.theatlantic.com/ideas/archive/2020/10/coming-threat-gay-rights/616882 [https://perma.cc/LPS6-RFUJ] ("If the Court in *Fulton* determines that any exception for a secular interest also necessitates, under the free-exercise clause, exceptions for all religious interests, then that ruling would presumably apply to Title VII just as it applies to Philadelphia's anti-discrimination policy."). Indeed, one federal judge has already held precisely this. As I explain elsewhere, a "federal court for the Northern District of Texas [has] concluded that because Title VII 'exempts' businesses of fewer than fifteen employees, it must also exempt all employers who object to its antidiscrimination requirements on religious grounds." Rothschild, *supra* note 71, at 1137.

187 *See, e.g.*, *supra* notes 136–138 and accompanying text (for discussion about *Stormans, Inc. v. Selecky*, a case involving rules regarding pharmacies dispensing contraception).

188 *See supra* notes 118–127 and accompanying text.

tions of religious discrimination have played out in the recent spate of free exercise cases, consider the following two cases.

The first example comes from a challenge to an executive order issued by the governor of North Carolina as part of the state's efforts to curtail the spread of COVID-19.[189] The governor's order forbade "mass gatherings,"[190] but it exempted "normal operations at airports, bus and train stations [or stops], medical facilities, libraries, shopping malls, and centers," as well as mass gatherings for "worship, or exercise of First Amendment rights."[191] The order, however, required that gatherings of over ten people for religious purposes be conducted outdoors unless it was "impossible" to do so, in which case indoor gatherings were allowed.[192] The state's rationale for applying its rule differently to religious gatherings was one of practicality: while it is impossible for shopping malls to relocate to the outdoors, in most instances it is feasible for churches to conduct their services outdoors—a safer alternative to indoor gatherings.[193] In response to a challenge to the order, a federal district court in the Eastern District of North Carolina concluded that the Free Exercise Clause requires that churches receive the same unconditional exceptions secular entities receive regardless of any differences between them.[194] The court held that if people are permitted to gather in shopping centers but are not permitted to gather in churches, the lockdown order cannot be said to be generally applicable.

By contrast, in the second case, a Louisiana church challenged a state order forbidding large indoor religious gatherings altogether by arguing that the order was discriminatory because similarly situated secular businesses were permitted to remain open.[195] Louisiana, for its part, argued that "the tran-

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189 *See* Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 653–54 (E.D.N.C. 2020). My discussion of the two cases in the text accompanying notes 190–202 and my discussion of *South Bay* in the text accompanying notes 210–234 draw from my discussion of these cases in Rothschild, *supra* note 105, at 287–91.

190 *Berean Baptist Church*, 460 F. Supp. 3d at 656, 659 (quoting Exec. Order No. 138, by Roy Cooper, Governor of N.C., (May 5, 2020)).

191 *Id.* at 656–59 (quoting Exec. Order No. 138, by Roy Cooper, Governor of N.C., (May 5, 2020)).

192 *See id.* at 657 (quoting Exec. Order No. 138, by Roy Cooper, Governor of N.C., (May 5, 2020)).

193 *See id.* at 660–61.

194 *See id.* at 662–63.

195 Spell v. Edwards, 460 F. Supp. 3d 671, 673–76 (M.D. La. 2020). The church argued that the state's "orders have been 'discriminatory and disparately applied' against them while allowing 'local and similarly situated non-religious businesses' to remain open, accommodating 'gatherings, crowds of more than ten

sient, in-and-out nature of consumer interaction with businesses, like those identified by the [church], are markedly different from the extended, more densely packed environments of churches, or from nonessential businesses that *have* been fully closed."[196] The court accepted the state's position and found no religious discrimination.[197]

These contrasting responses are ultimately attributable to the lack of clarity surrounding the meaning of *Smith*'s general applicability test.[198] The North Carolina district court found discrimination against religion under *Smith*, despite the state's reasonable explanation for the disparate application of its order. The court so held because religious practice in the state was not extended the *same* exemption that *some* secular entities received, despite countless other secular entities—including schools, libraries, and museums—not receiving *any*

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(10) people[.]'" *See id.* at 674–76 (quoting Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction at 3, Spell v. Edwards, 460 F. Supp. 3d 671 (M.D. La. 2020) (No. 20-00282-BAJ-EWD)).

196 *Id.* at 676 (emphasis in original).

197 *Id.*

198 Federal courts' treatment of churches during a pandemic and their general treatment of Native American sacred spaces provides a different type of contrast that is worth mentioning. Native Americans have had, and continue to have, immense difficulty securing protection under the Free Exercise Clause for their sacred spaces. *Lyng v. Northwest Indian Cemetery Protective Association* is an example of one such failure. 485 U.S. 439, 441–445 (1988). In *Lyng*, Native tribes in California brought a lawsuit challenging a decision by the U.S. Forest Service to engage in road construction and timber harvesting. The tribal members sought protection of what they described as their "most holy" site that had been "continuously used by them for generations." Brief for the Indian Respondents at 2, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86-1013). However, the Supreme Court ruled that "[w]hatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land." *Nw. Indian Cemetery*, 485 U.S. at 453. (Never mind that Native American sites often are the government's property only because indigenous peoples were divested of their land. *See* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 459–61 (1994).) And in *Slockish v. United States Federal Highway Administration*, a district court in 2018 held that even when the government bulldozed a Native American sacred burial ground, destroyed an ancient stone altar used in religious ceremonies, cut down old-growth trees that offered privacy for sacred rituals, and removed safe access to the site, the government had done nothing to "substantial[ly] burden" any indigenous religious beliefs. No. 3:08-cv-01169-YY, 2018 WL 2875896, at *3–4 (D. Or. June 11, 2018); Brief for Plaintiff-Appellees at 1–4, Slockish v. Fed. Highway Admin., No. 3:08-cv-01169-YY, 2018 WL 2875896 (D. Or. June 11, 2018) (No. 21-35220). Yet numerous temporary emergency restrictions on the number of people who can assemble during a global pandemic have been struck down as applied to churches. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65–69 (2020) (per curiam) (enjoining enforcement of occupancy limits on religious services).

exemptions at all.[199] Meanwhile, despite the difference in application of the state's stay-at-home order, the Louisiana district court did not find discrimination against religion; the court noted that religious gatherings were not the *only* gatherings prohibited, and the state articulated a reasoned explanation for the different treatment.[200] Judge James C. Dever III, appointed by George W. Bush, decided the first case;[201] Judge Brian A. Jackson, appointed by Barack Obama, decided the second.[202]

This split along partisan lines is consistent with the results of most free exercise challenges to COVID-19 lockdown orders. Before the Supreme Court intervened and provided at least a semblance of guidance on the meaning of general applicability,[203] Republican-appointed and Democratic-appointed judges decided COVID-19-related free exercise cases along remarkably predictable lines: Republican-appointed judges sided with the religious plaintiff 94% of the time, and specifically Trump-appointed judges sided with the religious plaintiff 100% of the time. Meanwhile, Democratic-appointed judges sided with the government 100% of the time.[204]

2. *Supreme Court*

As can be expected, disparate interpretation of general applicability in the COVID-19 context has not been limited to the lower courts. The Supreme Court has similarly split along politically predictable lines in the COVID-19 lockdown cases it has addressed.[205] Yet, helpfully, it also extended a sliver of clarity regarding the meaning of general applicability and how

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199 *See* Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 659–62 (E.D.N.C. 2020).

200 *Spell*, 460 F. Supp. 3d at 676.

201 *Dever, James C. III*, FED. JUD. CTR., https://www.fjc.gov/history/judges/dever-james-c-iii [https://perma.cc/QE5B-UTQM] (last visited Feb. 5, 2021); *Berean Baptist Church*, 460 F. Supp. 3d at 665.

202 *Jackson, Brian Anthony*, FED. JUD. CTR., https://www.fjc.gov/history/judges/jackson-brian-anthony [https://perma.cc/56WM-8DXS] (last visited Feb. 5, 2021); *Spell*, 460 F. Supp. 3d at 678.

203 *See infra* section IV.C.2.

204 *See infra* notes 314–315 and accompanying text.

205 In *South Bay*, *Calvary Chapel*, *Roman Catholic Diocese*, and *Tandon* only one of the Republican-appointed Justices—Chief Justice Roberts—voted against granting the applications of the religious institutions, with all others voting in favor. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

the test should be applied to stay-at-home orders.[206] This small measure of clarity helped to decrease the stark partisanship in lower courts.[207] But the respite in lower-court partisanship lasted only as long as the Supreme Court remained consistent in its own interpretation of general applicability.[208] When the Court's political makeup shifted, so did its stance on COVID-19 restrictions on religious institutions.[209] Examining the Court's moves from one position to the next—and the ripple effects its shifting posture has had on lower-court partisanship—illustrates one of the costs of an ambiguous jurisprudence that impacts a (now) controversial constitutional right.

