ARTICLES

COVID-19, FREE EXERCISE, AND MOST FAVORED NATION STATUS

by
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Commentators and some Justices suggest that religious activity is accorded a kind of Most Favored Nation status under free exercise guarantees—if a statutory exception is made for a relevantly similar secular activity, then an exception must also be made for religious activity. Such an approach would require a careful consideration of which secular activities were relevantly similar to religious activities to warrant protecting the latter. But the Most Favored Nation approach involves a mischaracterization of the past jurisprudence. Further, as is evidenced in the COVID cases, the U.S. Supreme Court does not engage in a nuanced consideration of which activities are relevantly similar, misapplying the overly protective approach that it has invented. Given the great diversity of religious belief and practice in our country, it will be impossible to apply this Most Favored Nation status across all religious beliefs and practices, which will mean that the courts will have to pick and choose which religious practices to protect. The Court's current approach cannot help but undermine religious freedom and respect for the Court.

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INTRODUCTION

Commentators suggest that religious activity should be afforded a kind of Most Favored Nation status under free exercise guarantees[1]—if a statute provides any exemptions to the regulation at issue for secular reasons, then religious activity must be accorded an exemption as well.[2] Some Supreme Court Justices have embraced this approach, although a separate question is whether such an approach accurately captures free exercise guarantees. Commentators' and some Justices' claims notwithstanding,[3] the Court's free exercise jurisprudence has not provided this kind of pro-

[1] *See* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 728 (2019) ("[S]ome advocates of religious exemptions . . . make a more novel and sweeping argument. . . . [T]hese advocates contend that *Smith* and its progeny are best read as embodying a much broader selective-exemption rule . . . .").

[2] Wendy K. Mariner, *Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States*, 22 GERMAN L.J. 1039, 1054 (2021) ("In [Justice Kavanaugh's] view, when a state creates categories that favor some but not other similar entities, it must place religious entities in the favored category, granting religion something like a 'most favored nation status,' absent a compelling reason to do otherwise."); Michael Helfand, *Religious Liberty and Religious Discrimination: Where Is the Supreme Court Headed?*, 2021 U. ILL. L. REV. ONLINE 98, 103 (2021) ("On this view, a law would fail the test of neutrality if it included exceptions for secular activity, but failed to do so for religious activity as well.").

[3] *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting) ("Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category." (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49 (1990) (explaining how this Court's precedents grant "something analogous to most-favored nation status" to religious organizations))); Dr. A v. Hochul, 142 S. Ct. 552, 555 (2021) (Gorsuch, J., dissenting) ("[L]aws that impose burdens on religious exercises must still be both neutral toward religion and generally applicable or survive strict scrutiny."); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 50 (1990) ("If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons."); Thomas C. Berg, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1277, 1295 (2005) ("This emerging approach of requiring religion to be treated as well as any comparable secular interest that is exempted—one leading scholar analogizes it to 'most favored nation' status—could

tection for religious activity,[4] and is unlikely to do so in the future. If history is any guide, this Most Favored Nation status for religious activity will be invoked and applied inconsistently, providing ostensible cover for decision-making that is unprincipled[5] and divisive.[6]

The COVID-19 crisis has provided a test case for this new-found free exercise jurisprudence.[7] Regrettably, the Court has more than fulfilled the pessimistic expectations of some[8] who fear that free exercise jurisprudence has been torn from its moorings[9] and that this will result in foreseeable and unnecessary harm.[10]

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make even the *Smith* approach very protective of religious practice."); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 864 (2001) ("[I]f a law is either not neutral or not generally applicable, it must pass through the gauntlet of superlatives that is strict scrutiny and will be upheld only if it advances a governmental interest 'of the highest order' and is narrowly tailored in pursuit of that truly compelling interest." (footnote omitted)); *cf.* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 195 (2002) ("In either case, it is argued that any legislation which contains at least one secular exemption or a pattern of secular exemptions must also provide for religious exemptions—unless the state has a compelling interest in rejecting the religious exemption that cannot be adequately furthered in any other way.").

[4] Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990) ("In practice, however, the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims. The Court generally found either that the free exercise right was not burdened or that the government interest was compelling.").

[5] Nicholas J. Nelson, Note, *A Textual Approach to Harmonizing* Sherbert *and* Smith *on Free Exercise Accommodations*, 83 NOTRE DAME L. REV. 801, 815 (2008) ("A religiously diverse society simply could not survive without limits on free exercise, and so a standard that in practice does not impose any meaningful limits—either through facial overcircumscription of legislative authority or through vagueness—will have to be interpreted along pragmatic rather than doctrinal lines. But the result of such pragmatism will almost inevitably be the courts' giving free rein, explicitly or implicitly, to their own notions of right conduct and proper religious belief.").

[6] *Cf.* Zelman v. Simmons-Harris, 536 U.S. 639, 725 (2002) (Breyer, J., dissenting) ("In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife . . . .").

[7] *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 63 (2020); Tandon v. Newsom, 141 S. Ct. 1294, 1296–97 (2021).

[8] *Cf.* Martha M. McCarthy, *State Aid to Religious Schools: The Saga Continues*, 394 ED. LAW REP. 13, 29 (2021) ("The Supreme Court seems to be heading in a dangerous direction in its church/state litigation that devalues the Establishment Clause and elevates the Free Exercise Clause . . . .").

[9] John Fahner, Note, *Free Conscience in Decline: The Insignificance of the Free Exercise Clause and the Role of the Religious Freedom Restoration Act in the Wake of* Hobby Lobby, 2 BELMONT L. REV. 185, 186 (2015) ("The current interpretation of the Free Exercise Clause is entirely severed from its historical moorings . . . .").

[10] *Cf.* Talya Seidman, Note, *The Strictest Scrutiny: How the* Hobby Lobby *Court's Interpretation of the "Least Restrictive Means" Puts Federal Laws in Jeopardy*, 14 CARDOZO PUB. L.

Part I of this Article discusses some of the cases allegedly establishing the special status afforded to religious activity under free exercise guarantees, revealing that the interpretation neither accounts for the cases themselves nor the established jurisprudence. Part II discusses some of the recent cases in which members of the Court allegedly applied this approach to the cases before them, making the jurisprudence unrecognizable. The Article concludes that the current free exercise jurisprudence is likely to become exactly what members of the Court have been seeking to avoid for decades,[11] an approach that is so transparently unprincipled that the Court will further erode the appearance of impartiality that is allegedly so important to maintain.[12]

I. MOST FAVORED NATION STATUS UNDER PRIOR JURISPRUDENCE

Two cases decided by the Court are sometimes cited for the proposition that free exercise protections provide robust guarantees.[13] Language in two other cases has been cited to support the proposition that religious activity must be afforded an exemption whenever the regulation at issue affords an exemption to secular activity.[14] But these interpretations are not plausible in light of the cases themselves, and the background jurisprudence suggests both the inaccuracy and the impracticality of these advocated approaches.

A. Sherbert

Sherbert v. Verner involved a free exercise challenge by Adell Sherbert, who had been denied unemployment compensation when she had been unable to find a job

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POL'Y & ETHICS J. 133, 135 (2015) ("[T]he Court warned that if it did apply strict scrutiny to all Free Exercise claims, the consequences for the government and for the country would be dire.").

[11] *Cf.* Williams v. Pennsylvania, 136 S. Ct. 1899, 1909 (2016) ("[T]he appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part.").

[12] *Cf.* Bush v. Gore, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting) ("[T]he identity of the loser is perfectly clear . . . the Nation's confidence in the judge as an impartial guardian of the rule of law.").

