Fordham Law Review

Volume 91 | Issue 3 Article 2

2022

Second-Best Free Exercise

Christopher C. Lund
Wayne State University Law School

SECOND-BEST FREE EXERCISE

*Christopher C. Lund**

The future of the Free Exercise Clause is up in the air. Thirty years ago, in Employment Division v. Smith*, the Supreme Court held the Free Exercise Clause only protected against religious discrimination and did not require exemptions from neutral and generally applicable laws.*

Yet despite having an official rule against religious exemptions, the Roberts Court has somehow managed to give religious exemptions in case after case. This illustrates Smith*'s waning power—the case has become more of an obstacle for courts to work around than a precedent for courts to obey. But these victories have also come to shape free exercise doctrine in ways that few could have predicted and in ways the* Smith *Court might not even recognize.*

The Court's new regime has many positive features. Its recent cases awarding religious exemptions have been based on a robust theory of equality that has genuine normative appeal. But these pluses go hand in hand with some negatives and some question marks. Smith*'s core concepts have become deeply indeterminate and thus manipulable; other features make it particularly hard for religious minorities to bring claims; underneath it all lies the fact that general applicability is a concept that turns heavily on arbitrary factors, introducing a great deal of sheer luck into the process. Concerns about judicial restraint and federalism have been totally lost, and open judicial balancing of interests—the one thing* Smith *most sought to avoid—has been tacitly reintroduced through the back door.*

The Roberts Court has been making lemonade out of the lemon it was given, which is understandable. But the Court's new theory of free exercise is a theory of the second best, and it bears the familiar scars of such theories. The Court could move to the narrowest form of Smith*, one centered around intentional discrimination, which would be conceptually clean but would basically mark the end of free exercise. Another approach, and a better one, would be to throw off* Smith*'s shackles and dive back into a regime of religious exemptions. But either way, probably the one thing most difficult*

* Professor of Law, Wayne State University Law School. I would like to thank Tom Berg, Elizabeth Sepper, Nathan Chapman, Steve Collis, Chad Flanders, Michael Helfand, Andrew Koppelman, Marc Storslee, Doug Laycock, and Jon Weinberg for helpful comments. This paper also benefited greatly from comments received when it was presented at Yale Law School's Free Exercise Speaker Series and the Nootbaar Fellows Program at Pepperdine University Rick J. Caruso School of Law.

to imagine is that the Free Exercise Clause will stay the same for much longer.

INTRODUCTION

Free exercise is in the middle of a revolution. Long neglected, the free exercise of religion has quickly become the favorite child of the Roberts Court. Last year, for example, the Court ruled that Philadelphia could not terminate its partnership with Catholic Social Services for refusing to work with gay couples seeking to adopt,[1] and it issued a raft of orders giving churches special rights to open in the face of quarantine orders related to the COVID-19 pandemic.[2] In earlier years, the Court protected a religious baker who refused to make a cake for a gay wedding,[3] immunized religious schools from employment claims brought by their religious teachers,[4] and exempted religiously run corporations from having to provide contraceptive coverage

1. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

2. *See* Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam) (exempting in-home religious gatherings from California's prohibition on having more than three families in a home); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (exempting religious organizations from California's rules limiting indoor capacity); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (exempting religious organizations from New York's rules limiting indoor capacity).

3. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

4. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

to their employees.[5] Religious claimants bringing free exercise claims have won many remarkable victories.[6]

The Roberts Court has managed to reach all these very protective results, despite having inherited some very unprotective free exercise doctrine. Since the 1990 decision in *Employment Division v. Smith*,[7] the Supreme Court's official position has been that the Free Exercise Clause only forbids religious discrimination, and so it is generally up to legislatures, not courts, to give religious exemptions from neutral and generally applicable laws.[8] Some Supreme Court justices have grumbled about *Smith*, and various exceptions have been carved from it.[9] Even so, *Smith* remains the core of free exercise jurisprudence.

So despite having an official rule against religious exemptions, the Roberts Court has somehow managed to keep giving religious exemptions in case after case. The Court has been able to do this by developing a powerful and conceptually elaborate set of new rules about what counts as discrimination. These new rules all make sense, and they certainly ameliorate some of *Smith*'s harsh effects. But they also warp the doctrinal fabric of free exercise.[10] This piece sees five issues as being of particular importance: (1) the concern of manipulation, (2) the risk of going too far, (3) the return of balancing, (4) the problem of constitutional luck, and (5) the plight of religious minorities.

---

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

6. In fact, if one looks at the cases the Supreme Court has decided on their merits (ignoring the so-called "shadow docket" rulings), religious claimants have not lost an exemption case since 1997. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating part of the Religious Freedom Restoration Act of 1993). This includes not only claims under the Free Exercise Clause, but also claims under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). In fairness, though, there was *Sossamon v. Texas*, 563 U.S. 277 (2011), which limited prisoners' claims under RLUIPA to injunctive relief.

7. 494 U.S. 872 (1990).

8. *See id.* at 879 (holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . . .'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

9. This grumbling was most recently seen in a concurrence in which three justices said they would overrule *Smith*. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring). The exceptions have been both legislative and judicial. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in scattered sections of 5 and 42 U.S.C.); Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended in scattered sections of 42 U.S.C.); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (confirming the existence of the ministerial exception and distinguishing *Smith* as being inapplicable to "internal church decision[s] that affect[] the faith and mission of the church itself").

10. Professor Tom Berg sees the same progression in gay rights cases like *Romer v. Evans*, 517 U.S. 620 (1996), and *United States v. Windsor*, 570 U.S. 744 (2013), which produced minimalist holdings based on conceptions of discrimination that may or may not make much sense doctrinally, yet pave the way toward a broader, more defensible substantive right that will come later. *See* Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, 2017–2018 CATO SUP. CT. REV. 139.

First, there is a concern about manipulation. In working around *Smith*'s somewhat ironclad rule against exemptions, the Court has made a number of free exercise's core concepts—like what counts as a "rule" or an "exception" to the rule, or what the appropriate level of generality is—fuzzy and susceptible to results-oriented reasoning.[11] Second, and relatedly, having so greatly loosened the shackles of *Smith*, many paths have become open to the Court, creating real risks the Court might go too far with free exercise.[12] Third, balancing has returned to free exercise analysis in ways that the *Smith* Court would have rejected.[13] Not only must judges now openly make somewhat discretionary decisions about the nature and weight of the governmental interest in question, they also must tacitly make somewhat discretionary decisions about the nature and weight of the religious interest in question as well.[14] Fourth, at the bottom of *Smith* is an ugly truth—because *Smith*'s structure works by accommodating religious needs when some analogous secular need has been accommodated through the political process, religious liberty now hinges on the vagaries of whether religious needs just happen to overlap with nonreligious needs.[15] This problem—the problem of "constitutional luck"—has not even been addressed, let alone dealt with.[16] And fifth and finally, there is the continuing plight of religious minorities.[17] The Court has been working *Smith* over hard to protect religious liberty.[18] But various structural reasons, especially when combined with some unintended facets of the Court's recent decisions, mean that traditional religious minorities (like Jews, Muslims, Sikhs, and others) will likely get less out of the new Free Exercise Clause than other groups.[19]

When it comes to free exercise, the Supreme Court has been working out a theory of the second best. *Smith* has distorted free exercise in such a way that, as long as the Court stays within *Smith*, it can fix the distortions only by creating others. Twenty years ago, I remarked that "[f]ree exercise can either grow into a full-fledged substantive right or devolve into a simple prohibition on intentional discrimination, but the current arrangement is a primitive attempt to split the difference that is completely out of accord with our intuitions and that will ultimately satisfy neither side."[20] I was overconfident both in my analysis and my prescriptions, but I still think I got a lot of it right, and we now have another two decades' worth of evidence for it. In other

11. *See infra* Part II.A.
12. *See infra* Part II.B.
13. *See infra* Part II.C.
14. *See infra* Part II.C.
15. *See infra* Part II.D.
16. *See infra* Part II.D.
17. *See infra* Part II.E.
18. *See infra* Part I.
19. *See infra* Part II.E.
20. *See* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 664–65 (2003).

work, I have pressed the case that *Smith* should be overruled.[21] That, and not this, is probably the Court's best direction forward.[22]

I. UNPACKING THE NEW FREE EXERCISE CLAUSE

The Free Exercise Clause is in the middle of a remarkable transformation. In case after case, the Roberts Court has given religious exemptions to believers, despite having inherited (and preserved) a jurisprudence whose master principle was that courts should not give religious exemptions.[23] Each of the Court's decisions makes some sense on its own terms. But when examined collectively and looked at critically, hidden tensions and vexing questions begin to appear.

A. The Ancient History: Smith *and* Lukumi

Histories of the Free Exercise Clause tend to center around one case in particular—the Supreme Court's 1990 decision in *Employment Division v. Smith*. *Smith* asked whether members of the Native American Church had a constitutional right to use peyote in their religious rituals, despite an Oregon law generally forbidding peyote use. Before *Smith*, the Court had operated under a strict-scrutiny test somewhat warm to religious exemptions[24] under which substantial burdens on free exercise had to be justified by compelling governmental interests.[25] More demanding on paper than in practice, this compelling-interest test nevertheless gave the Court enough discretion to give religious exemptions in cases it found sufficiently sympathetic.[26]

Smith changed everything. It not only rejected the Native American Church's claim for an exemption to the peyote laws, it rejected religious exemptions in general.[27] Religious claimants could ask legislatures for

21. *See* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163 (2016); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183 (2014); Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 SAN DIEGO L. REV. 466 (2010) [hereinafter Lund, *A Look at State RFRAs*].

22. I offer more on the direction I would take free exercise in an upcoming symposium piece, Christopher C. Lund, *Answers to* Fulton*'s Questions*, 108 IOWA L. REV. (forthcoming 2023) (on file with author).

23. *See infra* Parts I.A–B.

24. The test was sometimes referred to as the *Sherbert-Yoder* test, named after the core cases. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

25. To be sure, there were three elements in this test—substantial burdens, compelling state interests, and least restrictive means. For a representative explanation of the test, see Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

26. Apart from *Sherbert* and *Yoder*, *see supra* note 24, the Court also gave exemptions in three other cases. *See* Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); *Thomas*, 450 U.S. 707.