After numerous decisions by lower courts, the Supreme Court finally weighed in on the viability of a free exercise challenge to states' stay-at-home orders. In *South Bay United Pentecostal Church v. Newsom*,[210] the South Bay United Pentecostal Church asked the Court for emergency injunctive relief against California's stay-at-home order, which it argued unfairly discriminated against religion.[211] It grounded its allegation in the fact that California imposed an attendance cap on religious gatherings but allowed certain entities—including factories, offices, and restaurants—to fully reopen.[212] A fractured Court declined to interfere with California's regulation, denying the church's petition.[213]

Chief Justice Roberts explained his reasoning in a short concurrence. He began by noting that COVID-19 "has killed thousands of people in California and more than 100,000 nationwide" and, at the time, there was "no known cure, no effective treatment, and no vaccine."[214] Furthermore, "people may be infected but asymptomatic" and can easily and "unwittingly infect others."[215] The purpose of California's stay-at-home order, the Chief Justice recognized, was "to address this extraordinary health emergency."[216] Additionally, the form of relief South Bay United Pentecostal Church sought—an order blocking California from enforcing its restrictions on public gatherings—required the church to satisfy a particularly high

206 *S. Bay United*, 140 S. Ct. at 1613.
207 *See infra* notes 312–318 and accompanying text.
208 *See infra* notes 319–321 and accompanying text.
209 *See infra* notes 243–290, 319–321 and accompanying text.
210 *S. Bay United*, 140 S. Ct. at 1613.
211 *Id.* at 1614–15 (Kavanaugh, J., dissenting).
212 *Id.*
213 *Id.* at 1613 (majority opinion).
214 *Id.* (Roberts, C.J., concurring).
215 *Id.*
216 *Id.*

bar: it had to be indisputably clear that California's order violated the Constitution.[217] According to Chief Justice Roberts, South Bay United Pentecostal Church could not meet that bar.[218]

For Chief Justice Roberts, restrictions allowing churches to reopen at 25% capacity, with no more than 100 worshipers at a time, "appear[ed] consistent" with the First Amendment.[219] California, in Chief Justice Roberts's view, had an acceptable reason for treating churches more like concerts and movie theaters—where patrons "congregate in large groups" and "remain in close proximity for extended periods"—than grocery stores, where individuals can socially distance more easily.[220] Chief Justice Roberts reasoned that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement."[221] It is also a question primarily delegated to local politicians.[222] "That is especially true," Chief Justice Roberts explained, when the church is seeking emergency relief "while local officials are actively shaping their response to changing facts on the ground."[223]

Justice Kavanaugh dissented from the Court's order, as did Justices Alito, Gorsuch, and Thomas.[224] In his short dissenting opinion, Justice Kavanaugh cited the supermarkets, restaurants, hair salons, and other businesses not subject to the same restrictions as churches. He declared that the restriction on churches "discriminate[d] against places of worship and in favor of comparable secular businesses" in violation of the First Amendment.[225]

In their brief opinions, Chief Justice Roberts and Justice Kavanaugh did not directly engage with *Smith*'s general applicability test,[226] but they were clearly debating just that. For both Justices, the central question was what to compare religious gatherings to. The appropriate comparators, in Chief Jus-

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217 *Id.* (citing S. SHAPIRO, K. GELLER, T. BISHOP, E. HARTNETT & D. HIMMELFARB, SUPREME COURT PRACTICE § 17.4 (11th ed. 2019)).

218 *Id.* at 1614.

219 *Id.* at 1613.

220 *Id.*

221 *Id.*

222 *Id.* at 1613–14.

223 *Id.* at 1614.

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

225 *Id.* at 1614.

226 Despite the fact that a dissenting judge on the Ninth Circuit below did. *See* S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 944–46 (9th Cir. 2020) (Collins, J., dissenting).

tice Roberts's view, were "lectures, concerts, movie showings, spectator sports, and theatrical performances"—the secular gatherings that were *not* exempted—on the reasoning that, like religious gatherings at churches, they involve "large groups of people gather[ing] in close proximity for extended periods of time."[227] By contrast, "grocery stores, banks, and laundromats"—those entities receiving exemptions—differ from churches: in these locations, people do not "congregate in large groups" and "remain in close proximity for extended periods."[228] For Justice Kavanaugh, meanwhile, the apt comparison was to "supermarkets, restaurants, [and] hair salons," where numerous patrons sometimes gather and remain for long periods of time and which were exempted from California's order.[229]

But the meaning of "similarly situated" is in the eye of the beholder.[230] Church gatherings can be compared to either lecture halls or restaurants.[231] If the test of what constitutes

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227 *S. Bay United*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

228 *Id.*

229 *See id.* at 1614–15 (Kavanaugh, J., dissenting).

230 As I have explained elsewhere:

> One might argue that courts often must make difficult judgment calls based on the facts presented to them to determine, for example, whether disparate impact is suggestive of purposeful discrimination, and that doing so with respect to religious discrimination is no different. But courts in other contexts have tools at their disposal to assist with adjudication. In the employment context, for instance, courts may avail themselves of the *McDonnell Douglas* tripartite burden-shifting framework for Title VII disparate treatment claims, whereby a claim of discrimination can be made out by satisfying a series of prongs, including that an employer's explanation for its allegedly discriminatory treatment was pretextual. And drawing comparisons in the employment context is easier. Courts ask whether two people—one in a protected class and one not—were treated dissimilarly despite having the same position and qualifications. But in the context of assessing whether religion has been discriminated against among a scheme of exceptions, courts often must compare widely different entities and activities; they do not have the advantage of a specific workplace context that brings the two comparators into the kind of close proximity that makes comparisons—though still challenging—significantly more tenable.

Rothschild, *supra* note 105, at 285–86; *see also* Zalman Rothschild, *Free Exercise in a Pandemic*, U. CHI. L. REV. ONLINE 1, 2 (2020).

231 *Cf.* Linda Greenhouse, *The Supreme Court, Too, Is on the Brink*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/06/04/opinion/supreme-court-religion-coronavirus.html [https://perma.cc/N9QJ-YLKC]. Greenhouse argues that it is "obvious" that churches are radically different from the secular entities exempted under California's order in *South Bay*. *Id.* "Sitting in communal worship for an hour or more is not like picking up a prescription, or a pizza, or an ounce of marijuana. You don't need a degree in either law or public health to figure that out." *Id.* As compared to pharmacies, Greenhouse is certainly correct that churches are drastically different. One does not typically linger in a phar-

religious discrimination boils down to the similarity between an exempted secular activity and a non-exempted religious activity, it is no test at all.[232] Thus, a "similarity test" could not have been the linchpin of Chief Justice Roberts and Justice Kavanaugh's dueling opinions. Rather, the real constitutional question with which the Justices grappled was whether it could be said that California was discriminating against religion by having different standards for church gatherings and certain secular gatherings. In other words, was California's order generally applicable?

Chief Justice Roberts espoused the view that California did not discriminate against the church because the church was not singled out considering the various secular entities that also did *not* receive exemptions from the stay-at-home order, while Justice Kavanaugh proclaimed that California discriminated against the church because some secular entities *did* receive an exemption. According to Justice Kavanaugh, religion must always be treated as well as the most favored secular interest in society. Under Justice Kavanaugh's view, if there are any exceptions to California's order—even if they are for dissimilar establishments, like supermarkets[233]—an exception must be provided for churches, too. According to Chief Justice Roberts, by contrast, if religion has not been singled out, there is no free exercise violation.[234]

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macy, whereas the entire point of congregations is to congregate. But pharmacies, take-out restaurants, and cannabis dispensaries were not the only secular entities that were granted an exception from California's order. Office spaces, shopping malls, bookstores, hair salons, and sit-down restaurants—spaces where people often do "linger"—were also exempt from the prohibition. Further, although surprisingly not mentioned by Justice Kavanaugh in his dissent but certainly made known to him and to Chief Justice Roberts from the petitioner's application for emergency relief and from the parties' briefs filed in the Ninth Circuit, California also exempted schools (which are even more analogous to churches). *See* Emergency Application for Writ of Injunction Relief at 3, 7, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (No. 19A1044); Appellants' Reply Brief at 12, S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938 (9th Cir. 2020) (No. 20-56358).

232 *See supra* note 231 (discussing the impracticality of comparing various stay-at-home orders).

233 Justice Kavanaugh would later confirm that "similarly situated" is not a part of his test altogether. *See infra* note 357.

234 Lower courts also understood the Supreme Court to be saying precisely this. *See, e.g.*, *infra* notes 312–318 and accompanying text. It should be noted, however, that over a year later, in *South Bay II*, the Court enjoined pending disposition of a petition for certiorari part of California's stay-at-home order as it pertained to worship services in response to an application for injunctive relief. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021).