[13] Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 171 (2019) ("The relevant legal rule came from two leading cases, *Sherbert v. Verner* and *Wisconsin v. Yoder*.").

[14] *See* Dorit Rubinstein Reiss & Madeline Thomas, *More Than a Mask: Stay-at-Home Orders and Religious Freedom*, 57 SAN DIEGO L. REV. (SPECIAL ISSUE) 947, 955 (2020) ("But shortly after *Smith*, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* in 1993, the Court drew one line: it ruled that laws that are not neutral and generally applicable will still be held to strict scrutiny." (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993)).

permitting her to refrain from working on Saturday, her Sabbath.[15] The *Sherbert* Court explained that the "door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such."[16] However, the door is not closed so tightly when religious *actions* are at issue: "[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'"[17]

When rejecting that religious activity has the same kind of protection as religious belief under free exercise guarantees, the Court was not suggesting that religious activity is without protection. On the contrary, the religious "conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order,"[18] which presumably means that religious actions not imposing a substantial threat to public health or safety cannot be so readily limited.

The *Sherbert* Court noted that state regulation of religious conduct had been upheld in a few different cases.[19] An examination of some of these cases should help inform what kind or how much of a threat justifies such state limitations. For example, at issue in *Jacobson v. Massachusetts*[20] was a requirement that all individuals be vaccinated[21] unless the individual was an adult "under guardianship"[22] or a child who had been excused by a physician from receiving the vaccination.[23] Henning Jacobson apparently believed the smallpox vaccine dangerous[24] and argued that

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[15] Sherbert v. Verner, 374 U.S. 398, 399–400 (1963) ("When she was unable to obtain other employment because from conscientious scruples she would not take Saturday work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act.").

[16] *Id.* at 402 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

[17] *Id.* at 403 (quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961)).

[18] *Id.*

[19] *Id.* (citing Reynolds v. United States, 98 U.S. 145, 166 (1878); Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905); Prince v. Massachusetts, 321 U.S. 158, 159 (1944); Cleveland v. United States, 329 U.S. 14, 14–18 (1946)).

[20] *See generally Jacobson*, 197 U.S. at 11.

[21] *Id.* at 12 (quoting MASS. REV. LAWS ch. 75, § 137 (1902) ("The Revised Laws of that Commonwealth, c. 75, § 137, provide that 'the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars.").

[22] *See id.*

[23] *Id.* ("An exception is made in favor of 'children who present a certificate, signed by a registered physician that they are unfit subjects for vaccination.' § 139.").

[24] *Id.* at 23 ("The other eleven propositions all relate to alleged injurious or dangerous effects of vaccination.").

forcing him to be vaccinated was a violation of his rights.[25] The Court rejected his challenge,[26] recognizing "the authority of a State to enact quarantine laws and 'health laws of every description;' [to] . . . protect the public health and the public safety."[27] If the Court had struck down the law, it would have been "usurp[ing] the functions of another branch of government [when deciding that the requirement was] not justified by the necessities of the case."[28] Public health and safety must be protected,[29] and even an assertion of "religious or political convictions"[30] would not override the state interest in "protecting the public collectively against such danger."[31]

Jacobson illustrates at least two points: (1) The protection of public health is quite important,[32] and one individual refusing to be vaccinated creates the kind of public threat that could justify the enforcement of a public health requirement. (2) Affording an exemption from the vaccination requirement for a nonreligious reason such as promoting children's health would not necessitate that a free exercise exemption also be included.

The *Sherbert* Court also cited *Prince v. Massachusetts*[33] for the proposition that religious acts may be proscribed when posing a substantial threat to public safety.[34]

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[25] *Id.* at 26 ("The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination . . . .").

[26] *Id.* at 39 ("[N]othing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.").

[27] *Id.* at 25 (citing Gibbons v. Ogden, 22 U.S. 1, 203 (1824)).

[28] *Id.* at 28.

[29] *Id.* at 27 ("Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.").

[30] *Id.* at 29. When Justice Neil Gorsuch discusses *Jacobson* in his *Cuomo* concurrence, he nowhere mentions the *Jacobson* Court's discussion of religious convictions. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70–71 (2020) (Gorsuch, J., concurring). Nor does Justice Gorsuch discuss the possible implications of the *Sherbert* Court's endorsing *Jacobson*. For the *Sherbert* Court's citation of *Jacobson* with approval, see Sherbert v. Verner, 374 U.S. 398, 403 (1963). For Justice Gorsuch's discussion of *Jacobson*, see *Cuomo*, 141 S. Ct. at 70–71 (Gorsuch, J., concurring).

[31] *Jacobson*, 197 U.S. at 30.

[32] *Id.* at 25.

[33] Prince v. Massachusetts, 321 U.S. 158 (1944).

[34] *See Sherbert*, 374 U.S. at 403 (citing *Prince*, 321 U.S. at 159).

At issue in *Prince* was Sarah Prince's challenge to her conviction under Massachusetts child labor laws.[35] Prince, who was the custodian of her niece, Betty Simmons,[36] permitted Betty to distribute religious literature in exchange for donations.[37] The Supreme Judicial Court of Massachusetts held that handing out religious literature in exchange for a donation qualifies as "a sale."[38] Betty's selling religious literature fell under the state's child labor law,[39] and Prince was convicted for permitting nine-year-old Betty to work.[40]

Prince challenged the conviction as a violation of parental and religious rights.[41] The U.S. Supreme Court recognized the importance of the rights asserted,[42] explaining that "[t]he parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned"[43] and that the conflict becomes even more serious "when an element of religious conviction enters."[44] The Court further suggested that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[45]

Yet, "these sacred private interests"[46] do not outweigh the societal interest in protecting children.[47] While parents have important rights and responsibilities, the family is not beyond the reach of the law merely because the parent asserts "religious

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[35] *Prince*, 321 U.S. at 159 ("Sarah Prince appeals from convictions for violating Massachusetts' child labor laws, by acts said to be a rightful exercise of her religious convictions.").

[36] *Id.*

[37] *See id.* at 161 n.4 ("[S]pecified small sums are generally asked and received but the publications may be had without the payment if so desired.").

[38] Commonwealth v. Prince, 46 N.E.2d 755, 757 (Mass.1943), *aff'd sub nom.* Prince v. Massachusetts, 321 U.S. 158 (1944).

[39] *Prince*, 321 U.S. at 163 ("The state court's decision has foreclosed them adversely to appellant as a matter of state law."); *id.* at 163 n.6 ("The judge could find that the defendant permitted Betty to 'work' in violation of § 81." (quoting *Prince*, 46 N.E.2d at 757)).

[40] *See id.* at 159 (discussing "Betty M. Simmons, a girl nine years of age").

[41] *Id.* at 164 ("[S]he rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation, however, with a claim of parental right as secured by the due process clause of the latter Amendment.").

[42] *Id.* at 165 ("On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children.").

[43] *Id.*

[44] *Id.*

[45] *Id.* at 166.

[46] *Id.* at 165.

[47] *See id.*

liberty."[48] For example, a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds."[49]

In this case, it was not as if Sarah Prince had left Betty Simmons alone to face the dangers of the streets—on the contrary, Prince and Simmons were about 20 feet apart distributing the religious literature.[50] Thus, the danger to Simmons was mitigated by Prince's presence.[51] Nonetheless, the Court upheld the power of Massachusetts to prohibit the activity in question,[52] even though the State was not prohibiting other secular practices that might have put children in equal or greater danger.[53]

At least two points might be made about *Prince*. First, given that Prince was close by and thus mitigated the potential harm to Simmons,[54] the quantum of harm justifying the overriding of religious liberties was not very great.[55] Further, because there were a variety of other activities which children were permitted to perform even though the risk of danger in performing those activities was at least as great as the risk of danger in performing this religious activity,[56] the Court was clearly not affording religious activity a kind of Most Favored Nation status. Thus, in citing *Jacobson* and *Prince*, the *Sherbert* Court was not suggesting that the State must allow religious exemptions whenever the State permits exemptions based on secular concerns. On the contrary, the laws at issue in both cases permitted secular exemptions and were nonetheless upheld when prohibiting the religious conduct at issue.[57] The

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[48] *Id.* at 166 (citing Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).