27. More precisely, *Smith* held that burdens on religious exercise required no justification, as long as the laws in question were "neutral" and "generally applicable." *See* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) ("Subsequent decisions have consistently held that 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)

exemptions, the Court said, but they had no constitutional right to them.[28] In subsequent years, exceptions have been made to *Smith*, both by legislatures[29] and by the Supreme Court.[30] But *Smith*'s general rule—that courts should not give exemptions from laws that are "neutral" and "generally applicable"[31]—still dominates the jurisprudential landscape. If there is one rule to know, *Smith* is it. Last I checked, the bar review companies do not teach anything else about free exercise.

Three years after *Smith*, the Supreme Court returned to the Free Exercise Clause in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[32] where a congregation of Santería practitioners sought to sacrifice animals in religious rituals in the face of a set of ordinances passed by the city of Hialeah to stop exactly that.[33]

Lukumi unanimously held for the Santería, concluding that Hialeah's ordinances were neither neutral nor generally applicable.[34] The ordinances were not neutral, the Court said, because they had been passed deliberately to burden Santería religious practice.[35] And they were not generally applicable, the Court said, because Hialeah made exceptions to those ordinances for a variety of other kinds of killings.[36] For while Hialeah

conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))). In *Smith*, the Court did make some exceptions for individualized exemptions and hybrid rights. *See id.* at 881–82. But those exceptions were small ones and did not threaten the rule—at least, until recently. For a fuller explanation of these mechanics, see James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 725–26.

28. *See Smith*, 494 U.S. at 878–79.

29. In 1993, Congress passed RFRA, which restores religious exemptions at the federal level. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in scattered sections of 5 and 42 U.S.C.). In 2000, Congress passed RLUIPA, which restores religious exemptions from state and local law in the special contexts of land use law and prisons. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended in scattered sections of 42 U.S.C.). And on top of that, a number of states have restored exemptions through state statutes or interpretations of their state constitutions. *See* Lund, *A Look at State RFRAs*, *supra* note 21.

30. The key decision here is the Court's decision confirming the existence of the "ministerial exception"—a constitutional doctrine immunizing churches from employment suits brought by their clergy. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (holding that *Smith* does not apply to an "internal church decision that affects the faith and mission of the church itself"); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (expanding the breadth of the ministerial exception).

31. *See Smith*, 494 U.S. at 879–80.

32. 508 U.S. 520 (1993).

33. One such ordinance, for example, required people not to "unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* at 526–27 (quoting Hialeah, Fla., Ordinance 87-52 (Sept. 8, 1987)).

34. *See id.* at 524.

35. *Id.* at 540 ("[T]he ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice . . . ."). The Court drew this conception of neutrality from its equal protection cases, citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

36. *See Lukumi*, 508 U.S. at 536–38.

forbade killing animals in Santería rituals, it allowed a wide variety of other kinds of animal killings—for food, clothing, pest control, fishing, hunting, pet euthanasia, and so on. These kinds of killings threatened the city's stated interests as much as the Santería's killings would.[37] This was a form of unequal treatment, the Court explained, and "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment.'"[38]

Smith and *Lukumi* essentially stand on opposite ends of the spectrum. The law in *Smith* was neutral and generally applicable; the law in *Lukumi* was anything but. Left to draw the line between them, courts found the most help in *Lukumi*, where the Supreme Court centered the issue around notions of secular exceptions and underinclusiveness.[39] Basically, if a law makes no exceptions for other kinds of conduct (i.e., secular conduct), then it is generally applicable and no claim for a religious exemption is possible. But if a law makes exceptions for secular kinds of conduct, and if those secular exceptions threaten the government's interest as much as a religious exception would, that essentially amounts to religious discrimination and justifies a religious exemption.[40]

This conception of discrimination has intuitive appeal. It does indeed seem like discrimination when the government prohibits religious activities but permits secular equivalents—like when a school allows a girl to wear a baseball cap but not a hijab.[41] And, in a deep sense, the doctrine *must* be this

37. *Id.* at 544 ("The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it."); *see also* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 207–08 (2004) ("The ordinances' lack of general applicability was shown by their collective failure to prohibit secular killings of animals—analogous secular conduct outside the scope of the ordinances—and also by their failure to prohibit other secular conduct, not analogous as conduct, that caused analogous harmful consequences.").

38. *Lukumi*, 508 U.S. at 542 (second alteration in original) (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 148 (1987) (Stevens, J., concurring)).

39. To be sure, some courts initially took a narrower approach, conceiving of *Smith-Lukumi* as imposing a simple ban on intentional discrimination. *See, e.g.*, Thomas v. Anchorage Equal Rts. Comm'n, 165 F.3d 692, 702 (9th Cir. 1999) (asking whether the lawmakers in question "were impelled by a desire to target or suppress religious exercise"). This was probably not a persuasive reading of *Lukumi*. *See* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 28 (2000) ("Whatever else it may be, *Lukumi* is not a motive case. The lead opinion explicitly relies on the city's motive to exclude a particular religious group—and that part of the opinion has only two votes. So whatever the holding is, it is not a holding about motive."). But, in any event, it has been superseded by the Supreme Court's most recent cases. *See infra* Part I.B.

40. *See* Lund, *supra* note 20, at 637 (noting that "[a]s long as a law remains exceptionless, then it is considered generally applicable, and religious claimants cannot claim a right to be exempt from it," but when "a law has secular exceptions . . . a challenge by a religious claimant becomes possible"). As Professor Nelson Tebbe notes, this understanding of *Smith-Lukumi* found support from a surprisingly diverse coalition. *See* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2405 & nn.38–39 (2021) (making this point and providing citations).

41. Of course, the crucial thing will be deciding which secular activities count as equivalents. As Justice Kagan eventually put it, "the law does not require that the State equally treat apples and watermelons." Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (per curiam) (Kagan, J., dissenting); *cf.* Mark Storslee, *The Covid-19 Church-Closure Cases and the Free*

way, for there is probably no other way that an antidiscrimination right could go beyond religious status to protect religious conduct. Moreover, this approach has practical virtues—it gives religious minorities a kind of vicarious protection in the legislative process. Religious minorities can piggyback on battles fought by secular interest groups in the political branches. If those secular groups get an exemption, religious minorities do too.[42]

Despite some downsides that will be explored later, one can see the power and attractiveness of this "most favored nation" theory of free exercise in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[43] an influential opinion from the U.S. Court of Appeals for the Third Circuit written by then Judge Alito. There, two Muslim policemen challenged a department policy requiring them to shave, on grounds that they had a religious obligation to grow beards. Their claim succeeded because of a different exception made by the police department. Before the issue arose with the Muslim officers, the department had allowed other officers to wear beards when they had a particular medical condition making it painful to shave.[44] Seeing this as the kind of discrimination barred by *Lukumi*, *Fraternal Order* gave the Muslim officers their requested exemption.[45]

B. The Modern History: Masterpiece Cakeshop, Tandon, *and* Fulton

For more than twenty years, little changed about this basic picture. The Supreme Court decided various cognate issues. It addressed when religious exemptions should be awarded under the Religious Freedom Restoration Act of 1993[46] (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000[47] (RLUIPA);[48] it addressed the scope of other statutory religious

Exercise of Religion, 37 J.L. & RELIGION 72, 78 (2022) (pointing out "just how hard it can be to identify which activities are truly 'comparable,' at least when the underlying controversy relates to highly technical questions like disease transmission").

42. As Professors Douglas Laycock and Steven Collis put it: "Small religious minorities will rarely have the political clout to defeat a burdensome law or regulation. But if that regulation also burdens other, more powerful interests, there will be stronger opposition and the regulation is less likely to be enacted." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 25 (2016); *see also* Thomas C. Berg, *Religious Freedom amid the Tumult*, 17 U. ST. THOMAS L.J. 735, 738–40 (2022) (offering a similar account).

43. 170 F.3d 359 (3d Cir. 1999). The phrase "most favored nation status" was first coined in Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–50.

44. *See Fraternal Order*, 170 F.3d at 360 (noting this medical exception was made principally for officers with "a skin condition called pseudo folliculitis barbae").

45. As the Court put it, "the Department has provided no legitimate explanation as to why the presence of officers who wear beards for medical reasons does not have this effect [of undermining the government's interest] but the presence of officers who wear beards for religious reasons would." *Id.* at 366.

46. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in scattered sections of 5 and 42 U.S.C.).

47. Pub. L. No. 106-274, 114 Stat. 803 (codified as amended in scattered sections of 42 U.S.C.).

48. *See* Holt v. Hobbs, 574 U.S. 352 (2015) (RLUIPA); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (RFRA); Sossamon v. Texas, 563 U.S. 277 (2011) (RLUIPA);

exemptions;[49] and it carved an important exception from *Smith* in *Hosanna-Tabor*, the ministerial exception case.[50] But for a full generation, the Court left the basic structure of the Free Exercise Clause untouched. In the past five years, though, this has changed dramatically. The Court has returned to the Free Exercise Clause as if hungry for it. Later, this Article considers the cumulative effect of the Court's decisions in a critical light.[51] But before that, it addresses them individually.

1. *Masterpiece Cakeshop*: "Exceptions," "Rules," and the Level of Generality

In retrospect, the first sign everything was going to change came in 2018, with the Supreme Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[52] There, a couple seeking a cake for their wedding was turned away by the cakeshop owner, Jack Phillips, who objected on religious grounds to creating a cake for a gay wedding.[53] The couple sued Phillips for unlawful discrimination. But, in a 7–2 decision, the Supreme Court said it was Phillips himself who had been discriminated against, in violation of the Free Exercise Clause.[54] The Court based its conclusion partly on negative comments made about Phillips by the Colorado Civil Rights Commission, which first adjudicated the case.[55]

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (RFRA); Cutter v. Wilkinson, 544 U.S. 709 (2005) (RLUIPA).

49. *See* Advoc. Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017).

50. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020). The Court also had a set of funding cases creating free exercise rights to equality of treatment in government funding programs. *See* Carson v. Makin, 142 S. Ct. 1987 (2022); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

51. *See infra* Part II.

52. 138 S. Ct. 1719 (2018). Although everything seems different now, even five years ago, everyone saw *Smith*'s regnancy as totally firm. *See, e.g.*, Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 125 (2016) ("While *Smith* was a 5–4 decision in 1990, the Supreme Court has shown itself to be fully committed to the *Smith* rule.").

53. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

54. "Phillips' religious objection [to serving the gay couple]," the Court concluded, "was not considered with the neutrality that the Free Exercise Clause requires." *Id.* at 1731; *see also* Pamela S. Karlan, *Just Desserts?: Public Accommodations, Religious Accommodations, Racial Equality, and Gay Rights*, 2018 SUP. CT. REV. 145, 147 (arguing that, "in the end, the case fizzled out," as the Court's decision "rested entirely on the proposition that Colorado's administrative proceedings had been tainted by antireligious bias [and] left articulation of any general rule to 'further elaboration'").