This reading of *South Bay* was confirmed by *Calvary Chapel Dayton Valley v. Sisolak*, a case comprising only dissenting opinions.[235] In *Calvary Chapel*, the Supreme Court declined to intervene with respect to a request by a Nevada church for permission to hold services on the same terms that other facilities in the state—including casinos—were allowed to hold gatherings during the pandemic.[236] In a brief one-sentence order without any explanation, Chief Justice Roberts again joined the Court's more liberal Justices in rejecting the church's petition.[237]

In dissent, Justice Alito observed that although it was not a surprise that "Nevada would discriminate in favor of the powerful gaming industry and its employees," it was "disappointing" that the Court would be "willing[ ] to allow such discrimination" considering that "[w]e have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility."[238] Justice Gorsuch, dissenting separately, described the dispute as a "simple case": "The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."[239] Finally, Justice Kavanaugh, filing his own dissent as well, stressed that states cannot "impose strict limits on places of worship and looser limits on restaurants, bars, casinos, and gyms, at least without sufficient justification for the differential treatment of religion."[240]

Calvary Chapel was a closer call than *South Bay*—the comparators included gyms, bars, and casinos.[241] Yet Chief Justice Roberts still sided with the state, suggesting he was not particularly concerned about all the secular entities that were similar to churches and received more robust exemptions; rather, he looked to all the secular entities that were *not* treated preferentially. Focusing on the latter as opposed to the former indicates he understood religious discrimination to mean the "singling out" of religion. Meanwhile, Justice Kavanaugh made clear his view that all that matters for the purposes of religious

235 140 S. Ct. 2603 (2020).
236 *Id.* at 2603–04.
237 *Id.* at 2603.
238 *Id.* at 2604 (Alito, J., dissenting).
239 *Id.* at 2609 (Gorsuch, J., dissenting).
240 *Id.* at 2610 (Kavanaugh, J., dissenting).
241 *Id.*

discrimination is that a *single* secular entity is treated better than religion.[242]

Justices Alito, Gorsuch, and Kavanaugh did not have to wait long for a majority of the Court to adopt their interpretation of general applicability. Just a little over two months after it issued its order in *Calvary Chapel*, the Court in *Roman Catholic Diocese of Brooklyn v. Cuomo* applied, in a 5-4 decision, the "most favored nation" interpretation of religious discrimination to a state's stay-at-home orders.[243] This change in five—recall that in *South Bay* and *Calvary Chapel*, five Justices voted to reject similar petitions—came about because of a critical "switch in time."[244] Just several weeks before the Court issued its order, Justice Ginsburg's seat was replaced by Trump-appointed Justice Barrett.[245]

Some background to *Roman Catholic Diocese* is in order. In early October, in response to new spikes in COVID-19 positivity

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242 *Id.* at 2612–13 ("[T]he First Amendment requires that religious organizations be treated *equally* to the favored or exempt secular organizations[.]"). On Justice Kavanaugh's logic, the sheer existence of one better-treated secular entity implicates the Free Exercise Clause. As I read Justice Alito's dissent, the same holds true for him. Both Justices in *Tandon* would later explicitly adopt this view that all it takes is a single secular exemption to trigger strict scrutiny. *See infra* note 307 and accompanying text. Justice Kavanaugh, it should be noted, also went out of his way to disavow the need for any comparability analysis. According to Justice Kavanaugh, the only relevant question when determining whether to apply strict scrutiny is: "[D]oes the law create a favored or exempt class of organizations and, if so, do religious organizations fall outside of that class?" He further explains:

> That threshold question does not require judges to decide whether a church is more akin to a factory or more like a museum, for example. Rather, the only question at the start is whether a given law on its face favors certain organizations and, if so, whether religious organizations are part of that favored group.

Id. at 2613. To the extent one wishes to argue that the other dissenting Justices in *Calvary Chapel* did give weight to the "similarity" of the exempted secular entities and the religious non-exempted entity before applying strict scrutiny, and that, in their view, in *Calvary Chapel* the secular comparator entities *were* similar to churches, recall that these same Justices believed *pharmacies* were "similar" to churches in *South Bay*. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting). *See supra* note 231.

243 141 S. Ct. 63, 73 (2020) (Kavanaugh, J. concurring); *see* Laycock, *supra* note 123, at 49–50.

244 John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll* Save *Nine*," 73 OKLA. L. REV. 229, 238 (2021) (following Justice Owen Roberts's change of heart in supporting New Deal legislation in *West Coast Hotel Co. v. Parrish*, supposedly in an effort to stave off FDR's court packing plan, columnist Cal Tinney famously quipped "[m]aybe [Roberts] figures that a switch in time'll save nine").

245 Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/7CWN-EZMC].

rates in certain geographic areas,[246] New York designated these areas as "red zones," "orange zones," or "yellow zones" based on the state of the outbreak there.[247] In "red zones," all non-essential gatherings of any size were forbidden, non-essential businesses were to eliminate their in-person workforce, and all schools providing in-person instruction were to close.[248] One exception to these rules applied to "houses of worship," which could remain open subject to a capacity limit of up to 25% occupancy or ten people, whichever was fewer.[249] In "orange zones," meanwhile, all non-essential gatherings were limited to ten people, except for "gyms, fitness centers or classes, barbers, hair salons, spas, tattoo or piercing parlors, nail technicians and nail salons, cosmetologists, estheticians, the provision of laser hair removal and electrolysis, and all other personal care services," which were to completely eliminate their in-person workforce, and all schools providing in-person instruction were to close.[250] Again, a favorable exception was made for "houses of worship," which could remain open subject to a capacity limit of up to 33% occupancy or twenty-five people, whichever was fewer.[251] Finally, in "yellow zones," all non-essential gatherings were limited to twenty-five people, but "houses of worship" could remain open subject to a capacity limit of up to 50% occupancy.[252]

Two cases were filed in New York by religious plaintiffs challenging the order, one by the Roman Catholic Diocese of Brooklyn and the other by Agudath Israel of America.[253] In the former case, the district court sought to "determine whether [the order] was fashioned for the purpose of containing the spread of COVID-19 in public spaces in general or whether it

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246 New York identified twenty zip codes in which the average positivity rate was more than four times, and in some areas, nearly seven times, what it was in the rest of the state. *See Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, N.Y. STATE (Oct. 9, 2020) https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-43 [https://perma.cc/MJ34-6TVX].

247 State of New York Executive Chamber, Exec. Order No. 202.68, (Oct. 6, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.68.pdf [https://perma.cc/5375-MDZS].

248 *Id.*

249 *Id.*

250 *Id.*

251 *Id.*

252 *Id.*; Roman Cath. Diocese of Brooklyn, v. Cuomo, 495 F. Supp. 3d 118, 122 (E.D.N.Y. 2020), *rev'd*, 141 S. Ct. 63 (2020).

253 *Roman Cath. Diocese*, 495 F. Supp. 3d at 123; Agudath Isr. of Am. v. Cuomo, 980 F.3d 222, 225 (2d Cir. 2020).

was to curtail religious practice."[254] Applying the "reasoning of the Chief Justice in *South Bay*," which it found "instructive," the district court concluded that "it would be inappropriate for the court to apply strict scrutiny."[255] In particular, the court found it instructive that "religious gatherings [we]re treated more favorably than similar gatherings," specifically noting that "[i]n red zones, schools, restaurants, and non-essential businesses are closed entirely, while religious gatherings are permitted with significant capacity limitations[, and i]n orange zones, houses of worship are afforded more leeway than schools, restaurants, and high-risk businesses—many of which share salient public health characteristics with religious services."[256] The only "target[ing]" the state could be accused of was the targeting of "public gatherings based on COVID-19 transmission risk factors."[257] True, the order "establishes rules specific to religious gatherings, [but] it does so because they are gatherings, not because they are religious."[258]

As for the plaintiffs' grievance that religious institutions were not categorized as "essential businesses" such that they would be spared the orders' restrictions altogether, the court reasoned that it wasn't its place "to second guess the State's judgment about what should qualify as an essential business."[259] The court catalogued the various ways in which it

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254 *Roman Cath. Diocese*, 495 F. Supp. 3d at 129.

255 *Id.*

256 *Id.*

257 *Id.* at 129–30.

258 *Id.* at 130.