[49] *Id.*

[50] *Id.* at 162 ("[W]ith specific reference to Betty, she and Mrs. Prince took positions about twenty feet apart near a street intersection.").

[51] *Id.* at 169 ("The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them.").

[52] *Id.* at 170 ("[T]he rightful boundary of [the state's] power has not been crossed in this case.").

[53] *Cf. id.* at 167 ("The child's presence on the street, with her guardian, distributing or offering to distribute the magazines, it is urged, was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited.").

[54] *Id.* at 169; *see also id.* at 175 (Murphy, J., dissenting) ("[T]here is not the slightest indication in this record, or in sources subject to judicial notice, that children engaged in distributing literature pursuant to their religious beliefs have been or are likely to be subject to any of the harmful 'diverse influences of the street.'").

[55] *See also infra* note 81 and accompanying text (discussing the quantum of harm necessary to justify the Sunday closing law at issue in *Braunfeld*).

[56] *Prince*, 321 U.S. at 167.

[57] The challenge in *Jacobson* was based on liberty interests rather than free exercise interests. *See supra* note 25 and accompanying text. However, the Court has cited *Jacobson* as if religious conduct had been at issue. *See Prince*, 321 U.S. at 166 ("[H]e cannot claim freedom from

Sherbert Court's citation of these cases with approval suggests that those interpreting *Sherbert* to incorporate this most favored status have erred.

Sherbert is much more readily understood in light of *Braunfeld v. Brown*,[58] which involved a Pennsylvania statute[59] prohibiting stores from being open on Sunday.[60] Braunfeld, who owned a store that closed from sundown Friday to sundown Saturday for religious reasons,[61] argued that it would be very burdensome for him to close on Sunday in addition to Friday night and Saturday[62] and that the failure to exempt him from the Sunday closing requirement violated free exercise guarantees.[63]

The Pennsylvania statute prohibited the sale of certain items but not others,[64] and prohibited retailers but not other kinds of businesses from being open on

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compulsory vaccination for the child more than for himself on religious grounds." (citing Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905))).

[58] Braunfeld v. Brown, 366 U.S. 599 (1961).

[59] The *Braunfeld* Court noted that, per Pennsylvania statute at the time:

> 'Selling certain personal property on Sunday
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> 'Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof. . . .

Id. at 600 n.1 (quoting 1959 Pa. Laws 660 (codified as amended at PA. STAT. ANN. tit. 18, § 4699.10 (Purdon Supp. 1960))).

[60] *Id.* at 600 ("Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities.").

[61] *Id.* at 601 ("Appellants are merchants in Philadelphia who engage in the retail sale of clothing and home furnishings within the proscription of the statute in issue. Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday.").

[62] *Id.* at 602 (discussing the "serious economic disadvantage" at issue).

[63] *Id.* at 601 ("[T]he only question for consideration is whether the statute interferes with the free exercise of appellants' religion.").

[64] The *Braunfeld* Court noted that the very statute had been discussed in *McGinley*. *See id.* For a discussion of what was prohibited, see Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 589 (1961) (noting that the statute "forbid[s] the Sunday sale of only some items while permitting the sale of many others . . . .").

Sunday.[65] The statute at issue imposed an economic burden on the plaintiffs,[66] but that alone was not dispositive because "the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive."[67] The Court noted that "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions,"[68] and offered the consolation that "the statute at bar does not make unlawful any religious practices of appellants . . . ."[69]

The *Braunfeld* Court was unwilling to hold that the plaintiffs had to be exempted from the Sunday closing requirement, because so holding "would radically restrict the operating latitude of the legislature."[70] This was not to say that the legislature was given absolute deference: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[71] However, the Court saw a clear difference between the impermissible invidious discrimination that the Constitution prohibits[72] and the permissible distinctions at issue in *Braunfeld*:

> [I]f the State regulates conduct by enacting a *general* law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[73]

At least two points might be made about the Court's position. First, the Court's point about a "general" law was not limited to an "exceptionless" law. The statute the Court was upholding required some but not other businesses to close on Sunday, and even distinguished among retailers.[74] The Court's usage of "general" in this

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[65] *See McGinley*, 366 U.S. at 589 (noting that the prohibition "exclude[s] only retailers from Sunday operation while exempting wholesalers, service dealers, factories, and those engaged in the other excepted activities . . . .").

[66] *Braunfeld*, 366 U.S. at 601 ("Their complaint, as amended, alleged . . . Sunday closing will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment; . . . .").

[67] *Id.* at 605.

[68] *Id.* at 603 (citing Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940)).

[69] *Id.* at 605.

[70] *Id.* at 606.

[71] *Id.* at 607.

[72] *Id.* at 606 ("Abhorrence of religious persecution and intolerance is a basic part of our heritage.").

[73] *Id.* at 607 (citing *Cantwell*, 310 U.S. at 304−05) (emphasis added).

[74] *See* Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 586–87 (1961) (distinguishing among which businesses could be open on Sunday).

context could not have meant "universal," but instead likely meant not targeting a particular religion for adverse treatment.[75]

Second, when suggesting that a statute would be valid unless the State could accomplish its purposes without imposing a burden on religion, the Court did not mean that a statute would be invalidated merely because the State's purposes could have readily been achieved without imposing a burden on religion. The *Braunfeld* Court explained that "the State [c]ould cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday."[76] Indeed, several other states already did just that,[77] and the Court noted that "this may well be the wiser solution to the problem."[78] But the Pennsylvania statute was upheld, even though the State had an alternative that would meet its goals[79] and not impose a burden on the plaintiffs' religious exercise.

One further point about *Braunfeld* might be noted. The Court upheld the Sunday closing requirement, notwithstanding that Braunfeld might thereby be forced to go out of business,[80] and the allegedly important implicated state interest was "the mere convenience of having everyone rest on the same day."[81]

Braunfeld hardly seems compatible with an interpretation of free exercise guarantees affording religious activity a kind of Most Favored Nation status. *Sherbert* was decided a mere two years later,[82] and it is not plausible to cite *Sherbert* as the watershed decision sometimes claimed.[83]

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[75] *See Braunfeld*, 366 U.S. at 607 (suggesting that "the purpose . . . to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . is constitutionally invalid . . . .").

[76] *Id.* at 608.

[77] *Id.* ("A number of States provide such an exemption . . . .").

[78] *Id.*

[79] *Cf. id.* at 614–15 (Brennan, J., dissenting) ("[A] majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's.").

[80] *Id.* at 601 (majority opinion) ("Sunday closing will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment . . . .").

[81] *Id.* at 614 (Brennan, J., dissenting).

[82] *Braunfeld* was decided in 1961, while *Sherbert* was decided in 1963. Braunfeld v. Brown, 366 U.S. 599 (1961); Sherbert v. Verner, 374 U.S. 398 (1963).