55. *See Masterpiece Cakeshop*, 138 S. Ct. at 1732 ("The official expressions of hostility to religion in some of the commissioners' comments . . . were inconsistent with what the Free Exercise Clause requires."). For different takes on how bad these comments were, compare Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 143 (2018) (finding them less troubling), with Christopher C. Lund, *Discrimination*, Trump v. Hawaii, *and* Masterpiece Cakeshop, 56 GA. L. REV. (forthcoming) (on file with author) (finding them more troubling).

But the Court simultaneously floated a wider theory of discrimination—a theory taking *Smith* and *Lukumi* in a new direction. The Court turned its focus to a set of *other* cases decided earlier by the Colorado Civil Rights Commission.[56] In those other cases, a conservative Christian named William Jack had unsuccessfully sued a set of bakeries for refusing to make cakes with religious messages about the sinfulness of homosexuality written out on top.[57] The Supreme Court found inconsistencies in how the commission vindicated the gay couple's claim of discrimination against Jack Phillips in *Masterpiece Cakeshop* but rejected William Jack's claims of discrimination.[58] The Court took those inconsistencies as evidence of discrimination against Jack Phillips.[59] And, in a separate concurrence, Justices Gorsuch and Alito took it further, arguing that it was not just *evidence* of discrimination. It was discrimination itself, discrimination simpliciter, they claimed, for Colorado to find Jack Phillips liable for discrimination while dismissing William Jack's analogous claims.[60]

This theory—adopted by the Court and vigorously defended by two justices—reveals the complexities of the new Free Exercise Clause. The Court faulted the commission for treating the legal claims against Jack Phillips better than those brought by William Jack. But the truth is that there was no *necessary* inconsistency in how the commission acted. Discrimination law could plausibly draw the line between good legal claims and bad legal claims in any number of places—including the line between cakes with visibly written messages (the cakes requested by William Jack) and those without them (the cakes requested by the gay couple in *Masterpiece Cakeshop*). After all, visibly written messages require someone to write them out, thus requiring a special imposition on objecting bakers.

---

56. *See Masterpiece Cakeshop*, 138 S. Ct. at 1732 ("The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same [kind of discriminatory animus]."). For a strong formulation of this point, see Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 B.Y.U. L. REV. 167, 183–84, 187–88; Berg, *supra* note 10, at 144–45, 152–54.

57. *See Masterpiece Cakeshop*, 138 S. Ct. at 1728 (first citing Jack v. Gateaux, Ltd., Charge No. P20140071X, slip op. at 4 (Colo. C.R. Div. Mar. 24, 2015), http://www.adfmedia.org/files/GateauxDecision.pdf [https://perma.cc/JN4U-NE6V]; then Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X, slip op. at 4 (Colo. C.R. Div. Mar. 24, 2015), http://www.adfmedia.org/files/LeBakerySensualDecision.pdf [https://perma.cc/5DUZ-27ZW]; and then Jack v. Azucar Bakery, Charge No. P20140069X, slip op. at 4 (Colo. C.R. Div. Mar. 24, 2015), http://mediaassets.thedenverchannel.com/document/2015/04/23/Jack_Williams_V_Azucar_Bakery_17228465_ver1.0.pdf [https://perma.cc/5K6D-VV8U]).

58. To give one example, in *Masterpiece Cakeshop*, the commission saw the cake's message as the couple's rather than the baker's. Yet in the Jack cases, the commission viewed the cake's message as the baker's rather than the couple's. *See id.* at 1730 ("[T]he Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti–gay marriage symbolism."); *see also* Laycock, *supra* note 56, at 183–84 (pointing to other inconsistencies).

59. *See Masterpiece Cakeshop*, 138 S. Ct. at 1730.

60. *See id.* at 1734 (noting that some justices "have written separately to suggest that the Commission acted neutrally toward [Jack Phillips] when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment," but then concluding, "I do not see how we might rescue the Commission from its error").

Now maybe such a line would be dumb—unresponsive to the real concerns at stake. But that would not make it incoherent, and even that would not make it religiously discriminatory. Justice Gorsuch seems confident that the commission was attracted to this line because he believes it harbored religious prejudice against Jack Phillips.[61] And he could well be right about that, given the other facts in the case. But that turns *Masterpiece Cakeshop* back into a case about bad motives and tacitly abandons the position that the line drawn by Colorado was *inherently* discriminatory.[62]

But there is an even deeper problem with the Court's theory of discrimination in *Masterpiece Cakeshop*. The Court starts from the implicit premise that William Jack's claims and the gay couple's claims in *Masterpiece Cakeshop* have to be treated the same way—that Colorado has a constitutional obligation to interpret its ban on religious discrimination and its ban on sexual-orientation discrimination coextensively. In fact, all nine justices on the Court assume this, even the dissenters. The Court seems to think discrimination against religious discrimination claims is a kind of religious discrimination. But this is not true. Discrimination against religious-discrimination claims is not a form or species of religious discrimination. This is just a conceptual mistake.

To see the mistake most clearly, suppose Colorado had a law forbidding sexual-orientation discrimination in public accommodations, but no law forbidding religious discrimination in public accommodations. Under the Court's theory in *Masterpiece Cakeshop*, that is clearly unconstitutional; it is, in fact, an a fortiori case. After all, in that world, the gay couple in *Masterpiece Cakeshop* would still have a winning claim, and William Jack now would not even have a chance. Yet such a conclusion would be breathtaking—it would imply that every state must have statutory protections (coextensively interpreted) for every kind of constitutionally protected behavior or characteristic. That would have broad implications.[63] To take

61. *See, e.g.*, *id.* at 1739 (Gorsuch, J., concurring) (arguing that Colorado drew the line it did "[o]nly by adjusting the dials just right" so as to "engineer the Commission's outcome," and concluding that "[s]uch results-driven reasoning is improper").

62. In a different way, one sees that same tacit abandonment in Justice Gorsuch's repeated insistence that Phillips had religious reasons for seeing his cake as carrying his own message. *See id.* ("To some, all wedding cakes may appear indistinguishable. But to Mr. Phillips that is not the case—his faith teaches him otherwise."); *id.* at 1739–40 ("It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is just bread or a kippah is just a cap."). The easy response to Justice Gorsuch's argument is that Phillips's religious reasons do nothing to undermine the legitimacy of Colorado's reasons for drawing the line where it did. Justice Gorsuch's argument becomes an argument for religious exemptions and against *Smith*, rather than an argument about religious discrimination simpliciter.

63. Just to give one example, consider how some states forbid discrimination in public accommodations on the basis of religion but not sexual orientation. *See* Paul Vincent Courtney, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. PA. L. REV. 1497, 1500–01 (2015) ("Although forty-five states have enacted public accommodations statutes, the statutes of only twenty-one states and the District of Columbia explicitly prohibit sexual orientation discrimination."). If the Court is right that it amounts to religious discrimination to protect gays and lesbians, but not religious

just one of them, consider 42 U.S.C. § 1981, which forbids racial discrimination (but not religious discrimination) in contracting.[64] An interracial couple denied a cake by someone like Jack Phillips could successfully sue him for racial discrimination under § 1981, but someone like William Jack would not be able to use § 1981 to sue bakeries for religious discrimination when those bakeries refuse to put derogatory messages about interracial couples on wedding cakes. The Court's logic implies there is something unconstitutional about § 1981. But that cannot be right.[65]

All this does not just go to the logic of one narrow Supreme Court case. For although no one on the Court ever puts it in these terms, *Masterpiece Cakeshop* highlights a conceptual problem with the *Smith-Lukumi* notion of general applicability.[66] The Court's true objection to Colorado's discrimination law, in essence, is that it is not generally applicable—or at least not generally applicable *enough*. Colorado made an exception to its discrimination laws when it dismissed William Jack's claims. Now having made that exception, the logic goes, general applicability requires that the claims against Jack Phillips also be dismissed—as in *Fraternal Order* or *Lukumi*, the existing secular exception generates a claim for a religious exemption.

But this framing enables us to see just how manipulable the idea of general applicability has become. General applicability has courts give religious exemptions only when governments have already made other "exceptions" to the "rule" in question. But what counts as the "rule," and what counts as the "exception," tacitly depend on the level of generality in how things are framed. In *Masterpiece Cakeshop*, if one frames the rule at a low level of generality (if the rule is the "specific Colorado law forbidding religious

---

people, from discrimination, *see Masterpiece Cakeshop*, 138 S. Ct. at 1730, then it must also amount to sexual-orientation discrimination to protect religious people but not gays and lesbians. This means that all of the states above are acting unconstitutionally. Of course, this assumes that the Constitution protects gays and lesbians from discrimination by the state. But that assumption seems almost unassailable now. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

64. *See* 42 U.S.C. § 1981 (providing that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens"); *see also* Runyon v. McCrary, 427 U.S. 160, 168 (1976) ("It is now well established that § 1 of the Civil Rights Act of 1866 prohibits racial discrimination in the making and enforcement of private contracts." (citation omitted)).

65. Now, to be clear, if it was shown that Colorado refused to interpret its ban on religious discrimination as powerfully as its ban on sexual-orientation discrimination because it disliked religious people (or disliked conservative Christians) bringing discrimination suits, that would be a different story. But again, that would turn *Masterpiece Cakeshop* into a case about bad motives and would tacitly abandon the idea that Colorado's line was inherently discriminatory. *See supra* note 62 and accompanying text (explaining a similar point).

66. Professor Laycock defends Justice Gorsuch's view without talking about general applicability. But one nevertheless sees traces of the concept throughout his piece, particularly in this statement: "The state's conclusion that the law did not apply to the William Jack bakers *undermined its interest* in ending discrimination to the same extent as a conclusion that Masterpiece Cakeshop was entitled to exemption from the law on grounds of religious liberty." Laycock, *supra* note 56, at 189 (emphasis added).

discrimination"), then Colorado has made no exceptions to it, and so Jack Phillip's claim for a religious exemption should lose. But if one frames the rule at a higher level of generality (if the rule is "all of Colorado's laws forbidding discrimination"), then Colorado made an exception in the William Jack cases, and so Jack Phillip's claim for a religious exemption should win. Everything depends on the level of generality.