259 *Id.* It should be noted that the court interpreted the Supreme Court's order in *South Bay* as relying heavily on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in which the Court previously upheld a vaccine mandate. *Roman Cath. Diocese*, 495 F. Supp. 3d at 130. Several scholars have taken this position as well. *See, e.g.*, Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 750–51 (2021) (claiming that courts grafted *Jacobson* onto the Supreme Court's modern rights jurisprudence). *But see* Wendy E. Parmet, *Rediscovering* Jacobson *in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 129 (2020) ("[W]hile using *Jacobson* to help set the context for his decision to grant the state deference, the Chief Justice did not suggest that *Jacobson* established any 'test' for analyzing constitutional challenges to public health laws."). But *Jacobson* as relevant precedent was just one factor the Court found important in *South Bay*. The other was that there was no discrimination to begin with. Thus, even if *Jacobson* did not apply, the Court still would have found there to be no discrimination against religion and thus no free exercise infringement, and even if *Jacobson* did apply, the Court would still have had to undertake its "discrimination" analysis. *See* Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L.J. ONLINE 1, 8 (2020) ("Notably, even the courts that cite to *Jacobson* also apply the *Smith* free exercise test to the religious liberty challenges."). Justice Gorsuch in *Roman Catholic Diocese* and many amici made much of the lower court's references to *Jacobson* and centered much of their critique of *South Bay* on its "errone-

found "the essential businesses referenced [to be] distinguishable from religious services in key ways[, including that] they do not involve people arriving and leaving simultaneously, and they do not involve people packed in closely, or greeting each other, or singing or chanting."[260] Thus, the court concluded that the order "does not discriminate against religious gatherings, even if some businesses face less onerous restrictions."[261]

Just a few hours before the court held its hearing in *Roman Catholic Diocese*, a different judge in the same district held a hearing in *Agudath Israel of America v. Cuomo*, a case brought by Orthodox Jewish synagogues and rabbis challenging the same order on free exercise grounds.[262] In a ruling from the bench, the court concluded that New York had not discriminated against religion, and it denied the plaintiffs' request for a temporary restraining order.[263]

The Second Circuit affirmed both lower court decisions.[264] Relying on "recent precedent"—that is, *South Bay*—"which makes clear that COVID-19 restrictions that treat places of worship on a par with or more favorably than comparable secular gatherings do not run afoul of the Free Exercise Clause," it concluded that New York had not discriminated against religion despite the fact the some secular enterprises were treated more favorably than religious ones.[265] The Second Circuit's affirmance was made over the dissent of Judge Park, a Trump-appointee, who argued the order "singl[ed] out 'houses of wor-

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ous" reliance on *Jacobson*. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) ("To justify its result, the [*South Bay*] concurrence reached back 100 years in the U.S. Reports to grab hold of our decision in [*Jacobson*.]" (citation omitted)); Brief for First Liberty Institute as Amici Curiae Supporting Applicants at 10, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (No. 20A87) ("[S]everal lower courts have cited the [*South Bay*] concurring opinion as justification to avoid their responsibility to undertake a true constitutional analysis, opting instead simply to defer to government officials so long as the action has a 'real or substantial relation' to the crisis." (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905))); Brief for the Center for Constitutional Jurisprudence as Amici Curiae Supporting Applicants, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (No. 20-A90) ("[d]escribing in depth the seminal case federal courts have relied on in restricting religious liberty during the COVID-19 pandemic: *Jacobson v. Massachusetts*"); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020).

260 *Roman Cath. Diocese*, 495 F. Supp. 3d at 130.

261 *Id.*

262 *See* 980 F.3d 222, 224–25, 229 (2d Cir. 2020).

263 Transcript of Civil Cause for Order to Show Cause at 65–66, Agudath Isr. of Am. v. Cuomo, 495 F. Supp. 3d 118 (2d Cir. 2020) (No. 20-cv-04834) ("[Governor Cuomo] has lawfully exercised his power without religious animus or targeting . . . .").

264 *Agudath Israel*, 980 F.3d at 225–26, 228 (2d Cir. 2020).

265 *Id.* at 227.

ship' for unfavorable treatment . . . specifically and intentionally burden[ing] the free exercise of religion."[266] Making a point to distinguish *South Bay* on the ground that "[s]ummary decisions of the Supreme Court are precedential only as to 'the precise issues presented and necessarily decided'"[267] and that "[p]etitioners in *South Bay* sought a writ of injunction . . . [whereas h]ere, Appellants seek injunctions pending appeal," Judge Park concluded that the procedural postures of the cases were different and *South Bay* was not binding.[268]

Reversing course from its *South Bay* and *Calvary Chapel* orders, the second of which had been issued just several months previously, the Supreme Court agreed with Judge Park.[269] The Court held that "the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."[270] The Court's finding of a "singl[ing] out" came down to the different treatment of businesses within the red zones that were "categorized as 'essential'" as compared to houses of worship, which were not so categorized.[271] Essential businesses included "acupuncture facilities, camp grounds, garages, as well as . . . plants manufacturing chemicals and microelectronics and [ ] transportation facilities," which were permitted to "admit as many people as they wish," but "a synagogue or church [could] not admit more than 10 persons."[272] The Court also pointed to disparate treatment in orange zones where "attendance at houses of worship is limited to 25 persons, [while] even non-essential businesses may decide for themselves how many persons to admit."[273] Thus, "a large store in Brooklyn [ ] could 'literally have hundreds of people shopping there on any given day,' . . . [y]et a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service"—in the Court's view, a "troubling result[ ]."[274]

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266 *Id.* at 228–29 (Park, J., dissenting).

267 *Id.* at 230 (quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977)).

268 *Id.*

269 *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603 (2020) (denying Calvary Chapel's application for injunctive relief); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (denying South Bay United Pentecostal Church's application for injunctive relief); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65 (2020) (per curiam) (granting Roman Catholic Diocese's application for injunctive relief).

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

271 *Id.*

272 *Id.*

273 *Id.*

274 *Id.* at 66–67.

To put a finer touch on the Court's reasoning, if a state order treats any secular businesses better than any religious institutions, that order violates the Free Exercise Clause. This conclusion is true even if the better treated businesses are "transportation facilities," various "store[s]," "camp grounds," and "garages," which share some features with houses of worship but are also obviously different in significant respects.[275] Put differently, the government cannot distinguish between certain businesses and churches, placing the former but not the latter in a preferable category—regardless of any actual differences between the businesses and churches in question—if such distinctions result in a burden on religion.[276] To say the specific secular businesses are different—an argument the Court did not even bother to address despite its prominence in the underlying briefs—is inappropriate.[277] Rather, any line-drawing that results in a better outcome for some secular spaces over religious spaces must be seen as a subordination of religion. Soon after it was decided, Professor Cass Sunstein argued that *Roman Catholic Diocese* is "our anti-*Korematsu*"[278]—representing the current Court's readiness to interfere even during a national emergency when there is a "reasonable argument" that the government has discriminated against religion. But nothing could be further from the truth.[279] With its adoption of the expansive interpretation of

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275 *Id.*

276 *See id.* at 69 (Gorsuch, J., concurring) ("So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?").

277 *See id.* at 76 (Breyer, J., dissenting) ("But the [district] court found these essential businesses to be distinguishable from religious services and declined to second guess the State's judgement about what should qualify as an essential business.") (internal quotation omitted).

278 *See* Cass R. Sunstein, *Our Anti-Korematsu*, 1 AM. J. L. & EQUALITY 221, 237 (2021) (championing *Roman Catholic Diocese* as a "reflect[ion of] intense concern about discrimination," dubbing it "our anti-*Korematsu*").

279 *Id.* at 235. And to the extent Professor Sunstein wishes to see the Roberts Court *generally* as willing to speak truth to power even during a national emergency, it is worth contrasting the Court's intervention striking down local emergency lockdown orders as applied to religious gatherings with its deference to President Trump's proclamation and orders blocking travel into the United States from several nations in the wake of numerous anti-Muslim statements by Trump and administration officials. Despite giving lip service to repudiating *Korematsu*, and over a fiery dissent by Justice Sotomayor, the Court was willing to discount the officials' statements reflecting animosity towards Islam precisely in the name of "national emergency." *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review."). *See also* Neal Kumar

general applicability, *Roman Catholic Diocese* did not involve anything remotely resembling "discrimination," at least not as it is typically understood.[280]

Justices Gorsuch and Kavanaugh, in separate concurrences, drove the "general applicability" reasoning of the *Roman Catholic Diocese* Court home.[281] According to Justice Gorsuch, the problem with New York's categorization of certain secular businesses, but not religious services, as essential was that "[t]he only explanation for [such categorization] seems to be a judgment that what happens [in religious spaces] just isn't as 'essential' as what happens in secular spaces."[282] Taken to its logical conclusion, this reasoning suggests that a state's determination that grocery stores are "essential" and can remain open during a pandemic would require the same accommodation of religious services.[283] Anything else signals devaluation of religion vis-à-vis at least one secular interest—in the case of permitting grocery stores to remain open, physical survival—and constitutes unconstitutional discrimination against religion.[284] To prioritize physical survival over spiritual survival is to devalue, and thereby discriminate against, the latter.

Justice Kavanaugh, unique among the Justices in *Roman Catholic Diocese*, provided a clear rule for evaluating general applicability: "[O]nce a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored

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Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J.F. 641, 641 (2018–2019) (arguing that "while *Hawaii* overturned *Korematsu*, it essentially recreated the doctrine under another name").

280 *See* Sunstein, *supra* note 278, at 237; David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 937 (1989) (suggesting the Supreme Court's answer at the time to the question, "what is 'discrimination' . . . consists of acting with discriminatory intent").

281 *Roman Cath. Diocese*, 141 S. Ct. at 69–72 (Gorsuch, J., concurring); *id.* at 72–75 (Kavanaugh, J., concurring).

282 *Id.* at 69 (Gorsuch, J., concurring).

283 *See id.* (asserting that treating secular services such as "laundry and liquor," but not "traditional religious exercises," as "'essential' . . . is exactly the kind of discrimination the First Amendment forbids").