[83] Violet S. Rush, Note, *Religious Freedom and Self-Induced Abortion*, 54 TULSA L. REV. 491, 496 (2019) ("The *Sherbert* ruling was a watershed moment in the protection of religious exercise . . . ."); James M. DeLise, *Religious Exemptions to Neutral Laws of General Applicability and the Theory of Disparate Impact Discrimination*, 6 COLUM. J. RACE & L. 115, 118 n.24 (2016) (noting "the watershed cases of Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972)"); Justin W. Aimonetti & Christian Talley, *Religion as Sword, but Not as*

It is fair to suggest that a case could be revolutionary in that it might overrule a whole series of past cases, although overruling a series of precedents might have its own negative implications.[84] But *Sherbert* was not revolutionary, distinguishing *Braunfeld* rather than overruling it[85] and implying that the state interest at issue in *Braunfeld* was more important than the interest at issue in *Sherbert*.[86] Such an analysis suggests that the same test is being used in both cases rather than that free exercise jurisprudence had undergone a sudden shift.

B. Yoder

The other case sometimes cited to show the robustness of free exercise guarantees is *Wisconsin v. Yoder*.[87] At issue was a Pennsylvania law requiring children to attend school until they reached age 16.[88] The plaintiffs refused to send their children to high school,[89] believing that the values taught there undermined the Amish values that these parents were trying to instill in their children.[90] The *Yoder* Court struck down the requirement as applied to Amish children.

Yet, *Yoder* does not represent the kind of robust free exercise protection that is sometimes claimed, as is clear when one considers the rationales used by the *Yoder* Court to justify the holding. First, rather than suggest that free exercise guarantees were more robust than previously thought, the *Yoder* Court tried to situate the case within a free exercise jurisprudence that permitted the state to regulate a variety of

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Shield: Rectifying the Estrangement of Environmentalism and Religious Liberty, VT. J. ENV'T L., Spring 2021 at 1, 3 (describing *Sherbert v. Verner* as a watershed case).

[84] *See* Michael Gentithes, Janus-*Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 106 (2020) ("Overruling cases 'produces increased uncertainty,' with negative consequences including increased challenges to settled law and a public that is 'uncertain about which cases the Court will overrule and which cases are here to stay.'" (citing Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting)).

[85] *See Sherbert*, 374 U.S. at 403 ("[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'" (citing *Braunfeld*, 366 U.S. at 603)).

[86] The Court implied that free exercise protections would only be overridden when there was "some substantial threat to public safety, peace or order." *Id.*

[87] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[88] *Id.* at 207 ("Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 . . . .").

[89] *Id.* ("[R]espondents declined to send their children, ages 14 and 15, to public school after they completed the eighth grade.").

[90] *Id.* at 210–11 ("They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs.").

religious activities: "It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."[91] Thus, the Court understood that its holding in *Yoder* was not a departure from the existing jurisprudence and, in fact, the *Yoder* Court cited both *Braunfeld* and *Prince* with approval.[92] Further, the Court made clear that it was not adopting a position suggesting that whenever there are secular exemptions to a law, free exercise requires that there be religious exemptions, too. On the contrary, this case was about something else, instead illustrating "that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."[93]

The Court offered several justifications for its holding that the Amish could not be forced to send their children to high school, including that the Court did not believe that the extra year or two of education at issue would have afforded significant benefits to the children,[94] at least insofar as one viewed the value of education as decreasing the likelihood that the child would later end up in jail or require public support.[95] Further, the Court suggested that the clear divide between belief and action[96] was straddled in this case, making the free exercise analysis more difficult.[97]

Neither *Sherbert* nor *Yoder* is plausibly understood as setting a new, extremely protective free exercise jurisprudence—both cases cited *Braunfeld* and *Prince* with approval, endorsing the constitutionality of the respective statutes limiting religious freedom. Both *Sherbert* and *Yoder* suggested that the state interests implicated in those cases respectively were weaker than the interests implicated in *Braunfeld* and *Prince*,[98] and both *Sherbert* and *Yoder* were self-consciously within the jurisprudence rather than setting out to create a new or different course.[99]

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[91] *Id.* at 220.

[92] *See id.*

[93] *Id.*

[94] *Id.* at 222 ("[T]he evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests.").

[95] *See id.* at 212–13 ("The evidence also showed that the Amish have an excellent record as law-abiding and generally self-sufficient members of society.").

[96] *See supra* notes 16–17 and accompanying text.

[97] *See Yoder*, 406 U.S. at 220 ("[I]n this context belief and action cannot be neatly confined in logic-tight compartments."); *see also id.* at 219 ("[E]nforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.").

[98] *See id.* at 220; Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[99] Some commentators overstate *Yoder*'s holding. *See* Colin M. Murphy, *Concerning Their Hearts and Minds:* State of Oregon v. Beagley, *Faith-Healing, and a Suggestion for Meaningful Free*

C. Smith

Ironically,[100] some commentators suggest that *Employment Division, Department of Human Resources v. Smith*[101] provides the basis for establishing strong free exercise protections for religion, at least as "clarified" by *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[102] But these cases are also not plausibly interpreted to provide support for such an interpretation.

Exercise Exemptions, 46 GONZ. L. REV. 147, 171 (2010) ("*Yoder* required free exercise exemptions where the State could not demonstrate an overriding interest.").

[100] Doing so is ironic because many commentators suggest that *Smith* undermined free exercise guarantees. *See* Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 227 (2007) ("*Smith* dramatically weakens the force of . . . the Free Exercise Clause . . . ."); John D. Inazu, *Peyote and Ghouls in the Night: Justice Scalia's Religion Clause Minimalism*, 15 FIRST AMEND. L. REV. 239, 257 (2017) ("*Smith* . . . creates unsatisfying doctrinal tensions, substantially weakens religious liberty protections and which . . . continues to stalk our free exercise jurisprudence."); Janet V. Rugg & Andria A. Simone, *The Free Exercise Clause:* Employment Division v. Smith*'s Inexplicable Departure from the Strict Scrutiny Standard*, 6 ST. JOHN'S J. LEGAL COMMENT. 117, 131 (1990) ("*Smith* . . . served to weaken the first amendment free exercise clause."); David Schimmel, *Discrimination Against Religious Viewpoints Prohibited in Public Schools: An Analysis of the* Lamb's Chapel *Decision*, 85 ED. LAW REP. 387, 392 n.38 (1993) ("*Oregon v. Smith* which may have done more to undermine the preferred status of the Free Exercise Clause than any Supreme Court opinion in the past decade."); Mark G. Yudof, *Religious Liberty in the Balance*, 47 SMU L. REV. 353, 354 (1994) ("[I]n *Employment Division v. Smith* the Supreme Court adopted a crabbed vision of the free exercise of religion that undermines our religious freedoms."); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 57 (2011) ("*Employment Division v. Smith* . . . radically changed the nature of the Free Exercise Clause . . . ."); Thomas C. Berg, *Slouching Towards Secularism: A Comment on* Kiryas Joel School District v. Grumet, 44 EMORY L.J. 433, 498 (1995) ("*Employment Division v. Smith* . . . allow[s] the government to destroy religious practice without any free exercise barrier as long as the law is generally applicable."); Robert N. Anderson, Comment, *Just Say No to Judicial Review: The Impact of* Oregon v. Smith *on the Free Exercise Clause*, 76 IOWA L. REV. (SPECIAL ISSUE) 805, 818 (1991) ("The *Smith* ruling undermines this generally held view of the free exercise clause's strength as an independent source of constitutional protection.").

[101] Emp. Div. v. Smith, 494 U.S. 872 (1990).