But this creates concerns about manipulation, and those concerns extend far beyond *Masterpiece Cakeshop*. One can always get the religious claim to win if one raises the level of generality sufficiently. (Considered as a whole, American law is not generally applicable.) And one can always get the religious claim to lose by lowering the level of generality. (Every law applies to all the things to which it applies.) Moreover, because the level-of-generality question is always antecedent and not really capable of objective resolution, general applicability becomes a protean concept—perpetually contestable and quite manipulable.

We will turn back to this idea more formally later,[67] but we can see now how *Masterpiece Cakeshop* illustrates how modern free exercise jurisprudence involves a certain degree of gamesmanship. And this means that the success of free exercise claims will depend heavily on judicial temperament—judges sympathetic to certain claims can manipulate the level of generality one way, while judges unsympathetic to those claims can manipulate it the other way. This is surely better than a world without religious exemptions. But it is not the best.

2. *Tandon*: "Most Favored Nation" Status

The Supreme Court's next encounters with the Free Exercise Clause came in a flurry of cases arising out of the COVID-19 pandemic.[68] Wanting to minimize COVID's spread, state and local governments implemented quarantine orders typically banning gatherings (including religious ones) of more than ten people, with limited exceptions.

Religious organizations challenged those orders, and the Supreme Court initially turned those challenges away.[69] In *South Bay United Pentecostal Church v. Newsom*,[70] for example, the Supreme Court upheld California's decision to continue limiting attendance at churches, even though California had completely reopened manufacturing facilities, warehouses, and offices—

67. *See infra* Part II.A.

68. For a thorough factual overview of these cases, see Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637 (2021).

69. These cases, it should be noted, were "shadow docket" cases that involved requests for emergency relief and were heard on an expedited basis. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015). For criticism of the Roberts Court's use of the shadow docket, see Steve Vladeck, *Shadow Dockets Are Normal, the Way SCOTUS Is Using Them Is the Problem*, SLATE (Apr. 12, 2021, 6:09 PM), https://slate.com/news-and-politics/2021/04/scotus-shadow-docket-use-problem.html [https://perma.cc/K6ZY-FKHM].

70. 140 S. Ct. 1613 (2020).

and, in some places, schools and in-restaurant dining.[71] Religious organizations argued those "secular exceptions" rendered California's rules not generally applicable: these nonreligious gatherings posed the same risk of COVID transmission as religious services, they argued, so it was discriminatory for California to allow them without allowing religious services. Yet the Court rejected this claim.[72]

But things changed overnight when Justice Barrett replaced Justice Ginsburg on the Supreme Court. In a flash, the 5–4 decisions against churches became 5–4 decisions in their favor, and the same arguments that failed before now succeeded. In *Roman Catholic Diocese v. Cuomo*,[73] the Court invalidated New York's rules limiting religious gatherings to ten people because of the exceptions made for various businesses deemed essential and allowed to open.[74]

Later on, in *Tandon v. Newsom*,[75] the rules both crystallized and formalized. At issue there was California's rule limiting religious gatherings in homes to three families. This rule was nondiscriminatory in the most obvious sense. It applied to both religious gatherings and nonreligious ones—you simply could not have three non-related families gathering in the same home. But the Supreme Court still invalidated it because of how California treated businesses:

> California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time [and these activities have not been shown] to pose a lesser risk of transmission than applicants' proposed religious exercise.[76]

Tandon can be criticized from several directions. The strongest criticism is that the Court was simply wrong on the facts. There was, in truth, good reason to think that the businesses in question posed less transmission risk than gatherings of three families in the same house.[77]

---

71. *See id.* at 1613, *see also* Michael Helfand, *Religious Liberty and Religious Discrimination: Where Is the Supreme Court Headed?*, 2021 U. ILL. L. REV. ONLINE 98, 101–03 (providing an overview of *S. Bay* and the other cases).

72. As is typical for cases in this posture, the Court offered no explanation for this, simply denying injunctive relief without an opinion. In a concurrence explaining his own views, Chief Justice Roberts stressed that several of the permitted secular gatherings still had attendance limits, that courts should defer to politically accountable officials during a pandemic, and that the legal standard for obtaining an injunction pending appeal was high indeed. *See S. Bay*, 140 S. Ct. at 1614 (Roberts, C.J., concurring).

73. 141 S. Ct. 63 (2020).

74. The Court held that New York's rule was not generally applicable after focusing on the long list of businesses that New York had deemed essential. *See id.* at 66 ("[T]he list of 'essential' businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.").

75. 141 S. Ct. 1294 (2021) (per curiam).

76. *Id.* at 1297.

77. In dissent, Justice Kagan espoused this view, stressing that these were simply the facts the district court found: "No doubt this evidence is inconvenient for the per curiam's preferred

Tandon's doctrinal legacy lies in how it makes explicit something that had been only implicit back in *Roman Catholic Diocese*. In *Tandon*, the Court formally adopts the "most favored nation" approach to the concept of general applicability—an approach we saw back in the Third Circuit's decision in *Fraternal Order*.[78] "[G]overnment regulations are not neutral and generally applicable," *Tandon* says, "whenever they treat *any* comparable secular activity more favorably than religious exercise."[79] Even a *single* secular exception requires a religious exemption under the Free Exercise Clause, the Court said, as long as that secular exception undermines the rule to the same extent as a religious exemption.[80]

3. *Fulton*: Hypothetical Exemptions

We now come to the final case in the Supreme Court's recent triumvirate: *Fulton v. City of Philadelphia*.[81] *Fulton* repeats many of the same issues, themes, and political dynamics as *Masterpiece Cakeshop*.[82] *Fulton* saw three groups square off against each other: Catholic Social Services (CSS), gay couples seeking to adopt, and the city of Philadelphia. After a newspaper story about how CSS would not certify gay couples as prospective foster parents, Philadelphia's Department of Human Services ended up canceling CSS's contract with the city.[83] Ultimately, *Fulton* ends like *Masterpiece Cakeshop*: the Court rules for the religious claimants, but on a relatively narrow ground.

Like *Tandon*, *Fulton* is a case about general applicability. CSS's contract with Philadelphia had a provision forbidding CSS from rejecting any adoptive family. But at the same time, the contract gave the commissioner of Philadelphia's Department of Human Services the power to make exceptions to that provision—exceptions that would allow partner agencies to reject adoptive families.[84] Now most would agree that if the commissioner

---

result. But the Court has no warrant to ignore the record in a case that (on its own view) turns on risk assessments." *Id.* at 1298 (Kagan, J., dissenting).

78. *See* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366–67 (3d Cir. 1999).

79. *Tandon*, 141 S. Ct. at 1296 (adding, moreover, that "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue").

80. As Professors Laycock and Berg put it, *Tandon* now requires religious exemptions "whenever regulations exempt or permit even one comparable secular activity." Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020–2021 CATO SUP. CT. REV. 33, 35.

81. 141 S. Ct. 1868 (2021). For an in-depth look at *Fulton*, see Laycock & Berg, *supra* note 80, at 34–38.

82. *See* Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 160 (2014) (discussing how "much of the reason for the shift in views on accommodation involves another contested field in the American culture wars: the status of gay rights and same-sex marriage").

83. *See Fulton*, 141 S. Ct. at 1875–76.

84. Section 3.21 of the contract had the following provision: "Provider shall not reject a child or family including, but not limited to . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . *unless an exception is granted by the*

had *actually* exempted someone else from that provision, then CSS would have had a strong claim to a religious exemption. But that did not happen. As it turned out, the commissioner had never actually made an exception for anyone else. Yet the Supreme Court in *Fulton* ruled for CSS anyway, holding that the *mere ability* of the commissioner to make exceptions entitled CSS to an exemption, regardless of whether the commissioner had ever used that power.[85]

Although *Fulton* raises some issues we will shortly cover, the decision certainly makes some sense. Several cases, for example, establish a parallel principle with regard to free speech—the government cannot have unbridled discretion to choose among speakers because it might exercise that discretion in discriminatory ways.[86] *Fulton*, in a way, adopts this same principle, translated into the context of free exercise.[87]

Like *Masterpiece Cakeshop* and *Tandon*, *Fulton* neither overrules *Smith* nor changes its most basic features. Instead, *Fulton* conceives of itself as a discrimination case, implicitly presuming that if Philadelphia's rule were truly generally applicable—that is, if the rules applied to everyone and there was no possibility of exemptions—then CSS would really have to serve gay couples.

Of course, if push came to shove, the Court would probably not let that happen. But if Philadelphia's rules were truly neutral and generally applicable, protecting CSS would likely require the Court to overrule *Smith*. Six justices raised that possibility in two different concurrences.[88] But while

---

Commissioner or the Commissioner's designee, in his/her sole discretion." *Id.* at 1878 (emphasis added) (quoting the contract).

85. *Fulton* has other parts as well. Apart from the contract between CSS and Philadelphia, there was Philadelphia's antidiscrimination law. The Court dealt with that by concluding that CSS was not a place of public accommodation for purposes of city law, even though no state court had ever held such a thing. *See id.* at 1881. In reality, the Court seemed to be applying a doctrine of constitutional avoidance. But the Court was understandably hesitant to say that explicitly, because doing so (1) backhandedly implies *Smith* is defective and (2) ignores the fact that the doctrine of constitutional avoidance has not applied to matters of state and local law. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1904 (2011) ("[F]ederal courts . . . often refuse, for example, to apply widely accepted statutory interpretation doctrines—most conspicuously, the canon of constitutional avoidance—to state-law questions . . . .").

86. *See* City of Lakewood v. Plain Dealer Publ'g, 486 U.S. 750 (1988) (invalidating a city ordinance that gave the mayor discretion over which newspapers would be sold in public news racks, based on whatever he thought would be "necessary and reasonable"); *see also* Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992) (striking down a county ordinance for giving discretion to an administrator in setting fees for parade permits).

87. As Professor Tebbe puts it:

> It is true that there are freedom of speech precedents in which the Court has invalidated licensing regimes that give too much discretion to local officials. On an analogy to them, the mere availability of an exemption would be enough to arouse a suspicion of impermissible burdening. That seems to have been the justification in *Fulton*, and it makes some sense on its face.

Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 302 (2021).

88. In one concurrence, three justices (Alito, Thomas, and Gorsuch) argued straightforwardly that *Smith* should be overruled. *See Fulton*, 141 S. Ct. at 1931 (Gorsuch, J.,

Fulton may be a harbinger of *Smith*'s eventual overruling, right now it stands as just another case adopting the most protective version of *Smith* on the table.