284 *See* Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, 37 J.L. & RELIGION 72, 86 (2022) ("[T]he regulations [in *Roman Catholic Diocese*] explicitly required officials to consider the value of religious gatherings as a precondition for regulation—officials limited worship only after evaluating religious reasons for meeting and finding them wanting. And where religion is regulated under a regime like that, the First Amendment requires heightened scrutiny, irrespective of additional arguments about the similarities or differences between churches and hardware stores.").

class."[285] That is to say, whenever any business is treated more favorably than any religious institution, that difference in treatment triggers heightened scrutiny.[286] Justice Kavanaugh never qualifies that the "favored class" must be similarly situated to the religious class seeking the same favorable treatment.[287] Rather, "restrictions discriminate against religion [if they] treat[ ] houses of worship significantly worse than *some* secular businesses"—full stop.[288] While Justice Kavanaugh's test has the advantage of being clear,[289] the same cannot be said for the majority opinion. Its reasoning, if not its holding, supports a test similar to Justice Kavanaugh's.[290] But the majority's failure to provide clear direction opens the door for lower courts to interpret the test so as to yield their preferred outcome.

If the Court's lack of clarity in *Roman Catholic Diocese* were not enough, the Court reversed itself again in *Danville Christian Academy v. Beshear*—just as the ink on the Court's most recent COVID-19-related ruling was drying.[291] At issue in *Danville* was a Kentucky temporary school-closing order that closed all K-12 schools for in-person instruction through the

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285 *Roman Cath. Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring).

286 *See id.*

287 *See id.* (stating that any state creation of a "favored class of business[ ]" requires the state to "justify why houses of worship are excluded from that favored class").

288 *Id.* at 74 (emphasis added).

289 By "advantage," I do not mean Justice Kavanaugh's test itself is advantageous. Justice Kavanaugh's adoption of the "most favored nation" theory of religious discrimination—one that does not even *pretend* to require comparability—is unbounded. *See* Rothschild, *supra* note 71, at 1111–15.

290 Some lower courts have made this deduction, recognizing the Court's deemphasis on secular comparators as an adoption of a "most favored nation" test that does not require comparability. In late January 2021, a California district court enjoined portions of California's stay-at-home order that would restrict religious gatherings. The court noted that in *Roman Catholic Diocese*,

> the Supreme Court did not specifically consider whether houses of worship were treated less favorably than analogous secular facilities. Rather, the Supreme Court emphasized the disparate treatment of non-analogous places such as campgrounds, garages, manufacturing plants, and all transportation facilities. The per curiam opinion did not elaborate on these points of comparison, however, Justice Kavanaugh's concurring opinion succinctly captures the approach the Court appeared to take.

Gateway City Church v. Newsom, 516 F. Supp. 3d 1004, 1016 (N.D. Cal. 2021). The Ninth Circuit has also recognized that *Roman Catholic Diocese* "arguably represented a seismic shift in Free Exercise law." Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1232–33 (9th Cir. 2020). The district court in *Gateway* highlighted that "the [Ninth Circuit] panel dropped the 'comparable' or 'analogous' requirement." *Gateway City Church*, 516 F. Supp. 3d at 1016.

291 141 S. Ct. 527, 527 (2020).

upcoming Christmas-New Year's holiday break.[292] A religious private school asked for a preliminary injunction against the school-closing order.[293] A district court granted the preliminary injunction, but the Sixth Circuit stayed the injunction pending appeal.[294] After outlining the applicants' argument "that the Order treats schools (including religious schools) worse than restaurants, bars, and gyms, for example, which remain open" and, therefore, "the Order is not neutral and generally applicable for purposes of [ ] *Smith*," the Supreme Court concluded that "[u]nder all of the circumstances, especially the timing and the impending expiration of the Order," it would "deny the application."[295]

In his dissent, Justice Alito wasted no time instructing the reader not to "misinterpret [the Court's] denial as signifying approval of the Sixth Circuit's decision."[296] Rather, "[a]s I understand this Court's order," Justice Alito explained, "it is based primarily on timing[, as] . . . the executive order in question will expire before classes would normally begin next year."[297] Justice Gorsuch in a separate dissent echoed Justice Alito's reading of the majority opinion.[298]

These attempts to distinguish *Danville* and *Roman Catholic Diocese* are unconvincing.[299] The Court had no qualms about intervening in *Roman Catholic Diocese* even though the order at issue had similarly "arguably expired."[300] "None of the houses

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292 *Id.*
293 *Id.*
294 *Id.*
295 *Id.* at 527–28.
296 *Id.* at 528 (Alito, J., dissenting).
297 *Id.*
298 *Id.* at 528–30 (Gorsuch, J., dissenting). According to Justice Gorsuch, the majority opinion "turns to an assessment of the equities. Whatever the problems with the Sixth Circuit's order, it says, we should let this one go because this case is old news; winter break is coming soon, and the Governor's decrees will expire in a few weeks, on January 4." *Id.* at 530.
299 What was different in *Danville* was that the order at issue included no exceptions; it applied to all schools. However, there were other orders that did include exceptions similar to—and in fact greater than—the exceptions for secular activities that constituted discrimination against religion according to the Court in *Roman Catholic Diocese*. One could argue that the fact that the *specific* order at issue in *Danville* was exemption-free and those exemptions that were provided were in *other* orders served as a sufficient distinction between the facts in *Danville* and *Roman Catholic Diocese* to warrant different outcomes. But the Court did not suggest that this difference was relevant, probably on the assumption that it would be overly formalistic to hold that so long as a state's exceptions are included in a different order with a slightly differently numbered heading discussing the same overarching executive order, those exceptions are irrelevant to the analysis.
300 *Danville Christian Acad.*, 141 S. Ct. at 530 (Gorsuch, J., dissenting).

of worship identified in the applications [were] subject to any fixed numerical restrictions" at the time of the decision.[301] And, just two days before it issued its order in *Danville*, the Court vacated and remanded a Tenth Circuit decision denying a preliminary injunction against stay-at-home orders as applied to churches,[302] despite a critical dissent by Justice Kagan (joined by Justices Breyer and Sotomayor) which pointed out that the limits at issue had already been lifted by Colorado and the "case [was] moot."[303]

The Supreme Court changed course yet again roughly four months later in *Tandon v. Newsom*.[304] *Tandon* involved a California restriction on group events including more than three households.[305] Private bible study and prayer meeting participants challenged the order on the ground that it constituted discrimination against religion because, they observed, larger numbers of people were permitted to congregate in barber shops and ride city buses, but similar "exempt[ions]" were not extended to religious gatherings.[306] In a per curiam opinion, the Court declared 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."[307] 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. . . . Comparability is concerned with the risks various activities pose, not the reasons why people gather."[308]

In other words, the Court wholly adopted Professor Laycock's test for general applicability. Comparability is measured against the alleged "interest" served by the state action in question, irrespective of any competing interests that might be at play. Here, the interest animating the state action was stemming the spread of COVID-19, and that interest was undermined by virtue of the "exceptions" to the three-household rule

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301 Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 75 (2020) (Roberts, C.J., dissenting).

302 High Plains Harvest Church v. Polis, 141 S. Ct. 527, 527 (2020).

303 *Id.* at 527 (Kagan, J., dissenting).

304 141 S. Ct. 1294, 1296 (2021) (per curiam).

305 *Id.* at 1297.

306 *See* Opening Brief for Plaintiffs-Appellants at 40, Tandon v. Newsom, 992 F.3d 916 (9th Cir. 2021) (No. 21-15228).

307 *Tandon*, 141 S. Ct. at 1296 (emphasis in original).

308 *Id.*

for a handful of secular activities. It was "no answer" 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."[309] Even a single secular exemption could render a law unconstitutional as applied to religious activity.

3. *Lower Court Responses to the Supreme Court*

Ultimately, the Court's internal disagreement and shifting makeup rendered it unable to provide clarity for lower courts seeking to interpret and apply *Smith*'s general applicability rule. However, there was at least some movement toward an answer, even if that answer shifted several times over a short span of time.[310] Select Justices, and the majority of the Court by implication, began to address general applicability in the Court's first two COVID-19-related orders, in which the Court held that exceptions for some secular interests did not necessarily require local governments to exempt religious institutions as well. By implication, these orders stood for a rejection of the "most favored nation" approach to general applicability.

South Bay was not a beacon of clarity with respect to the meaning of general applicability. Chief Justice Roberts's sole concurrence did not even mention general applicability, let alone explicate a test for it; reading between the lines was required to extract direction from the Court's majority on how to apply *Smith*. But some direction was better than none. Lower courts understood Chief Justice Roberts's instruction, however implied, and responded accordingly.[311]

For a brief period, free exercise partisanship decreased significantly. After the first of the Court's COVID-19-related free exercise orders, all but one non-Trump Republican-appointed judge sided with the state or city[312] and, for the first time, Trump-appointed judges did so, too.[313] While pre-*South Bay* there was a 94% differential between how Republican- and Democratic-appointed judges decided COVID-19-related free

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309 *Id.*

310 *See supra* section IV.C.2.