[102] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–43, 545–46 (1993); *see* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." (citing *Hialeah*, 508 U.S. at 546)); *see also* Daniel Farber, *The Long Shadow of* Jacobson v. Massachusetts*: Public Health, Fundamental Rights, and the Courts*, 57 SAN DIEGO L. REV. 833, 853 (2020) ("In *Employment Division v. Smith*, the Court held that there is no free exercise exemption from state laws that apply generally to the public. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, however, the Court recognized a limit to this principle: the compelling interest test continued to apply when state regulations target religious practices."); *cf.* Note, *Constitutional Constraints on Free Exercise Analogies*, 134 HARV. L. REV. 1782, 1784 (2021) ("But *Smith* left largely unanswered the question of what constitutes a 'generally applicable' law, other than noting that a 'system of individual exemptions'

Smith involved a challenge to an Oregon law "prohibit[ting] the knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner."[103] The respondents, Alfred Smith and Galen Black, had been "fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church."[104] When they applied for unemployment compensation, they were deemed ineligible because they had been fired for "work-related 'misconduct.'"[105]

When analyzing the relevant issues, the *Smith* Court offered an expansive view of religious exercise, which "often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."[106] Further, religious activity is afforded protection under free exercise guarantees and, for example, "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."[107] Yet, the conduct at issue was nonetheless not protected.[108]

One issue involved clarifying what the respondents were claiming, and Smith and Black were characterized as arguing that "their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons."[109] But that was a mischaracterization of their position—they were not directly challenging the application of the law against them if only because they had never been prosecuted for breaking the law.[110] Instead, they

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would not qualify. The Supreme Court revisited the issue three years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, holding that city ordinances designed to outlaw ritual animal sacrifice by adherents of the Santeria religion specifically targeted the 'central element' of Santeria worship and thus fell 'well below the minimum standard' of general applicability.").

[103] *Smith*, 494 U.S. at 874.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 877.

[107] *Id.*

[108] *Id.* at 890 ("[R]respondents' ingestion of peyote was prohibited under Oregon law, and . . . that prohibition is constitutional . . . .").

[109] *Id.* at 878.

[110] *Id.* at 911 (Blackmun, J., dissenting) ("Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote."); *see also* Vance M. Croney, Note, *Secondary Right: Protection of the Free Exercise Clause Reduced by* Oregon v. Smith, 27 WILLAMETTE L. REV. 173, 190 (1991) ("[D]espite its interest in enforcing its drug laws, Oregon had not prosecuted Smith and Black, and had

were arguing that they, like Adell Sherbert, could not be denied unemployment compensation because of their exercise of religion.[111]

Smith's analysis of free exercise guarantees was disappointing, at least in part, because the Court did not offer a plausible account of the previous jurisprudence.[112] For example, the Court had held in *Yoder* that the parents could not be subjected to criminal penalty for failing to send their children to high school, generally applicable law requiring them to do so notwithstanding.[113] The *Smith* Court accounted for *Yoder* by describing it as involving a hybrid right because both free exercise rights and the parent's right to educate were at issue.[114] Yet, there had been no mention of hybrid rights in *Yoder*.[115] Further, were the hybrid analysis in fact a part of free exercise jurisprudence, *Prince* would presumably have been decided differently because that involved both parental rights and free exercise.[116]

The *Smith* Court announced 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) conduct that his religion prescribes (or proscribes).'"[117] In making this announcement, the Court was suggesting that neutral and generally applicable laws adversely affecting religious

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previously sought only one prosecution for religious use of peyote."); David Leventhal, Note, *The Free Exercise Clause Gets a Costly Workout in* Employment Division, Department of Human Resources of Oregon v. Smith, 18 PEPP. L. REV. 163, 179 (1990) ("Smith was never arrested, prosecuted, convicted, nor sentenced under this criminal statute.").

[111] *Cf.* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1891 (2021) (Alito, J., concurring) ("Just as Adell Sherbert had been denied unemployment benefits due to conduct mandated by her religion (refraining from work on Saturday), Alfred Smith and Galen Black were denied unemployment benefits because of a religious practice (ingesting peyote as part of a worship service of the Native American Church).").

[112] *See Smith*, 494 U.S. at 891 (O'Connor, J., concurring) ("[T]oday's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."); McConnell, *supra* note 4, at 1125 ("[N]either *Prince* nor *Braunfeld* supports the holding of *Smith.* In fact, the rationales of the decisions point to the opposite interpretation of the Free Exercise Clause.").

[113] *See supra* notes 87–99 and accompanying text (discussing *Yoder*).

[114] *Cf. Smith*, 494 U.S. at 882 ("The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.").

[115] *Cf. id.* at 896 (O'Connor, J., concurring in the judgment) ("The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions, . . . but there is no denying that both cases expressly relied on the Free Exercise Clause . . . .").

[116] *See supra* note 41 and accompanying text (noting that both religious and parental rights were at issue).

[117] *Smith*, 494 U.S. at 879 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

activity would not be examined with strict scrutiny.[118] But this was a break with the traditional approach.[119] In prior cases, the Court had allegedly "carefully weigh[ed] the competing interests"[120] when upholding state regulations burdening free exercise.

Regardless of how one interprets the free exercise jurisprudence preceding *Smith*, a separate question involves the proper interpretation of the standard announced in *Smith*. When the *Smith* Court suggested that a "valid and neutral law of general applicability"[121] would not trigger strict scrutiny even if adversely impacting religious practice, the Court was not only referring to laws that were universal or exceptionless. The law at issue in *Smith* was not exceptionless—instead, "Oregon law prohibit[ed] the knowing or intentional possession of a 'controlled substance' *unless* the substance has been prescribed by a medical practitioner."[122] But this means that the very rule announced in *Smith* does not accord religious activity an analog of Most Favored Nation status. A physician might have prescribed a controlled substance for health reasons, and there was no requirement that religious activity also be afforded an exemption.

The Oregon Supreme Court had construed the state law as not exempting the sacramental use of peyote,[123] although that court had also held that free exercise guarantees required that the statute exempt sacramental use of peyote by adults.[124]

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[118] *See id.* at 888 ("[W]e cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."); *id.* at 908–09 (Blackmun, J., dissenting) ("[T]he majority . . . conclude[s] that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford . . . .").

[119] *Id.* at 891 (O'Connor, J., concurring) ("[T]oday's holding dramatically departs from well-settled First Amendment jurisprudence . . . ."); *id.* at 907 (Blackmun, J. dissenting) ("This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means."); *see also* Rashelle Perry, Note, Employment Division, Department of Human Resources v. Smith*: A Hallucinogenic Treatment of the Free Exercise Clause*, 17 J. CONTEMP. L. 359, 367 (1991) ("Traditionally, first amendment jurisprudence mandated that any statute burdening first amendment rights be subject to a compelling interest test . . . .").

[120] *Smith*, 494 U.S. at 896 (O'Connor, J., concurring).

[121] *Id.* at 879 (majority opinion) (citing *Lee*, 455 U.S. at 263, n.3 (Stevens, J., concurring)).

[122] *Id.* at 874 (emphasis added).

[123] Smith v. Emp. Div., 763 P.2d 146, 148 (Or. 1988), *rev'd sub nom.* Emp. Div. v. Smith, 494 U.S. 872 (1990) ("[T]he Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote . . . .").

[124] *Id.* ("[O]utright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment directly . . . .").