II. A CLOSER LOOK AT THE FREE EXERCISE REVOLUTION

The Court that decided *Smith* would undoubtedly be amazed at how the decision has played out. With ingenuity and determination, the Court has somehow built a robust regime of constitutionally required religious exemptions on the back of a case whose core idea was that the U.S. Constitution does not require religious exemptions.[89]

Much of this is a good thing. Religious freedom stands on much firmer footing than it did before; religious people and institutions can better live their lives in a manner consistent with their faiths. But a closer look reveals some subtle concerns about the Court's new approach not visible at first glance.

In this section, we focus on five worries about the present state of free exercise: (1) the concern of manipulation, (2) the risk of going too far, (3) the return of balancing, (4) the problem of constitutional luck, and (5) the plight of religious minorities.

A. The Concern of Manipulation

The first concern worth noting is the risk of manipulation. We hinted at this a bit earlier in our discussion of *Masterpiece Cakeshop*,[90] but it is worth repeating. Ever since *Lukumi*, judges have been in charge of deciding when a secular exception to a rule is so significant that the Free Exercise Clause entitles a religious claimant to a religious exemption.[91] Courts answer this by asking whether a religious exemption would threaten the government's stated interest as much as an existing secular exception already does.[92] But this gives judges a great deal of discretion—discretion in (1) figuring out what the government's real interests are in a policy, (2) deciding whether something should be recognized as a secular exception, (3) determining the degree of harm to the government's interests created by the existing secular exemptions, and (4) comparing that harm to the harm posed by the proposed religious exemption.

Maybe most crucially, judges have discretion over the level of generality in how things are framed. By widening their field of vision, certain things will appear as exceptions to the rule that would not appear within a narrower frame. *Masterpiece Cakeshop* is the example we used before.[93] There, the

concurring). In another concurrence, three other justices (Barrett, Kavanaugh, and Breyer) raised questions about *Smith* but stopped short of saying it should be overruled. *See id.* at 1882 (Barrett, J., concurring).

89. *See supra* Part I.
90. *See supra* Part I.B.1.
91. *See supra* Part I.A.
92. *See supra* Part I.A.
93. *See supra* Part I.B.1.

Court objected to Colorado's application of antidiscrimination law on the ground that it had not been applied in a generally applicable manner. Having made an exception to its discrimination laws when it dismissed William Jack's assorted claims, general applicability demanded that the claims against Jack Phillips also be dismissed.

This illustrated the manipulability of general applicability as a concept. Jack Phillips loses if one takes a narrow field of vision (taking the law as the "specific Colorado law forbidding religious discrimination"). Jack Phillips wins if one takes a broader field of vision (taking the law as "all of Colorado's laws forbidding discrimination"). Religious claimants argue for raising the level of generality, governments argue for lowering it, and there is no objective way to decide who is right.

Maybe the best way of showing this is through the Court's recent decisions under RFRA and RLUIPA. All of them could now be rewritten as Free Exercise cases. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*[94] held that a Brazilian group could use hoasca in its religious rituals.[95] *Gonzales* was a RFRA case, but the Court could now give the exemption under the Free Exercise Clause, the idea being that the exception for religious use of peyote in the drug laws destroys the general applicability of Schedule I.[96] Also a RFRA case, *Burwell v. Hobby Lobby Stores, Inc.*[97] partially exempted a religiously run business from the Affordable Care Act's[98] contraceptive mandate.[99] But now, the Court could take the exceptions for small businesses and grandfathered plans as eliminating the general applicability of the act. *Holt v. Hobbs*,[100] an RLUIPA case, could be decided on the basis of the secular exception to the rule that allowed quarter-inch beards needed for medical reasons.[101] It may be true that not *every* case could be decided this way—Texas's rule in *Ramirez v. Collier*[102] really does seem generally applicable from all directions.[103] But all this illustrates the malleability and manipulability of the Free Exercise Clause at present.

B. The Risk of Going Too Far

This all leads to the next point—the risk that the Court might go too far. It is striking how so many of the Supreme Court's RFRA and RLUIPA

94. 546 U.S. 418 (2006).
95. *Id.*
96. Schedule I drugs are defined by the U.S. Drug Enforcement Administration as "drugs with no currently accepted medical use and a high potential for abuse." *Drug Scheduling*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/drug-information/drug-scheduling [https://perma.cc/7F99-HZ9D] (last visited Nov. 7, 2022).
97. 573 U.S. 682 (2014).
98. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).
99. *Hobby Lobby*, 573 U.S. 682.
100. 574 U.S. 352 (2015).
101. *Id.*
102. 142 S. Ct. 53 (2021).
103. *Id.*

decisions could be rewritten as free exercise cases. The Court's reconfiguring of *Smith* has not made RFRA and RLUIPA redundant, but the gap between them has narrowed more than anyone would have believed possible. And the Court's current take on *Smith* certainly seems more powerful than the old *Sherbert-Yoder* compelling-interest test.[104]

Take *Quaring v. Peterson*,[105] an old case in which a Pentecostal woman sought a driver's license but was turned away when she objected to being photographed for it on religious grounds.[106] Her claim failed in the Supreme Court because she could not get five votes from the Court in 1984 under *Sherbert-Yoder*, but she now would probably get nine votes under *Smith*. It certainly should be an easy case. The requested accommodation did not burden anyone else, it did not cost the state much, and few religious people wanted anything similar.[107] Plus, there were a ton of secular exceptions in the rule that a Court under *Smith* could use to make it happen doctrinally.[108]

If this is so, the Court has pulled off the doctrinal heist of the century. *Smith* dismissed *Sherbert-Yoder* as being too protective of free exercise. But, as now applied, *Smith* is probably *more* protective of free exercise than *Sherbert-Yoder*. This tells a fascinating story about the irrelevance of formal doctrine. A similar story could be told with the Establishment Clause, where the Court moved from forbidding the funding of religious institutions to allowing it (and now to requiring it), all somehow under the same three-part test from *Lemon v. Kurtzman*.[109] Of course, this makes it seem a little weird that the Court is presently considering whether to overrule *Smith* and go back to the compelling-interest test of *Sherbert-Yoder*. But there is no real weirdness, as everyone knows a new compelling-interest test for free exercise would resemble *Sherbert-Yoder* only linguistically; we have little idea what it would mean in practice.

All this puts us in uncharted territory, and there is some risk that the Court will go too far with the Free Exercise Clause. Of course, what counts as "going too far" will be different for different people; some would say the Court has already gone too far. Yet the Court's free exercise decisions so far have been relatively narrow and supported by supermajorities of the Court. *Masterpiece Cakeshop* was 7–2; *Fulton* was 9–0.[110] It is true that *Tandon* was 5–4, but the Court there split not over the law but over the facts—the dissenters did not object to *Tandon*'s legal conception of general applicability, but on the factual issue of relative transmission risk. It is not

104. *See supra* note 24.

105. 728 F.2d 1121 (8th Cir. 1984), *aff'd by an equally divided court sub nom.* Jensen v. Quaring, 472 U.S. 478 (1985).

106. *Id.*

107. *See id.* at 1123.

108. *See id.* at 1126–27.

109. 403 U.S. 602 (1971); *see id.* at 612. Professor Laycock gets the credit for this insight, pointing it out to me in conversation.

110. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1868 (2021).

clear when the Free Exercise Clause will lose that fifth vote, but it will keep growing until it does.

So if the Court has not yet gone too far, it surely might. Consider a recent case that reached the Court, *Dr. A. v. Hochul*.[111] It involved New York's requirement that health-care workers be vaccinated against COVID. Lower courts refused to enjoin the requirement, and the Supreme Court did not interfere. But in a dissent for himself and Justice Alito, Justice Gorsuch argued that New York's requirement likely violated the Free Exercise Clause.[112]

The way Justice Gorsuch saw it, New York's requirement failed to be generally applicable because New York had exempted those with medical needs from the requirement.[113] The logic paralleled *Lukumi*'s: New York "prohibits exemptions for religious reasons while permitting exemptions for medical reasons," and the state's goals are undermined "equally whether the worker happens to remain unvaccinated for religious reasons or medical ones."[114] Now, Justice Gorsuch conceded, maybe there might be more religious objectors than those with medical needs.[115] But the policy still fails the requirement of general applicability—the numbers would only affect the application of strict scrutiny, not whether it is triggered. And, most strikingly, Justice Gorsuch added that exemptions would need to be rationed out equally between the religious objectors and those with medical needs.[116]

Justice Gorsuch clearly thinks that New York lacks a strong interest in forcing vaccination on religious objectors, and maybe he is right.[117] But there is something a little unsettling about this as a conception of general applicability. And what's a little unsettling is this—Justice Gorsuch's analysis is totally blind to the reasons why New York has exempted those

111. 142 S. Ct. 552 (2021).

112. *See id.* at 555 (Gorsuch, J., dissenting).

113. Justice Gorsuch also argued that the policy failed *Smith*'s neutrality prong, pointing to untoward comments made by Governor Kathy Hochul and the fact that she initially promised a religious exemption and then apparently changed her mind. *See id.* at 553–54. On this point, Justice Gorsuch was on perfectly solid ground; the governor should indeed have stayed well out of theological issues instead of saying things like, "I know you're vaccinated, you're the smart ones, but you know there's people out there who aren't listening to God and what God wants." *Id.* at 554 (quoting Governor Hochul). For my take on similar comments in other recent cases, see Lund, *supra* note 55.

114. *See Dr. A.*, 142 S. Ct. at 556 (Gorsuch, J., dissenting).

115. There certainly were more religious objectors than those with medical needs—evidence submitted by New York put the ratio somewhere around twenty-to-one. *See* We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 286 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021).

116. *See Dr. A.*, 142 S. Ct. at 556–57 (Gorsuch, J., dissenting) (arguing that the state "might prevail" if it could "contend the most narrowly tailored means to achieve that interest is to restrict vaccine exemptions to a particular number divided in a nondiscriminatory manner between medical and religious objectors").

117. *See id.* at 557 (noting that "the evidence before us shows that employee vaccination rates in the State's healthcare facilities already stand at between roughly 90% and 96%," and that "New York has presented nothing to suggest that accommodating the religious objectors before us would make a meaningful difference to the protection of public health").

with medical needs.[118] Those reasons are important and contingent; they depend on facts about the world unrelated to religious exercise. This makes ignoring them dangerous. Put it like this: what if we could predict with absolute certainty that an identifiable group of people would die (say, because of a fatal allergy) if they had to get the COVID vaccine? At that point, Justice Gorsuch would probably back away from the logic of his dissent. He would not require religious objectors to be treated the same as those with medical needs; he would not ration exemptions between the two groups in proportion to their numbers. Instead, he would rightly say that we simply have stronger reasons for exempting those with medical needs than we have for exempting religious objectors. But that means the logic of his dissent was wrong all along—or, at least, it was contingent on the truth of certain things formally irrelevant to his analysis.