311 *See, e.g.*, High Plains Harvest Church v. Polis, No. 1:20-cv-01480-RM-MEH, 2020 WL 4582720, at *6 (D. Colo. Aug. 10, 2020) (denying plaintiffs' request for a preliminary injunction against Colorado's COVID-19-related restrictions).

312 *See* Soos v. Cuomo, 470 F. Supp. 3d 268, 268 (N.D.N.Y. 2020) (granting plaintiffs' request for a preliminary injunction against New York's COVID-19-related restrictions).

313 *See, e.g.*, *infra* notes 316–318 and accompanying text (describing a Trump-appointed judge's rejection of a church's request for a temporary restraining order and preliminary injunction against New York's COVID-19-related restrictions).

exercise cases, and a 100% differential between how Democratic- and Trump-appointed judges did so,[314] after *South Bay* that differential shrunk to 29% between Republican- and Democratic-appointed judges and to 67% between Democratic- and Trump-appointed judges.[315]

For example, in early October 2020, Trump-appointed Judge Eric Komitee of the Eastern District of New York rejected a church's motion for a temporary restraining order and a preliminary injunction against New York Governor Andrew Cuomo's emergency executive order "restrict[ing] attendance at 'houses of worship' in certain parts of New York, in response to a large uptick in COVID-19 infection rates."[316] Noting that he faced "a difficult decision,"[317] Judge Komitee found that "[i]n light of [ ] the Supreme Court's recent decision" in *South Bay*, he was compelled to hold that the church failed to establish "a likelihood of success on the merits."[318]

As discussed, however, the Court confusingly (though not unpredictably)[319] switched gears in *Roman Catholic Diocese* just a little over two months after it issued the second of its COVID-19-related free exercise orders.[320] Since then, partisanship in lower courts deciding COVID-19 free exercise cases once again spiked. The differential between Democratic- and Republican-appointed judges jumped to 73% and between Democratic- and Trump-appointed judges to 83%.[321]

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314 There was a total of 30 federal court adjudications pertaining to free exercise challenges to stay-at-home orders between the outbreak of the pandemic in the United States and *South Bay*. Of these judges, 16 were Republican-appointed, including 6 appointed by Donald Trump, and 14 of the judges were Democratic-appointed. (Note that these include only district court and courts of appeals judicial participations, and not Supreme Court votes.)

315 There was a total of 36 federal court adjudications pertaining to free exercise challenges to stay-at-home orders between *South Bay* and *Roman Catholic Diocese*. Of these judges, 17 were Republican-appointed, including 6 appointed by Donald Trump, and 19 of the judges were Democratic-appointed. (Note that these include only district court and courts of appeals judicial participations, and not Supreme Court votes.)

316 Roman Cath. Diocese of Brooklyn v. Cuomo, 493 F. Supp. 3d 168, 170 (E.D.N.Y. 2020).

317 *Id.*

318 *Id.* at 171.

319 Renuka Rayasam, *How Barrett Could Affect the Covid-19 Battle*, POLITICO (Sept. 25, 2020), https://www.politico.com/newsletters/politico-nightly-coronavirus-special-edition/2020/09/25/how-barrett-could-affect-the-covid-19-battle-490446 [https://perma.cc/F8GP-P95G].

320 *See supra* notes 235–242 and accompanying text.

321 There was a total of 21 federal court adjudications pertaining to free exercise challenges after *Roman Catholic Diocese*, in which the Supreme Court reversed itself. Of these judges, 15 were Republican-appointed, including 6 appointed by Donald Trump, and 6 of the judges were Democratic-appointed.

The changing degree of partisanship in COVID-19 free exercise cases is instructive. The predictive power of judges' political leanings decreased following the Supreme Court's direction in how to interpret and apply general applicability, but that decrease was short-lived and judicial partisanship increased again after the Supreme Court reversed itself several months later. This connection suggests that where there is a doctrinal vacuum, judges can—and as indicated by the COVID-19 free exercise cases, sometimes do—fill it with their partisan preferences. That is to say, judges consider themselves constrained by law, but law can play a constraining role only insofar as it exists. Ambiguous law is often as good as no law at all.

V.
A WAY FORWARD

The "legal model" posits that judges follow the law,[322] while the "attitudinal model" holds that judges decide cases based on political preference.[323] This Article's survey of free exercise cases suggests that each model has its merits. When the law is clear, judges are likely to follow it.[324] When the law is not clear, judges are more free to base their decisions on extra-legal factors—and in controversial areas of law, that freedom too often invites partisan decision-making.

The Court cannot unilaterally de-politicize the popular perception of free exercise. But it could clarify the precise legal definition of religious discrimination under the Free Exercise Clause in a full-fledged, binding decision. Such a decision could help to stem the tide of free exercise judicial partisanship

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(Note that these include only district court and courts of appeals judicial participations, and not Supreme Court votes.) As just one illustration of the partisanship, consider a case involving a school-closure order in Lucas County in Toledo, Ohio, in which religious schools argued the order discriminates against religion because although it required *all* schools to shut down, it did not require every institution writ large in the county to be closed. Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't, No. 3:20-cv-02720, 2020 WL 7334743, at *1–2 (N.D. Ohio Dec. 14, 2020), *rev'd*, 984 F.3d 477 (6th Cir. 2020). In mid-December, Judge Jeffrey J. Helmick—appointed by Barack Obama—denied the religious school's motion for preliminary injunction, holding that it was unlikely to succeed on the merits of its religious discrimination claim. *Id.* at *23. Two weeks later, the Sixth Circuit reversed. Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't, 984 F.3d 477, 482 (6th Cir. 2020), *reh'g denied*, No. 20-4300, 2021 U.S. App. LEXIS 338 (Jan. 6, 2021). The Sixth Circuit panel consisted of Judge Raymond Kethledge, appointed by George W. Bush, and Judges John K. Bush and John B. Nalbandian, both appointed by Donald Trump.

322 *See supra* notes 26–28 and accompanying text.

323 *See supra* notes 29–32 and accompanying text.

324 *See supra* notes 311–318 and accompanying text.

in lower courts. The Court has twice rejected the opportunity to provide that clearer definition—in 2009 when it declined to grant certiorari in *Stormans*,[325] and in 2018 when it decided *Masterpiece Cakeshop*.[326]

The Court again passed on the opportunity to do so in *Fulton v. City of Philadelphia*, which it decided in June 2021.[327] In *Fulton*, a Catholic adoption agency challenged the City of Philadelphia for refusing to refer foster children to the agency after the agency confirmed it would not match children with same-sex couples.[328] The agency argued that the city's refusal to permit it to place children constituted discrimination against religion.[329] More specifically, the agency contended that despite Philadelphia's antidiscrimination laws, the city expressly required agencies to consider various factors—including marital status, familial status, and disability—when certifying foster parents.[330]

If adoption agencies may take these factors into consideration in service of the "best interests" of the child, the agency argued, then Philadelphia is discriminating on the basis of religion when it prohibits a Catholic agency from considering the sexual orientation of potential adopting couples in the name of "religious beliefs."[331] Philadelphia provided reasons for allowing certain considerations at the certification stage, including most obviously that considering an adoptive couple's familial status or disability status when assessing their ability to fulfill the responsibilities of foster parents does not send a discriminatory message, whereas categorically refusing to work with gay couples does.[332] But according to the agency, if the

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325 Stormans, Inc. v. Wiesman, 579 U.S. 942, 942 (2016), *denying cert. to* 794 F.3d 1064 (9th Cir. 2015). *But see id.* at 943 (Alito, J., dissenting) (finding religious discrimination under the given facts and interpreting failure to grant certiorari as "a sign of how religious liberty claims will be treated in the years ahead").

326 *See* Kendrick & Schwartzman, *supra* note 141, at 135. *But see* Berg & Laycock, *supra* note 153 (arguing that the Court decided *Masterpiece Cakeshop* on broader free exercise grounds than acknowledged by many commentators).

327 141 S. Ct. 1868 (2021).

328 *Id.* at 1874. For an argument that under Supreme Court precedent religious adoption agencies may constitute unconstitutional delegations of governmental authority to religious institutions, see Zalman Rothschild, Fulton*'s Missing Question: Religious Adoption Agencies and the Establishment Clause*, 100 TEX. L. REV. ONLINE 32, 33 (2021), https://texaslawreview.org/wp-content/uploads/2021/10/Rothschild.Publication.pdf [https://perma.cc/794U-VCTW].

329 Brief for Petitioners at 23–30, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

330 *Id.* at 28.

331 *Id.* at 28–29.