The U.S. Supreme Court rejected the Oregon Supreme Court's contention that free exercise required the Oregon criminal law to contain such an exemption.[125]

Regardless of whether free exercise guarantees required an exemption for the sacramental use of peyote, a separate issue was whether employment compensation could be denied to those who had been fired for performing that sacrament. The Oregon Supreme Court had construed the provision permitting the State to deny unemployment compensation to those guilty of misconduct as designed to preserve fiscal integrity and held that this rationale could not justify the denial of respondents' free exercise interests.[126] The U.S. Supreme Court disagreed.[127]

When analyzing the unemployment compensation case law, the *Smith* Court suggested that the unemployment compensation context "len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct."[128] The Court explained that its "decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[129] This phrasing has led some commentators to suggest that the *Smith* Court was offering an analog of Most Favored Nation status to free exercise.[130]

Yet, this is not a plausible interpretation. Even if one ignores that the Court is not offering a plausible account of the previous unemployment compensation cases,[131] such an interpretation does not make sense of the *Smith* case itself. First,

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[125] *Smith*, 494 U.S. at 876 ("Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we proceed to consider whether that prohibition is permissible under the Free Exercise Clause."); *id.* at 878–79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

[126] *Id.* at 875 ("The Oregon Supreme Court reasoned, however, that the criminality of respondents' peyote use was irrelevant to resolution of their constitutional claim—since the purpose of the 'misconduct' provision under which respondents had been disqualified was not to enforce the State's criminal laws but to preserve the financial integrity of the compensation fund, and since that purpose was inadequate to justify the burden that disqualification imposed on respondents' religious practice.").

[127] *Id.* at 890 ("Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.").

[128] *Id.* at 884.

[129] *Id.* (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[130] *See* Laycock, *supra* note 3, at 49 ("In such individualized decisionmaking processes, the Court's explanation of its unemployment compensation cases would seem to require that religion get something analogous to most-favored nation status.").

[131] Brian A. Freeman, *Expiating the Sins of* Yoder *and* Smith*: Toward A Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 48

the Court went to great pains to differentiate unemployment compensation cases from other kinds of cases and to emphasize the Court's unwillingness to treat cases involving other issues in the same way that it had treated unemployment compensation cases.[132] Those suggesting that the *Smith* approach should be applied in other kinds of cases are simply ignoring what the *Smith* Court itself had stated expressly.

Second, what was at issue in *Smith* was unemployment compensation,[133] which means that the fact that individualized assessment was appropriate in that context did not necessitate affording a free exercise exemption.[134] Instead, the Court suggested that because the activity at issue was criminal (even if in fact the parties had not been prosecuted), no free exercise exemption was required. According to the very account offered and utilized by the *Smith* Court, nonreligious reasons, e.g., health, might justify an exemption even where religious practices did not similarly provide an exemption.

One more point might be added to show that the *Smith* Court's understanding of *general* laws was not limited to *exceptionless* laws. For support of its view, the *Smith* Court cited to Justice John Paul Stevens's concurrence in *United States v. Lee*.[135] *Lee* involved an Old Amish employer who refused to file quarterly Social Security tax returns for his employees, refused to withhold Social Security contributions from the employee checks, and refused to pay the employer's share of the Social Security taxes.[136] Lee's justification was that participation in the Social Security system was against his religion.[137]

The Court held that no exemption was required to accommodate Lee's beliefs,[138] notwithstanding that an accommodation had already been made for self-

(2001) ("Not one of the cases suggested that exemptions for religious reasons had to be given because exemptions were being given for secular reasons.").

132 *Smith*, 494 U.S. at 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied.").

133 *Smith,* 763 P.2d at 149–50 ("[T]he decisions against denying unemployment compensation to persons whose unemployment results from their exercise of their religious freedom precluded a denial of unemployment compensation in these cases.").

134 McConnell, *supra* note 4, at 1124 ("Even more strikingly, the 'individual governmental assessment' distinction cannot explain the result in *Smith* itself.").

135 United States v. Lee, 455 U.S. 252, 261–64 (1982) (Stevens, J., concurring).

136 *Id.* at 254 ("Appellee, a member of the Old Order Amish, . . . failed to file the quarterly social security tax returns required of employers, withhold social security tax from his employees, or pay the employer's share of social security taxes.").

137 *Id.* at 255 ("[T]he Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions by Amish to the social security system.").

138 *Id.* at 261 ("The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.").

employed individuals who for religious reasons refused to participate in the Social Security system.[139] The *Lee* Court cited *Braunfeld* with approval.[140]

Yet, it was not as if another exception could not have been made which would have exempted Lee,[141] and in fact Congress later expanded the exception to accommodate the very kind of case at issue in *Lee*.[142] Further, when Justice Stevens concurred in *Lee*, he noted, "Congress already has granted the Amish a limited exemption from social security taxes. As a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case."[143] He thereby noted that the existing rule was not exceptionless and that it would not be particularly burdensome to expand the exception a little bit, but nonetheless agreed that constitutional free exercise protections did not require the expansion. This concurrence does not provide a plausible basis for requiring strict scrutiny whenever laws have exceptions.[144]

Many have criticized the *Smith* account of free exercise jurisprudence because it did not provide an accurate assessment of the past jurisprudence.[145] It might be

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[139] *See id.* at 255 ("Congress has accommodated self-employed Amish and self-employed members of other religious groups with similar beliefs by providing exemptions from social security taxes." (citing 26 U.S.C. § 1402(g))).

[140] *Id.* at 259 (quoting Braunfeld v. Brown, 366 U.S. 599, 605–06 (1961)).

[141] *See* Mark Strasser, *Narrow Tailoring, Compelling Interests, and Free Exercise: On ACA, RFRA and Predictability*, 53 U. LOUISVILLE L. REV. 467, 484 (2016) ("The Court nowhere explained why Congress's clear intent to exempt the Amish in certain cases could not easily be extended a little so that Amish employers and employees who *all* objected to participation in the Social Security system could also have their religious beliefs respected.").

[142] Nelson Tebbe, Comment, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 289–90 (2021) ("When Congress reacted to *Lee*, it protected religious employers who objected to the Social Security tax—but only insofar as their employees shared their faith.").

[143] *See Lee*, 455 U.S. at 262 (Stevens, J., concurring in judgment) (citing 26 U.S.C. § 1402(g)).

[144] *Cf.* Tebbe, *supra* note 142, at 269 ("Unless the Court is willing to settle for contrived justifications for its outcomes, it will have to bring greater coherence to religious freedom law before too long.").

[145] United States v. Philadelphia Yearly Meeting of Religious Soc'y of Friends, 753 F. Supp. 1300, 1306 (E.D. Pa. 1990) ("*Smith* has radically altered Free Exercise Clause jurisprudence and practice."); Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 L. & INEQ. 59, 78 (2008) ("*Smith*'s characterization of the pre-existing jurisprudence is inaccurate."); John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71, 71 (1991) ("In the recent landmark decision of *Oregon v. Smith*, the United States Supreme Court, in Justice O'Connor's words, 'dramatically departs from well-settled First Amendment jurisprudence' in a 'paradigm free exercise' case by reframing a core dimension of free exercise doctrine."); Rachel Toker, Recent Development, *Tying the Hands of Congress—* City of Boerne v. Flores*, 117 S. Ct. 2157 (1997)*, 33 HARV. C.R.-C.L. L. REV. 273, 299 (1998) (describing "*Smith*'s retraction of constitutional Free Exercise protections").

helpful to understand why the Court may have felt the need to revise or reframe the existing jurisprudence.