This makes clear two things at once. First, it highlights the risk of the new Free Exercise Clause and how the Court might take religious liberty too far. But second—and this will be the very next section of this Article—it illustrates how balancing has now reentered free exercise analysis through the backdoor. Notice how *Dr. A.* illustrates a striking trade-off that the Court must face—you can have a powerful but unsustainable version of *Smith* without balancing or you can have a more sensible version of *Smith* with a lot of balancing. Choose your poison, but there's poison either way. If this point is not clear now, however, it will be after the next section.

C. The Return of Balancing

Smith was about many things. But if we are going to oversimplify and say *Smith* was just about one thing, then *Smith* was about balancing. Consistent with Justice Scalia's conception of the judicial role more generally, *Smith* wanted courts out of the business of balancing governmental interests against religious ones.[119]

But if *Smith*'s plan was to get courts out of judgment-laden roles with regard to free exercise, then things have not gone according to plan. The first indication of this came in *Lukumi*, where the Court's carefully crafted conception of general applicability put it on judges to decide "whether the secular exceptions endanger the purposes of the legislation to a similar or greater degree than a religious exemption would."[120] To be sure, this did not return the Court to the open-ended interest balancing of *Sherbert-Yoder*. But it did require judges to make value-laden discretionary decisions. If you wanted, you could think of this as the compelling-interest test, but with tight evidentiary limits. Rather than asking whether the government's interest was

118. For someone to obtain a medical exemption, New York requires that they get a certification from their physician that the vaccine would be detrimental to their health due to a preexisting health condition. For the full text of New York's medical exception, see *We the Patriots USA, Inc.*, 17 F.4th at 275 n.2.

119. Dramatically, or maybe melodramatically, *Smith* called it "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." Emp. Div. v. Smith, 494 U.S. 872, 889 n.5 (1990).

120. Lund, *supra* note 20, at 640–41.

compelling in some abstract way, courts would instead ask whether the government had already undermined its claim of a compelling interest by allowing analogous nonreligious behavior. If you, the government, can't even treat your own interests as compelling, the logic goes, then why should we?

But in part because it was so easy, *Lukumi* did not talk much about the discretion it was giving back to judges—for there is a lot of leeway in deciding (1) the government's real interest in a policy, (2) the exceptions the government had previously made to that policy, (3) the harm of those existing exceptions to that interest, and (4) the relative harm of a religious exception to that interest. And, as discussed earlier, all of these are subject to manipulation, particularly through the level of generality at which they are framed.[121]

Even so, you might think, at least *Smith* got one big thing right. At least all the judicial assessment now happens only on one side of the equation—even if judges now must make judgments bearing on the weight of the *governmental* interest, at least *Smith* has gotten them out of the business of judging the *religious* interest in question.

But has it? This is the question: has *Smith*, in fact, gotten courts out of the business of assessing religious interests? *Tandon* desperately wants the answer to be yes; *Tandon*, in fact, firmly instructs courts not to consider the weight of the religious interest. This is what *Tandon* means when it says that "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather."[122] Remember *Tandon* was a case about quarantine orders. In deciding whether a church should get to open because a nail salon can, *Tandon* says the question is simply whether an open church threatens the government's interest (i.e., transmission risk) as much as an open nail salon.[123] Courts should address that question, *Tandon* directs, *without* passing on whether the value of an open church is more than the value of an open hair salon. Courts look to the relative *harms* of secular and religious exemptions to the government's interests; they do not look to the relative *benefits* of secular and religious exemptions. This is how *Tandon* tries to keep courts out of the free-for-all that might result if every free exercise claim required judges to directly weigh the importance of the religious exercise in question.

Here, however, is where I must make a little confession. For years, I thought this was the right approach to free exercise. For years, I thought free exercise could be handled the way that *Tandon* imagines. But I no longer see things that way. I was wrong then, and *Tandon* is wrong now. Simply put, it is neither sensible nor really possible for courts to truly bracket the weight of religious interests. Repressed explicitly, it will resurface tacitly.

---

121. *See supra* notes 61–66 (discussing this point, with particular reference to Justice Gorsuch's opinion in *Masterpiece Cakeshop*).

122. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

123. *See id.* at 1296–97.

To see the point most clearly, start with an old case about a Native American medicine woman criminally prosecuted for possessing owl feathers for use in the religious rituals of her Cherokee tribe.[124] Her argument for a religious exemption under *Smith* hinged on the fact that the relevant statute did not forbid possession across the board: "Possession of owl feathers is permitted under Virginia law by taxidermists, academics, researchers, museums, and educational institutions."[125]

Appoint a student to argue the woman's case and ask that student which of these secular exceptions they should focus on to argue against the general applicability of the rule. Most students will latch on quickly to what is almost surely the right answer—the taxidermy exception.

But notice what is really happening. Taxidermy jumps out at us *not* because the exception for taxidermists does more harm to the government's interest than the other secular exceptions do. After all, to know that, we would have to know more about the facts—like how many owl feathers taxidermists use, as compared to how many, say, museums use. Instead, taxidermy jumps out at us because it just seems like an unimportant reason to have owl feathers. If even *taxidermists* have the right to possess owl feathers, the logic goes, then surely the Native American medicine woman must be allowed to do so as well.

This logic is strikingly persuasive. But if you think about it for a bit, it demonstrates that something fishy is happening here. What we are saying, boiled down, is that Native American religious exercise is just more important than taxidermy. (And it is! No offense to taxidermists!) But this reflects how the weight of the religious interest has come in through the backdoor, and in direct contradiction of *Tandon*'s instruction that courts should focus only on the relative harm of the secular and religious exemptions to the government's interest. To frame it more conceptually, consider two propositions:

Proposition A:	The government cannot devalue religion.
Proposition B:	The government cannot decide the value of religion.

Now if these propositions were considered separately, a lot of people would say they believe in both of them—either seeing them as the same or as mutually reinforcing. But the truth, of course, is that they are not the same; the truth is they are contradictory and incompatible. You cannot say whether the government has devalued religion without first deciding, either implicitly or explicitly, what the true value of religion really is.

If the tension between these two propositions was hidden before, the COVID-19 pandemic brought it out into the open. This is apparent in cases like *Roman Catholic Diocese* and *Tandon*, where churches challenged

124. *See* Horen v. Commonwealth, 479 S.E.2d 553, 556 (Va. Ct. App. 1997).
125. *Id.* at 557.

quarantine orders. But it was apparent even before then—in the very orders themselves and in the problems they were trying to solve.

Forget religious organizations for a second. In deciding what things should be open during the pandemic, governments naturally took into account the value of those things. Essential businesses—like grocery stores, hospitals, sometimes liquor stores—never had to close. States had different definitions of "essential businesses," of course, but their common task was to identify which things were *essential*—which were simply too important to close.

Moreover, these kinds of value judgments extended far beyond deciding the narrow category of "essential businesses." In its multistage reopening plan, California put restaurants in stage 2 and bars in stage 3, meaning that restaurants could reopen before bars.[126] Perhaps this decision was reached purely by considering the relative risk of COVID-19 transmission in restaurants and bars. But I am not sure about this, especially given that social distancing and masks were required in both places. More likely, there was also a value judgment. California may have simply believed—and may have had good reason for believing!—that open restaurants are simply more important to society than open bars.

In the closure orders issued by governors and mayors, one sees these kinds of value judgments everywhere. Grocery stores were deemed essential because people need food and a lot of people don't have the money (or even reliable internet access) for grocery delivery. Childcare services were placed in the first category of businesses to reopen because parents have a lot of trouble working without reliable childcare for their kids. Determinations about when different things should reopen did not merely involve questions of fact (what's the amount of risk?), but also questions of value (is this worth the amount of risk?). The more something is worth, the more risk we are willing to accept.

But this, of course, puts us in a terrible bind when it comes to figuring out what to do with religious organizations. Take again California's multistage reopening plan. Essential businesses (including grocery stores, fast-food places, and liquor stores) were in stage 1 and never had to close.[127] Other organizations were classified as stage 2 (which really consisted of two separate stages, 2a and 2b), stage 3, and stage 4. Where do religious organizations most naturally fit? Should religious organizations be treated like concerts (stage 4), movie theaters (stage 3), restaurants (stage 2), or grocery stores (stage 1)?

We must listen to the scientists, who will tell us about the comparative transmission risk of all those things. (This is what *Tandon* tells us should be

126. These facts come from *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 940 (9th Cir. 2020) (Collins, J., dissenting); *see also* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (denying application for injunctive relief).

127. For the facts that follow, see *S. Bay*, 959 F.3d at 940.

our exclusive focus.)[128] But that is not enough. Cost-benefit analysis depends on us evaluating both the costs *and* the benefits. This means someone also needs to tell us about the comparative value of those things. How important is a worship service, as compared to a concert, a movie, a meal out, or a trip to the grocery store?

But this is a real pickle. It reflects the tension between wanting a robust devaluing principle (Proposition A) and wanting government to stay out of the business of deciding religion's value (Proposition B). And note this point is institution independent—this tension exists regardless of whether the decision-maker happens to be a governor, a legislature, or a court. In ordinary life, we believe pretty strongly in Proposition B. The government does not decide religion's value because people decide the value of religion for themselves. People might think religion good or bad; they might think it valuable, invaluable, or worthless. But each of us decides the issue for ourselves—we decide, with those we love and trust, whether to believe, what to believe, and how to practice. But the pandemic changed all this because what had previously been utterly ordinary activities started creating new kinds of spillover costs on everyone else. Your decision to go to a bar, a restaurant, or a church service started affecting my life differently than it did before. And these brand-new, third-party harms forced governments into the role of making binding and collective decisions about the worth of virtually everything—including the worth of religion.

And, just to be clear, I doubt there was any real way governments could have avoided these decisions. *Any* quarantine scheme classifying organizations by type would have to deal with them. And any *other* kind of quarantine scheme would run into real practical problems. For if governments could not classify organizations by type—if they could only make generally applicable rules like "indoor masks," "six feet apart," "buildings at 50 percent capacity"—they would lose the capacity to draw distinctions even among *nonreligious* organizations. California would be unable to favor restaurants over bars. It would be unable to give any priority to grocery stores, hospitals, or childcare services. Sensible quarantine schemes must classify organizations by type. But classifying organizations by type, and trying to figure out what to do with religious organizations, returns us to the thicket. Everyone, or at least most people, would say religious exercise should be given a high priority when it comes to being allowed to reopen. But how high? High by what measure?