332 *See* Brief for City Respondents at 25–26, 31, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) ("[The] requirement ensures that prospective

city provides *any* "exemptions" from a general antidiscrimination rule, it must provide exemptions for *all* religious entities as well. By failing to provide an exemption that would allow the Catholic adoption agency to discriminate for religious reasons against potential adoptive parents who are gay, the agency argued, the city unconstitutionally discriminated against religion under *Smith*'s general applicability test.[333]

The question whether failing to treat religion as well as the best-treated secular interest constitutes discrimination against religion is an important question that carries broad consequences for free exercise jurisprudence writ large. But instead of answering it, the Court took the agency's invitation to decide the case on more technical grounds.[334] The plaintiff in *Fulton* came armed with an additional claim: that the government's "exemptions" from its antidiscrimination scheme operated under an "individualized exemptions" regime.[335] Writing for the Court, Chief Justice Roberts opted to confine the Court's holding to a finding of constitutional infringement on this alternative basis.[336] Chief Justice Roberts focused on the terms of the city's contract with foster care agencies, which forbade discrimination based on sexual orientation but permitted city officials to make exceptions.[337] Philadelphia's contractual wiggle room doomed the requirement that the Catholic agency must

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foster parents and foster children are treated equally, not 'as social outcasts or as inferior in dignity and worth' because of their sexual orientation or other protected characteristics.") ("[A]llowing FFCAs to comply with the child-protective requirements of state law in making certification decisions—the very job that FFCAs are hired to perform—does not plausibly (let alone 'substantial[ly]') injure the City's interests in ensuring equal treatment of its residents and providing certified foster parents for its children.").

333 *See* Reply Brief for Petitioners at 6–7, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) ("[S]tate law governing home studies requires agencies to consider factors supposedly forbidden by Philadelphia's contract, including marital status, familial status, and disability. . . . Respondents defend those exemptions as relating to the care and nurturing of children . . . . Philadelphia is therefore making a value judgment, rooted in its own beliefs about marriage and nurture of children, to allow exceptions for other agencies, but not for CSS.").

334 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1872 (2021).

335 Reply Brief for Petitioners, *supra* note 333, at 4. CSS also argued that the government displayed animus toward it. *See* Petition for Writ of Certiorari at 28, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (contending that the government's policy was adopted due to hostility toward the petitioner's religious beliefs). But the Court did not address this claim.

336 *Fulton*, 141 S. Ct. at 1872, 1877 ("This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable.").

337 *Id.* at 1878–79. For criticism of the Court's reasoning, see Rothschild, *supra* note 71, at 1119–22; Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 300 (2021).

not discriminate against same-sex couples.[338] Although the decision has broad ramifications,[339] it has been widely interpreted as a "small win" that "is unlikely to have many implications" for future free exercise cases.[340]

Rather than recognize the critical importance of clarifying ambiguous doctrine that touches on controversial issues, the *Fulton* Court repeated the mistake it previously made in *Masterpiece Cakeshop*.[341] The Court again avoided providing a precise definition of religious discrimination. The recent free exercise cases should have served as a reminder that lower-court judicial partisanship is often a result of ambiguity in important doctrines that interplay with controversial issues—but the warning went unheeded.

The Court's decision can be viewed as an attempt at "judicial minimalism"—the philosophy that courts should generally rule as narrowly as possible, without reaching issues of consequence unless strictly necessary.[342] By declining to clearly de-

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338 *Fulton*, 141 S. Ct. at 1878 ("No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable."); *see also* Tebbe, *supra* note 337, at 300 (observing that the Court in *Fulton* dusted off "the individualized-exemptions rule [which previously] had never [served as] the sole foundation for a holding by the Court").

339 *See* Rothschild, *supra* note 71, at 1114–15 (arguing that although *Fulton* has been (mis)understood as a narrow decision and that Justice Roberts framed it—and it has been received—as such, it is in fact broad and carries significant consequences for the future of free exercise jurisprudence).

340 Ian Millhiser, *An Epic Supreme Court Showdown Over Religion and LGBTQ Rights Ends in a Whimper*, VOX (June 17, 2021), https://www.vox.com/2021/6/17/22538645/supreme-court-fulton-philadelphia-lgbtq-catholic-social-services-foster-care-john-roberts-religion [https://perma.cc/A4KH-XSEY]; *see also* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 5 AM. CONST. SOC'Y SUP. CT. REV. 8 (Working Paper No. 2021-27); Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2021 CATO SUP. CT. REV. 33, 37, 39 ("[Fulton's] general applicability holding turns on specific features of Philadelphia's rules. . . . Overruling Smith's unprotective rule is important . . . ."); 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").

341 Although I believe *Masterpiece* was a broad decision, the decision *lends itself* to being a narrow one—as it has been interpreted by most. *See* Murray, *supra* note 141, at 297 (describing the *Masterpiece* decision as "narrow and cabined"); Cole, *supra* note 156 (describing *Masterpiece* as decided on a "case-specific ground").

342 ONE CASE AT A TIME, *supra* note 19, at 3–4 (praising very narrow rulings as desirable "decisional minimalism"); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 8 (1996) (recommending judicial minimalism especially "when the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise)").

fine discrimination against religion, the Court avoided wading into a larger culture-war issue and managed to issue a decision that was not split along political lines. But the Court's avoidance tactics come at the cost of destabilized jurisprudence, about which the only thing that can be said to be predictable is that cases will be adjudicated in lower courts along partisan lines.[343]

Proponents of judicial minimalism point out that the judicial practice of "leaving as much as possible undecided . . . promote[s] more democracy and more deliberation."[344] This Article argues that those benefits should at least be weighed against the likely cost of enabling lower court judicial partisanship.[345]

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343 *Fulton* is not unique in this regard; the Roberts Court has taken a minimalist approach in a series of cases, including—if not especially—in the same Term it decided *Fulton*. For instance, various federal circuits have recently addressed whether sex-segregated bathrooms that define sex according to biology violate the Equal Protection Clause, a question over which there is much disagreement. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (deciding "whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender"), as amended (Aug. 28, 2020); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1312 (11th Cir. 2021), *vacated*, 9 F.4th 1369 (11th Cir. 2021) (mem.) (arguing the dissent's three "subsidiary claims" are unavailing). In an act of ultimate minimalism, the Supreme Court declined to grant certiorari in a transgender school bathroom case. Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878, 2878 (2021) (declining to grant certiorari). *See also* Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker, 138 S. Ct. 1260, 1260 (2018) (declining to grant certiorari). It should be noted that to date there is no circuit split over this question. But the Court does not restrict itself to granting certiorari exclusively for cases involving circuit splits. *See, e.g.*, City of Austin v. Reagan Nat'l Advert. of Tex., Inc., 141 S. Ct. 2849, 2849 (2021), *granting cert.*, 972 F.3d 696 (5th Cir. 2020) (granting certiorari to resolve the question of whether an Austin sign code constituted an impermissible regulation of content-based speech). Thus far, three courts of appeals have addressed the transgender bathroom question. Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1292 (11th Cir. 2020); *Grimm*, 972 F.3d at 593; Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1039 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1260 (2018) (mem.). With one exception, every judge who voted in favor of granting students access to the bathroom matching their gender identity was Democratic-appointed and every judge to vote the opposite was Republican-appointed. In *Adams*, Judges Martin and J. Pryor, both appointed by President Obama, voted in favor, while Judge W. Pryor, appointed by President George W. Bush, voted against. In *Grimm*, Judges Floyd and Winn, both Obama-appointees, voted in favor, while Judge Niemeyer, appointed by President George H.W. Bush, voted against. And in *Williams*, Judge Royner, appointed by President George W. Bush, joined two Democratic-appointed judges to vote in favor. This account does not include subsequent en banc decisions.

344 ONE CASE AT A TIME, *supra* note 19, at 3–4.

345 In my view, those advocating in favor of European-style proportionality analysis should also consider the potential costs of increased judicial partisan-

Given the damage inflicted by doctrinal confusion, a potential solution might be to flip the principle of judicial minimalism when doctrine is ambiguous, and replace it with judicial maximalism regarding the meaning of that doctrine.[346] According to the principle of judicial maximalism, once the Court

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ship of such practice. *See, e.g.*, JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021) (advocating for American adoption of the proportionality analysis); *see also* Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1316–29 (2022) (evaluating Professor Greene's proportionality proposal).