Prior to *Smith*, the common understanding of free exercise jurisprudence was that the Court would impose strict scrutiny when examining statutes burdening free exercise.[146] Yet, many commentators rejected that the Court was in fact employing strict scrutiny in several of those cases,[147] presumably because the state statutes

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[146] Tebbe, *supra* note 142, at 281 ("[T]he Supreme Court did administer a strict scrutiny regime for free exercise exemptions during the three decades before *Smith* was decided."); Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?*, 39 HASTINGS CONST. L.Q. 357, 357 (2011) ("In the 1990 case of *Employment Division v. Smith*, a sharply divided Supreme Court abandoned the routine application of strict scrutiny when considering Free Exercise Clause claims seeking exemption from generally applicable legal duties or prohibitions."); Laura Keeley, *Religious Liberty, Immigration Sanctuary, and Unintended Consequences for Reproductive and LGBTQ Rights*, 37 COLUM. J. GENDER & L. 169, 185 (2018) ("Some scholars maintain that the pre-*Smith* test employed strict scrutiny for free exercise claims."); Ariana S. Cooper, Note, *Free Exercise Claims in Custody Battles: Is Heightened Scrutiny Required Post-*Smith*?*, 108 COLUM. L. REV. 716, 716 (2008) ("Before *Smith*, the Supreme Court had held that free exercise claims should be evaluated using strict scrutiny."); Hope Lu, Comment, *Addressing the Hybrid-Rights Exception: How the Colorable-Plus Approach Can Revive the Free Exercise Clause*, 63 CASE W. RSRV. L. REV. 257, 259–60 (2012) ("Some commentators subscribe to the idea that free exercise rights received vigorous strict scrutiny protection before *Smith* and that *Smith* was a radical departure from previous precedent."); Margaret Smiley Chavez, Comment, *Employing* Smith *to Prevent a Constitutional Right to Discriminate Based on Faith: Why the Supreme Court Should Affirm the Third Circuit in* Fulton v. City of Philadelphia, 70 AM. U. L. REV. 1165, 1173 (2021) ("Until *Smith*, the Supreme Court automatically applied strict scrutiny when considering claims concerning free exercise of religion . . . .").

[147] Lu, *supra* note 146, at 260 ("Other scholars and courts have argued that the standard in *Smith* was the same as the standard in most cases even prior to the 1990 decision."); Keeley, *supra* note 146, at 185 (noting that some scholars rejected that the pre-*Smith* Court employed strict scrutiny in free exercise bas a general matter). The inconsistency in the Court's jurisprudence has not gone unnoticed. *See* Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487, 493 (1998) ("The Court's various dodging, avoidance, and manipulation strategies resulted in a chaotic, incoherent, and unprincipled free exercise jurisprudence."); McConnell, *supra* note 4, at 1144 ("[T]he doctrine was poorly developed and unacceptably subjective."); Adam Lamparello, *A Fourth Amendment Framework for the Free Exercise Clause*, 42 J. LEGIS. 131, 153 (2016) ("The case-by-case approach taken by the Court has resulted in an unpredictable and largely unprincipled free exercise jurisprudence that has failed to strike the proper balance between religious freedom and the government's interest in promoting the public health, safety, and welfare."); Jeremy Pomeroy, Note, *Reason, Religion, and Avoidable Consequences: When Faith and the Duty to Mitigate Collide*, 67 N.Y.U. L. REV. 1111, 1123 (1992) (discussing "a complex, inconsistent, and often unsatisfying free exercise jurisprudence"); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 269 (1993) (discussing "the chaotic and unsatisfactory state of free exercise law as it stood on the eve of *Smith*").

burdening free exercise were often upheld.[148] In effect, the *Smith* Court agreed, not only admitting that employment of strict scrutiny would not have permitted so many statutes to be upheld,[149] but suggesting that the failure to employ strict scrutiny was neither inadvertent nor mistaken.

The *Smith* Court's analysis of the prior case law was controversial—an alternative account of the past decisions is that the Court had applied strict scrutiny in each of the cases and that the state had met its heavy burden in each of the cases in which the state law or practice had been upheld.[150] But the *Smith* Court rejected that strict scrutiny had in fact been employed, and noted that if a non-watered-down version of strict scrutiny is employed as a general matter in free exercise cases, then "many laws will not meet the test,"[151] especially in a society in which there are so many different religious traditions. "Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of

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[148] *See* Mark Strasser, *Definitions, Religion, and Free Exercise Guarantees*, 51 TULSA L. REV. 1, 31 (2015) (noting that "the Court had so often upheld state practices burdening free exercise while allegedly employing strict scrutiny"); *see also* Freeman, *supra* note 131, at 148 ("Justice Scalia is correct to assert that strict scrutiny in free exercise cases . . . is only the form, not the reality, of the Supreme Court's free exercise jurisprudence."); Jesse H. Choper, *In Favor of Restoring the* Sherbert *Rule-with Qualifications*, 44 TEX. TECH L. REV. 221, 221 (2011) ("[E]xperience over a quarter of a century demonstrates that the Sherbert rule has been applied so as to provide a very diluted version of the traditional strict scrutiny criterion."); Mark Strasser, *Free Exercise and Substantial Burdens Under Federal Law*, 94 NEB. L. REV. 633, 634 (2016) (discussing "the Court's inconsistent application of free exercise guarantees"); Shannon L. Doheny, Note, *Free Exercise Does Not Protect Animal Sacrifice: The Misconception of* Church of Lukumi Babalu Aye v. City of Hialeah *and Constitutional Solutions for Stopping Animal Sacrifice*, 2 J. ANIMAL L. 121, 130 (2006) ("[T]he Court rarely struck down any regulations of conduct in the name of free exercise. Instead, the Court would swiftly determine the state's interest satisfied the 'compelling public interest' burden."). *But see* Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom* Non-*Restoration Acts*, 23 HARV. J.L. & PUB. POL'Y 411, 413–14 (2000) ("As of 1990, the United States Supreme Court had consistently interpreted the Free Exercise Clause of the First Amendment to afford maximum protection of all individuals whose religion was compromised by requirements of generally applicable laws.").

[149] *See* Emp. Div. v. Smith, 494 U.S. 872, 888 (1990) (suggesting that neutral and generally applicable laws adversely affecting religious practice were not presumed invalid); *see also* Kathleen A. Brady, *The Disappearance of Religion from Debates About Religious Accommodation*, 20 LEWIS & CLARK L. REV. 1093, 1099 (2017) ("[T]he Supreme Court had often watered down the compelling state interest test in its free exercise decisions prior to *Smith*.").

[150] *Cf. Smith*, 494 U.S. at 896–97 (O'Connor, J., concurring) ("That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place.").

[151] *Id.* at 888 (majority opinion).

religious beliefs, and its determination to coerce or suppress none of them."[152] Precisely because of the great diversity of religious belief and practice in this nation,[153] the employment of strict scrutiny when reviewing any law that burdened religious practice would simply be unworkable.[154]

In the *Smith* Court's view, the multiplicity of religious beliefs and practices precluded employing strict scrutiny whenever religious practices were burdened by statutes. But the same reasoning suggests that according religion an analog of Most Favored Nation status would also be unworkable. While one might believe that it would be wise or good to accord religious activity this Most Favored Nation status,[155] the *Smith* decision is not plausibly interpreted to recommend such an approach.

D. Hialeah

One more case is sometimes cited to justify the Most Favored Nation status for religion, namely, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[156] At issue was an ordinance criminalizing animal sacrifice as part of a religious ceremony.[157] When passing the ordinance the Hialeah City Council members had made very clear that they were targeting the Santeria religion.[158]

The Santeríans practiced animal sacrifice,[159] and members of the city council expressed their opposition to the practice.[160] The city attorney described the

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[152] *Id.*

[153] *Id.* (noting that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference" (citing Braunfeld v. Brown, 366 U.S. 599, 606 (1961))).

[154] Mark J. Austin, Comment, *Holier than Thou: Attacking the Constitutionality of State Religious Freedom Legislation*, 33 LOY. L.A. L. REV. 1183, 1191 (2000) (discussing "the [*Smith*] majority's more practical concerns regarding the effects of using strict scrutiny in the free exercise context"); *see also* Oleske, *supra* note 1, at 714–15 ("[T]rue strict scrutiny, if applied faithfully to government denials of religious exemptions, would lead to far more exemptions than society would be willing to tolerate.").