Of all the Supreme Court COVID cases that could be used to press the point, the best is probably *Calvary Chapel Dayton Valley v. Sisolak*,[129] which involved Nevada's quarantine scheme. Under Nevada's rules, religious organizations—churches, synagogues, mosques, and so on—could have a maximum of fifty people. But casinos could have up to 50 percent of their

128. These are the "risks" that the *Tandon* Court referred to with the line, "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

129. 140 S. Ct. 2603 (2020).

maximum capacity—and, given their size, that meant effectively thousands of people.[130] Moreover, casinos are actually like religious organizations in some ways that bear on risk transmission. Like churches, and unlike grocery stores, people tend to stay at casinos for significant periods of time.

A number of Supreme Court justices thought this unconstitutional. They said it devalued religious exercise. "[T]here is no world," Justice Gorsuch memorably wrote, "in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."[131] Justice Gorsuch had a solid point: if casinos and churches are similar in terms of risk transmission, then the decision to let casinos open, while forcing churches to remain closed, is indeed a value judgment that casinos are more important than churches.

But at the same time, consider this. Nevada apparently gets more than 30 percent of its revenue—almost a billion and a half dollars per year—from casinos and their related hotels.[132] Nevada needs the casinos to be open—it needs that money to fix the roads, to keep the schools open, and to maintain various social programs. The argument that churches should open because casinos are open and pose the same kinds of health risks only works, as a logical matter, if the benefits of churches and casinos are roughly equal. But are they? Casinos are worth more than a billion dollars to Nevada. What can we honestly say about churches in this respect? Are they worth a billion dollars to Nevada? More? Less? How much? How could we possibly say?

In a concurring opinion in *Calvary Chapel*, Justice Kavanaugh admirably addressed some of this. He talked about the general economic benefits of casinos, as opposed to the taxes they paid to Nevada. But he then said this:

> [N]o precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide. Nevada's rules reflect an implicit judgment that for-profit assemblies are important and religious gatherings are less so; that moneymaking is more important than faith during the pandemic. But that rationale "devalues religious reasons" for congregating "by judging them to be of lesser import than nonreligious reasons," in violation of the Constitution.[133]

These are all good points, but there are weak spots in this analysis as well. For one thing, it is strange to rely on the absence of a precedent. More fundamentally, the claim of discrimination here assumes its premise: Justice

130. Justice Alito's dissent explains the core facts, which were undisputed: "A church, synagogue, or mosque, regardless of its size, may not admit more than fifty persons, but casinos and certain other favored facilities may admit 50 percent of their maximum occupancy—and in the case of gigantic Las Vegas casinos, this means that thousands of patrons are allowed." *Id.* (Alito, J., dissenting).

131. *See id.* at 2609 (Gorsuch, J., dissenting).

132. *See How Gaming Benefits Nevada*, NEV. RESORT ASS'N, https://nevadaresorts.org/benefits/taxes.php [perma.cc/VX5E-5U4E] (last visited Nov. 7, 2022).

133. *See Calvary Chapel*, 140 S. Ct. at 2614 (Kavanaugh, J., concurring) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–38 (1993)). Or, as Professor Berg put it, "[t]he state may value the jobs and revenue that casinos and bowling produce; but it may not value the constitutional right of religion less." Berg, *supra* note 42, at 742.

Kavanaugh says economic benefits do not justify this discrimination between casinos and religious organizations (and why don't they, again?). But the real claim is that the differences between casinos and religious organizations, in terms of their economic benefits, mean this is not really discrimination at all. Religion has not been devalued, because there are reasons for exempting casinos that just don't apply to churches.

To be clear, I am on Justice Kavanaugh's side in all of this—I, too, would have invalidated Nevada's rules in *Calvary Chapel*. I suppose Justice Kavanaugh's response to this would probably be that Nevada is still treating casinos and churches differently, and that the government could justify that differential treatment only by showing a compelling interest. But whether it happens at the general-applicability stage, or whether it happens at the compelling-interest stage, courts still must somehow assign a weight to the religious interest. The way Justice Kavanaugh would do it, the question would be this: given that casinos are worth about a billion dollars to Nevada, are churches worth so much less that Nevada has a compelling interest in keeping the churches closed but the casinos open? That question cannot be answered without assigning some weight to the religious interest. In this way, balancing (and direct judicial assessments of the worth of religious exercise) has indeed returned to free exercise. Such judgments are not bad; any regime even modestly concerned with free exercise will have to make them. But it is important to see that our system has already given up on *Smith*'s core idea—the impermissibility of interest balancing.

D. The Problem of Constitutional Luck

Earlier sections have stressed the points in the analysis where *Smith* gives judges a lot of discretion.[134] But the opposite is also true, at least in small part. For in one crucial respect, *Smith* denies judges any discretion. *Smith* is still an antidiscrimination right, rather than a substantive right (like freedom of speech). So to get a religious exemption, *Smith* requires religious claimants to show they have been discriminated against in some sense—*Smith* requires them to show a "secular exception" that has already undermined the law in question as much as a religious exemption would. Now, as we have seen, the Court has been extremely generous with various parts of that analysis. But *Smith*'s very nature imposes some fundamental limits on how generous the Court can be. The basic limit can be stated in a sentence. Unless there is some existing secular exception to a rule, religious claims for exemptions from the rule must fail.

This limitation destabilizes the entire regime of free exercise, rendering it—as I have put it before—a matter of luck.[135] Return to *Fraternal Order*—that old Third Circuit case decided by then Judge Alito about the Muslim

134. *See supra* Part I.A.

135. What follows here comes originally from Lund, *supra* note 20.

police officers who sought a right to wear beards as required by their faith.[136] Recall that they won their case because the police department had earlier permitted other officers to wear beards—namely, officers who had a rare skin condition called *pseudo folliculitis barbae*.[137]

But this prompts questions: What if the officers with that skin condition had not needed a medical exception because there were other treatments for it? Or what if the skin condition had simply never existed? In either case, there would be no medical exception and thus no religious exception, and so the Muslim officers would have ended up losing.

This is a real problem with *Smith* and *Lukumi*. They can only generate religious exemptions when the needs of religious believers just happen to overlap with other peoples' nonreligious needs. In practice, that means that free exercise exemptions will end up turning on idiosyncrasies. Muslim officers will have the legal right to follow the Qur'an only if enough other people have uncurable skin conditions (*Fraternal Order*). Santería congregations will be able to practice their religion only if other people kill animals in secular contexts sufficiently analogous to Santería sacrifice (*Lukumi*). Religious exemptions turn on more-or-less random factors—factors not directly related either to the religious claimant's interest in getting an exemption or the government's interest in denying one. This is the problem of constitutional luck.

E. The Plight of Religious Minorities

Another worrying facet of the *Smith*-*Lukumi* framework lies in how it treats religious minorities. The previous section of this Article raised the problem of constitutional luck, and for reasons we will explore, we can expect that problem to most profoundly affect religious minorities. Moreover, certain aspects of the Court's most recent decisions also come into play—although those decisions have lowered barriers faced by certain kinds of free exercise claims, they are likely to do the least for the kinds of claims religious minorities typically bring.

1. Religious Minorities and the Triple Barrier

But before getting into all these points, we should start at the beginning. Religious minorities seeking to exercise their religion in this country find themselves limited in three ways, which we could call the "triple barrier."

The first barrier arises from the Constitution itself. Forget the Religion Clauses for the moment. For even without them, the Constitution establishes rights that backhandedly protect majoritarian religious practices. Undoubtedly, the best example is the Free Speech Clause.[138] Now the Free

136. *See* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999); *see also supra* notes 43–45 and accompanying text (discussing *Fraternal Order*); *see also* Lund, *supra* note 20, at 647–52 (making some of these points).

137. *See Fraternal Order*, 170 F.3d at 360.

138. *See* Widmar v. Vincent, 454 U.S. 263, 269 (1981) ("[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment.");

Speech Clause is religiously neutral in the most obvious sense—it gives all religious groups (and, in fact, nonreligious ones) the same rights.[139] But the right to evangelize—an aspect of the right of free speech[140]—is relied on particularly heavily by evangelical faiths who see it as vital to share their faith with others. And, of course, this is hardly a coincidence. If one goes back to the Founding, one sees an overwhelmingly Protestant population that valued free speech in significant part because they valued and sought to protect religious evangelization.[141]

This illustrates something important. Perhaps the most significant religious practice of the most significant religious groups in America are constitutionally protected, even without the Free Exercise Clause. The same is not true for other religious groups. There were no Jews or Muslims at the Constitutional Convention; no one cared about protecting *their* primary religious practices through other parts of the constitutional text. All this is to say that religious minorities need specific free exercise rights in ways that other religious groups may not.

The second barrier arises from the nature of the legislative process. This is so obvious that it feels odd to say. But religious minorities are, in fact, minorities. As such, they have a more difficult time obtaining religious exemptions from the political branches. Legislators respond well to sizeable groups of voters and campaign contributions. But that dynamic generates a political process in which large and wealthy groups will find it easier to

---

Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.").

139. In fact, it would violate both the Free Speech Clause and the Establishment Clause to prefer religious speech over nonreligious speech. *See Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 766 ("Of course, giving sectarian religious speech preferential [treatment] . . . would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)."); *see also* Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 653 (1981) ("[N]onreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to . . . spread their views, whether by soliciting funds or by distributing literature.").

140. *See Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 760 (noting that the Court "ha[s] not excluded from free-speech protections . . . religious proselytizing or even acts of worship"). For some careful thoughts on this, see Richard W. Garnett, *Changing Minds: Proselytism, Freedom, and the First Amendment*, 2 U. ST. THOMAS L.J. 453, 465–72 (2005).

141. Many religious disputes at the Founding were over religious expression. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2165–66 (2003) (giving examples). As Justice Scalia memorably put it, "in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 760. And indeed, one of the Court's first free speech cases involved a Christian minister who sought to speak on Boston Common, although his claim went well beyond the Court's understanding at the time. *See* Davis v. Massachusetts, 167 U.S. 43, 47 (1897) ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.").

obtain religious exemptions, and small and less wealthy ones will find it harder.[142]

The third barrier arises from *Smith* itself. The way *Smith* has unfolded, it protects religious needs only to the extent there are analogous secular needs. In the last section, we labeled this the problem of "constitutional luck."