346 Some may argue that promoting judicial maximalism at the Supreme Court merely shifts partisan decision-making from lower courts to the highest court. While it is certainly possible that it's "partisanship all the way up" and the Supreme Court is no less likely to decide controversial cases along partisan lines, it is arguable that the highest court clarifying doctrine in a maximal way is preferable to leaving matters in the hands of lower courts because—as Professor Tara Grove has argued—in a hierarchical legal system, it is the *job* of the Supreme Court to clarify doctrine and lower courts rely on the Supreme Court to do its job. And when the Court addresses questions of unsettled constitutional doctrine, doing so can bring predictability and consistency to constitutional law, the twin hallmarks of the rule of law. *See* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 59 (2009) ("To perform its 'supreme' role in the current judicial hierarchy, the Court should aim to issue broad precedents that 'clarify the law' and provide guidance . . . ."). An additional reason—one I confess I have not fully worked out and can only gesture towards here—is grounded in accountability. If we accept that judges will likely decide controversial cases along partisan lines when there is no clear constraining doctrine, it may be the lesser of the evils for the Supreme Court, rather than lower courts, to be the court that acts in a partisan way. The Supreme Court receives far more attention from the public than lower courts do. And that attention, it can be said, comes with some degree of accountability. As scholars such as Professor Barry Friedman have argued, the Supreme Court uniquely among the courts responds to public will. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 370 (2009). Even if one disagrees with Professor Friedman's assessment that the Court is responsive to public will, it should at least be acknowledged that the choices made by the Supreme Court regarding constitutional interpretation and application receive more attention from the media than lower courts do. And it is likely that members of the Court at least care about what the media—which is shaped by and shapes public opinion—says about the Court. *See, e.g.*, NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 46 (2019) (arguing that the Justices are "influence[d]" by "the news media"). Indeed, there might be some recent indication that the Supreme Court is responsive to public opinion. Just after heightened attention (including a Senate Judiciary Committee hearing) and criticism were directed at the Court's increased and inconsistent use of its "shadow docket," early indicators suggest that the Court has begun to cut back its reliance on the shadow docket. *See* Mike Bedell, *Public Perception May Curb Supreme Court's Shadow Docket*, CHI. POL'Y REV. (Dec. 23, 2021), https://chicagopolicyreview.org/2021/12/23/public-perception-may-curb-supreme-courts-shadow-docket/ [https://perma.cc/A5M5-6KV4]; *see, e.g.*, Does v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application for injunctive relief). So long as what is at issue is a constitutional question of first impression—as the meaning of discrimination against religion and the appropriate test for identifying it are—courts addressing that question will inevitably be "making new law." And so long as judges are making

has created doctrine, it should take care to ensure the doctrine is clarified rather than obscured.[347] In a hierarchical judicial system such as ours, where lower courts are bound by directives from on high, following the approach of judicial maximalism could help diminish judicial partisanship in lower courts.[348] Benefits of that approach would include consistency and predictability in challenging areas of law, the twin hallmarks of the rule of law.[349] At the end of the day, litigants bringing constitutional challenges in trial courts and appealing them in courts of appeals should not have to assume that the outcome of their case will largely rest on the political leanings of the judges randomly assigned to them.

It is worth pausing to note that some may question whether the underlying goal of achieving legal clarity is attainable altogether. Of course, if eradicating judicial discretion is the purpose of clarifying ambiguous doctrine, it must be acknowledged that in some instances no degree of clarity is ever likely to fully achieve that objective. Clarifying the law cannot result in the absence of discretion when, for example, the law being clarified is a standard rather than a bright-line rule.[350] In *Casey*, for instance, the Court was clear about the relevant test—whether the regulation affecting abortion is unduly bur-

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new law, it might as well be the court with a spotlight on it and some expectation of accountability to public will that does so.

347 By "maximalism" I do not mean the Court should address constitutional questions at every opportunity or that the substance of its doctrine should be maximal, only that when the Court has already provided doctrine, it should be maximal about the meaning of the doctrine; in other words, it should be maximal with respect to the doctrine's clarity. Also, in theory, that clarity need not necessarily come from the Supreme Court. So long as the Court is creating new constitutional law, there are good arguments that could be marshaled that it should certify questions of constitutional meaning to Congress. *See generally* Henry Paul Monaghan, *Constitutional Common Law*, 89 COLUM. L. REV. 1 (1975) (outlining a theory of constitutional common law "subject to amendment, modification, or even reversal by Congress"). Of course, there are arguments that cut the other way, too.

348 *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) ("[L]ongstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court 'superior' to it.").

349 *See* Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1179 (2006) (arguing that consistency and uniformity are particularly important given the "critical issues" that come before courts); LON L. FULLER, THE MORALITY OF LAW 39, 79–91 (rev. ed. 1969) (arguing in favor of predictability and consistency).

350 *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 406 (1985) ("[I]f standards were correctly interpreted, they would exhibit not only all the standard virtues (i.e., flexibility) but also all the rule virtues (i.e., certainty).").

densome.[351] But whether a burden is "undue" is not a hard science with a ready and obvious answer, and the question certainly leaves room for judicial discretion.[352] (No wonder that abortion cases, which are highly charged, have been rife with judicial partisanship.[353])

Yet acknowledging that discretion is not always avoidable does not require abandoning the project of clarifying doctrine altogether. Discretion is not an all-or-nothing proposition; doctrinal clarity operates on a spectrum. In the free exercise context, some might consider *Smith* itself a "clear" decision because it eliminated *Sherbert* and *Yoder*'s balancing test.[354] But by simply holding that the Free Exercise Clause is violated when the government discriminates against religion, without saying much more, *Smith* allowed judges to choose among vastly different tests with drastically different underlying purposes.[355] In this instance, the Supreme Court could at least

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351 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."). This article was in the printing stage when the Supreme Court decided *Dobbs v. Jackson Whole Women's Health*, 142 S. Ct. 2228 (2022), which overruled *Casey*.

352 *See* Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 686–87 (W.D. Tex. 2014), *rev'd*, 790 F.3d 563 (5th Cir. 2015) (finding that Texas's admitting privileges law amounted to an undue burden); Whole Woman's Health v. Cole, 790 F.3d 563, 590 (5th Cir. 2015) (reversing upon finding that the same law does not place an undue burden on women seeking an abortion).

353 NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 41 (2005) (finding that, between 1994 and 2001, Democratic-appointed lower court judges were more likely to strike down an abortion restriction "by 44 percentage points compared with . . . Republican-appointed judge[s]").

354 Sherbert v. Verner, 374 U.S. 398, 403 (1963); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *see* David B. Salmons, *Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion*, 62 U. CHI. L. REV. 1243, 1247 (1995) (explaining how *Sherbert* and *Yoder* established a balancing test for free exercise jurisprudence).

355 I believe a faithful reading of *Smith* results in an understanding of religious discrimination as intentional discrimination and not the "most favored nation" interpretation. But even so, and even accepting that "judicial partisanship causation" is not linear and monodirectional and that often judicial partisanship begets ambiguity which begets more judicial partisanship and on it goes, there is a significant difference between a case stating the basic underlying meaning of free exercise as "anti-intentional-discrimination" and providing a *test* for identifying it. The "most favored nation" theory does not capture the intent component of free exercise discrimination, which is why I view it as disingenuous. But clever lawyering (which predates the new composition of the Court) can, and, as I have documented, has manipulated the general standard provided in *Smith* into a test that yields something much more robust than *Smith* contemplates. *Smith* was clear about the objective of free exercise's meaning but not the test for realizing it. It could have been a lot clearer.

provide a test for identifying discrimination against religion, as it has done in many other antidiscrimination contexts.[356] While it is true that a common feature of antidiscrimination tests is whether two entities are similarly situated,[357] and any test will involve some degree of discretion, there is a significant difference between a test that calls for some discretion and not having any test at all.[358]

CONCLUSION

Free Exercise jurisprudence has undergone a cataclysmic change over the last decade: whereas free exercise was once seen as an American value on which Americans across the aisle could agree, it is now intensely controversial. The impacts of this shift have not been confined to the political arena—indeed, the politicization of religious freedom has infiltrated every level of the federal judiciary. But while religious freedom has joined the expanding list of controversial issues in American society, steps can be taken to minimize the role partisanship plays in free exercise decisions in lower courts. As the findings in this Article suggest, if the governing doctrine were to be crystalized through provision of a clearer definition of religious discrimination, lower court judges would be less likely to consider themselves able to decide free exercise cases in concert with their political preferences.

Many legal scholars have touted the benefits of "judicial minimalism," which holds that if the Court need not tackle a constitutional question, it should not do so.[359] While that approach offers certain benefits—including "promot[ing] more de-

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356 In the employment context, for instance, the Court has established the *McDonnell Douglas* tripartite burden-shifting framework for Title VII disparate treatment claims, whereby a claim of discrimination can be made out by satisfying a series of prongs, including that an employer's explanation for its allegedly discriminatory treatment was pretextual. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (considering the first two prongs).

357 I should add that "comparability" is not required for identifying discrimination according to everyone, at least when it comes to religion. As I have explained above, *supra* note 233, according to Justice Kavanaugh, when applying the "most favored nation" approach to discrimination against religion, comparability is irrelevant. Rather, categorically, "once a State creates a favored class of businesses . . . the State must justify why houses of worship are excluded from that favored class." Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 73 (2020) (Kavanaugh, J., concurring).

358 Given its majority conservative make-up, progressives will oppose *this* Court adopting a maximalist approach. But there is something to be said for being principled about judicial minimalism and maximalism and accepting that there will be periods when conservatives will "win" and periods when progressives will "win" at the Supreme Court.

359 ONE CASE AT A TIME, *supra* note 19, at 3–4; Sunstein, *supra* note 342, at 8.

mocracy and more deliberation"[360]—minimalism also comes with a serious downside: it gives free rein to lower court judicial partisanship.

The Supreme Court has in the past been invited to clarify the meaning of religious discrimination, but it has thus far passed on the opportunity and kicked the can down the road for a later day. If history is precedent, the Court will likely give the can a few more kicks. If it does, the history of partisanship in the COVID-19-related free exercise cases will serve as a valuable lesson in the troubling consequences of leaving lower court judges to decide controversial cases based on ambiguous law.

360 ONE CASE AT A TIME, *supra* note 19, at 3–4.