But it is important to see how religious minorities are less likely to have this kind of luck than other groups. Though this is somewhat of an overgeneralization, religious minorities tend to have religious practices that the dominant culture tends to see as strange and idiosyncratic (and sometimes threatening). Indeed, these features are often the reason *why* we might consider a group to be a religious minority in the first place. But to the extent religious minorities seek to do things few other people will want to do, they will naturally be burdened by laws that do not burden other people. To the extent this logic holds, we would expect statutes burdening the religious exercise of religious minorities to be disproportionately uniform (that is, exceptionless). So not only will religious minorities have more difficulty getting accommodations from legislatures, but they also will have more difficulty getting them from courts because general applicability as a concept is somewhat stacked against them.

For example, take a small religious group seeking to use an obscure drug in their religious practices.[143] These very things (the smallness of the group, the unfamiliarity of the drug) make it less likely that anyone will want to use this drug for nonreligious reasons. Secular exceptions to this rule are unlikely to develop, which precludes the possibility of a religious exemption. And speaking more generally, it seems logical to think religious minorities will have religious needs with fewer secular parallels—it is hard to imagine secular analogues, for example, to the religious prohibitions against photographs, automobiles, or blood transfusions.[144]

Now this point should not be pushed too far. Counterexamples come quickly to mind. *Fraternal Order* and *Lukumi* are both good examples of obscure religious needs just happening to have nonreligious analogues. But because of the close relationship between religion and culture, one can

142. Everyone now sees *Lukumi* as an easy case. But Professor Laycock reminds us that this was not the case at the time: "Stephen Solarz, the lead sponsor of RFRA in the House, wanted to file a congressional amicus brief in *Lukumi*, but he could not get a single Representative or Senator to even consider signing such a brief. The Santeria religion was too unpopular to touch." Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 776 (1998); *cf.* Larson v. Valente, 456 U.S. 228, 245 (1982) ("Free exercise thus can be guaranteed only when legislators . . . are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.").

143. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (involving a small Brazilian group, the Uniao do Vegetal, who sought to use a relatively unknown drug, hoasca, in their religious rituals).

144. *See* Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 359 (2010) ("Small religious minorities often want idiosyncratic things—they demand rights that no one else wants."); James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 329 (2013) ("The practices of small religious minorities often are not shared by others.").

probably expect viable secular analogues to arise most often for culturally dominant religious practices. This is part of why *Smith*'s effects will likely be hardest on religious minorities.

2. Religious Minorities and the Supreme Court's Recent Cases

Whenever the law creates discretion in implementation, we naturally worry about how that discretion will be exercised, and one persistent fear is that minority groups will bear the brunt of that discretion. As we have seen, so many of free exercise's core concepts—what counts as the "rule," what counts as its "purpose," what counts as a "secular exception"—are somewhat manipulable. A judge sympathetic to a claimant's religious practices will have some (though not unlimited) freedom to manipulate those concepts to give an exemption, while an unsympathetic judge will have freedom to deny one. Of course, this is true for a lot of the ways free exercise doctrines could be shaped—it was true under *Sherbert-Yoder* as much as it is today under *Smith*.

But certain aspects of the Court's recent free exercise jurisprudence backhandedly compound these fears. Consider some common features of the Supreme Court's three most recent decisions: *Tandon*, *Masterpiece Cakeshop*, and *Fulton*. All of them generously interpret the Free Exercise Clause to maximize religious exemptions within *Smith*'s constraints. But all three are also culture-war cases, with two sides that are highly motivated, well represented, and well funded. All three also involve relatively formal policies established by written documents, with public and documented enforcement histories. In important ways, these features have come to shape the protections of the Free Exercise Clause and its boundaries.

Start with *Fulton*, where the Supreme Court exempted Catholic Social Services from Philadelphia's contractual requirement that CSS serve all couples because that requirement gave Philadelphia officials the ability to make exemptions.[145] *Fulton* is a straightforward case and a unanimous one too. But what exactly does *Fulton* mean? *Fulton* cannot mean that religious claimants get exemptions anytime any government official has the power to make an exemption for them. That may be the way *Fulton* most naturally reads, but it would mean every religious exemption claim now gets heightened scrutiny. After all, *some* government official *always* has the power to look the other way and not enforce the rules.

A close read reveals how *Fulton* skillfully avoids any such implication. Note how *Fulton* attributes the problem to Philadelphia's "creation of a

145. *See supra* Part I.B.3 (discussing *Fulton*). Again, the key provision here was section 3.21 of the contract, which stated that providers could not reject prospective parents "unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021) (quoting the contract). On the basis of this quoted language, the Court exempted Catholic Social Services from the rule, explaining that "the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable." *Id.* at 1879.

formal mechanism for granting exceptions."[146] That "formal mechanism" language is crucial; it suggests the problem lies in how Philadelphia formalized its ability to make exceptions by putting it in writing. But that makes *Fulton* of little use in a wide variety of day-to-day cases. Take a Muslim girl whose school demands she take off her hijab during gym class. The policy she wants to challenge will not be written down—and, even if it were, it would probably not mention how officials could make exceptions to it. This point carries over to a lot of run-of-the-mill free exercise cases—*Fulton* will mean little for religious prisoners or religious employees, for example, because the discretion of prisons and employers often tends to be implied rather than explicit, and will often not be formalized in writing.

Or take *Masterpiece Cakeshop* and the need to find a secular exception that one can use as the basis for claiming a religious exception. When rules are formalized, and exceptions are hidden but discoverable, a strong litigation team can go hunting for those exceptions and often find them. Recall how the religious claimant in *Masterpiece Cakeshop*, Jack Phillips, won his case, at least in part, because of how the Colorado Civil Rights Commission adjudicated three other cases brought by William Jack.[147] But those three other cases, it turns out, were unpublished. Even now, they are not on Lexis or Westlaw.[148] Jack Phillips had a great litigation team that went out, discovered those adjudications, recognized their potential as "secular exceptions," and then turned them into the basis for Jack Phillips's constitutional claim. But without such a team, of course, Jack Phillips probably would have lost. Religious claimants with resources may have a relatively easy time winning religious exemptions. But folks without resources may be in a different position. They may not have the resources to bring suit at all; they certainly may not have the resources to bring the kind of force necessary to win. It is important that we think about how Jews, Muslims, and other religious minorities are going to fare in all this.

Indeed, if one looks again at *Masterpiece Cakeshop*, one sees another striking thing. Again, Jack Phillips's claim succeeded because of those earlier cases brought by William Jack. But the William Jack cases were not

146. *Fulton*, 141 S. Ct. at 1879 (emphasis added). The entire line from the Court is this: "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invites[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude . . . ." *Id.* (first alteration in original) (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

147. *See supra* Part I.B.1 (discussing *Fulton*); *see* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018) ("The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same [kind of discriminatory animus].").

148. *See* Jack v. Gateaux, Ltd., Charge No. P20140071X (Colo. C.R. Div. Mar. 24, 2015), http://www.adfmedia.org/files/GateauxDecision.pdf [https://perma.cc/JN4U-NE6V]; Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X (Colo. C.R. Div. Mar. 24, 2015), http://www.adfmedia.org/files/LeBakerySensualDecision.pdf [https://perma.cc/DUZ-27ZW]; Jack v. Azucar Bakery, Charge No. P20140069X (Colo. C.R. Div. Mar. 24, 2015), http://mediaassets.thedenverchannel.com/document/2015/04/23/Jack_Williams_V_Azucar_Bakery_17228465_ver1.0.pdf [https://perma.cc/5K6D-VV8U].

mere happenstances. William Jack filed those lawsuits deliberately to help Jack Phillips.[149] Part of a cause popular in conservative Christian circles, Jack Phillips needed help from his allies to get a religious exemption, and he got that help from William Jack. This is a story equal parts happy and sad—it is nice to have friends, of course. But questions of constitutional right should not be decided on the basis of how many friends you have. And a constitutional regime that allocates rights this way is incompatible with the most basic notions of religious equality.[150]

Put these principles together, and you see a Free Exercise Clause shaped in a way that best helps well-connected and well-funded parties fighting culture-war issues. It ends up looking like a lesson about tax avoidance, where complicated rules, opaque rules, and rules that require front-end investigation all end up helping the powerful, while leaving everyone else stranded. To be sure, these problems are endemic to law. Some (the rich, the sophisticated, cultural insiders, religious majorities) will always find it easier to enforce their rights than others (the less wealthy, the unsophisticated, cultural outsiders, religious minorities). But in several important ways, modern free exercise doctrine is making things worse and not better.

CONCLUSION

"It would be rash in the extreme to make any predictions as to where the majority of the Court may take First Amendment doctrine in deciding the cases of the conscientious objectors."[151] Mark DeWolfe Howe wrote that line in 1965, but it seems perpetually applicable. The Roberts Court is openly pondering what it should do next with free exercise, and several justices have invited suggestions. One thought is that maybe nothing needs to change. If the Court can sufficiently protect free exercise within *Smith*, why not just do that? If it ain't broke, the saying goes, don't fix it.

But *Smith* is indeed broken and it needs fixing, and it cannot be satisfactorily fixed from the inside. The Court's recent attempts to retcon *Smith* into something that can protect religious exercise are noble; they are certainly better than nothing. But the defects of that approach have become

149. Michael Gryboski, *Christian Activist Denies Asking Colorado Bakery to Make 'God Hates Gays' Cake*, CHRISTIAN POST (Jan. 31, 2015), https://christianpost.com/news/christian-activist-denies-asking-colorado-bakery-to-make-god-hates-gays-cake-133368/ [https://perma.cc/34HL-24C5] ("[William] Jack explained to CP [(the Christian Post)] that his ultimate point in requesting the cake and filing the complaint was to point out how anti-discrimination law was being unequally applied to bakers . . . . 'This statute is being applied inequitably; it so far is only being applied against Christians, such as Jack Phillips and Masterpiece Bakery.'" (quoting William Jack)). For a more pointed take, see Stephanie Mencimer, *Did the Supreme Court Fall for a Stunt?*, MOTHER JONES (June 7, 2018), https://www.motherjones.com/politics/2018/06/did-the-supreme-court-fall-for-a-stunt/ [https://perma.cc/ZXV2-K2YY].

150. *See* Larson v. Valente, 456 U.S. 228, 245 (1982) ("Free exercise thus can be guaranteed only when [people] accord to their own religions the very same treatment given to small, new, or unpopular denominations.").

151. *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 166 (1965).

increasingly clear. Years of cases have given us a doctrinal structure of epicycles mounted upon epicycles—a clear sign it is time to throw out the Ptolemaic model altogether and move on to the Copernican, whatever that may be.