[155] *Cf.* Laycock, *supra* note 3, at 5 ("If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons.").

[156] *See generally* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[157] *Id.* at 527 ("Ordinance 87–52 defined 'sacrifice' as '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' . . . .").

[158] *Id.* at 534 ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.").

[159] *Id.* at 524 ("The basis of the Santeria religion is the nurture of a personal relation with the *orishas,* and one of the principal forms of devotion is an animal sacrifice.").

[160] *Id.* at 527 ("The resolution declared the city policy 'to oppose the ritual sacrifices of animals' within Hialeah and announced that any person or organization practicing animal sacrifice 'will be prosecuted.'").

religious practices as abhorrent,[161] and the Hialeah Police Department chaplain remarked that "Santeria was a sin, 'foolishness,' 'an abomination to the Lord,' and the worship of 'demons.'"[162]

The *Hialeah* Court explained that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral,"[163] and had concluded that "the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice . . . ."[164] Express statements evidenced hostility toward the Santeria religion,[165] and "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief."[166] Because of this lack of neutrality, the Court had to examine the ordinance with great care. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[167] The law at issue in *Hialeah* was not neutral in that it was clearly targeting the Santeria religion and was not of general application in that it was designed to pick out the Santeria religion.[168] For example, the city had exempted several secular animal-killing practices,[169] and seemed to have tailor-made the prohibition to apply only to Santerían practices.[170]

The *Hialeah* Court made very clear that free exercise protections are robust under certain circumstances. "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and

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[161] *Id.* at 542 ("The city attorney commented that Resolution 87–66 indicated: 'This community will not tolerate religious practices which are abhorrent to its citizens.'").

[162] *Id.* at 541.

[163] *Id.* at 533 (citing Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990)).

[164] *Id.* at 540 (citing Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

[165] *Id.* at 541 ("The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice.").

[166] *Id.* at 543.

[167] *Id.* at 546.

[168] David Orentlicher, *Law, Religion, and Health Care*, 8 U.C. IRVINE L. REV. 617, 619 (2018) ("In *Church of the Lukumi Babalu Aye v. City of Hialeah,* the Court struck down Hialeah, Florida's ban on animal sacrifice because the city's animal killing ordinances permitted a variety of animal slaughters and only prohibited animal killing by a particular religious denomination as part of the denomination's religious practice.").

[169] *Hialeah*, 508 U.S. at 537 ("The city, on what seems to be a *per se* basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary.").

[170] *Id.* at 536 ("[T]he burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others . . . ."); *see also* Jonathan J. Marshall, Note, *Selective Civil Rights Enforcement and Religious Liberty*, 72 STAN. L. REV. 1421, 1431 (2020) ("The Supreme Court applied strict scrutiny, distinguishing *Smith* on the ground that the law at issue was not neutral, since it was enacted specifically to discriminate against the Santeria faith.").

must be narrowly tailored in pursuit of those interests."[171] That was not a new standard, because it had already been articulated in *Smith*.[172] But that very tough standard mentioned in *Smith* did not accord Most Favored Nation status to religion, as should be clear when one considers that the *Smith* Court upheld a law prohibiting sacramental use of peyote, notwithstanding that other prohibited drugs were permissible if authorized by a physician.

The rule against picking out religion for special adverse treatment mentioned in *Smith* had long been recognized. The *Braunfeld* Court had stated that the Free Exercise Clause does not permit targeting religion.[173] But prohibiting the targeting of religion is a far cry from giving religion Most Favored Nation status,[174] and one must ignore a host of cases including the very ones allegedly establishing this approach to pretend that free exercise jurisprudence really offers this protection.[175]

II. COVID-19 RESPONSES AND MOST FAVORED NATION STATUS

Some members of the Court have suggested in recent decisions that free exercise guarantees are very robust. But the readings of past cases have been implausible, and the applications of this robust standard do not inspire confidence that future decisions will either be well-reasoned or consistent.

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[171] *Hialeah*, 508 U.S. at 546 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

[172] *Id.* ("The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] . . . down' but 'really means what it says.'" (quoting Emp. Div. v. Smith, 494 U.S. 872, 888 (1990))).

[173] *Id.* ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."); Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid . . . ."); *see also* Christopher Tyler Prosser, Note, *The* Locke *Exception: What* Trinity Lutheran *Means for the Future of State Blaine Amendments*, 46 PEPP. L. REV. 621, 649 (2019) (suggesting that the *Hialeah* Court imposed strict scrutiny when examining statutes targeting religion).

[174] *See, e.g.*, Laycock, *supra* note 3, at 50 ("The other point in the Court's explanation of its unemployment compensation cases is secular exemptions. If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons."). A separate question is whether religion must be afforded an exemption even when exemptions for secular reasons are rejected. *See* McConnell, *supra* note 4, at 1122 ("Even though workers who decline work for other important, conscientious reasons (for example, because of ideological objections to the work or because of the need to care for a dependent) would not receive unemployment compensation, workers who decline work for religious reasons must be given benefits.").

[175] Oleske, *supra* note 1, at 728 (discussing the novel and sweeping reading of *Hialeah*).

A. *Warning Shots*

Recently, states have tried to impose restrictions on gatherings in response to the COVID-19 global pandemic. Those restrictions have sometimes meant that individuals could not meet together to worship, especially because singing together in close quarters without masks presented a grave risk of transmission.[176] In two cases where the Court refused to enjoin the challenged laws, some members of the Court overstated the protections recognized in the case law and over applied the overstated protections in ways that would, if adopted, bode very poorly for a sensible free exercise jurisprudence.

1. South Bay

South Bay United Pentecostal Church v. Newsom[177] involved a church's attempt to enjoin the implementation of a state restriction on worship services. Although the application for an injunction was denied,[178] several Justices served notice that their interpretation of free exercise guarantees would be robust and that their application of these alleged guarantees would not have permitted the state to limit worship services in this way.

To stem the spread of COVID-19, Governor Gavin Newsom of California issued an emergency order limiting the size of public gatherings.[179] The order applied to religious and secular activities, and the restriction on secular activities was at least as burdensome as the restrictions on religious activities.[180] However, some members of the Court were nonetheless convinced that the state was discriminating against religion.[181]

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[176] *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 78 (2020) (Breyer, J., dissenting) ("[M]embers of the scientific and medical communities tell us that the virus is transmitted from person to person through respiratory droplets produced when a person or group of people talk, sing, cough, or breathe near each other.").

[177] *See generally* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

[178] *Id.* at 1613 ("The application for injunctive relief . . . is denied.").

[179] *Id.* (Roberts, C.J., concurring) ("The Governor of California's Executive Order aims to limit the spread of COVID-19 . . . . The Order places temporary numerical restrictions on public gatherings.").

[180] *Id.* (Roberts, C.J., concurring) ("Although California's guidelines place restrictions on places of worship . . . [s]imilar or more severe restrictions apply to comparable secular gatherings.").

[181] *Id.* at 1614 (Kavanaugh, J., dissenting) ("California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses.").

While the State had also imposed a moratorium on comparable secular activities,[182] Justices Kavanaugh, Thomas, and Gorsuch complained that secular businesses were receiving more favorable treatment than houses of worship.[183] The Justices apparently believed that "pharmacies, shopping malls, pet grooming shops, bookstores, florists, [and] hair salons"[184] were comparable, even though the activities within those establishments as well as the length of time individuals might be expected to remain within them would not be comparable to the activities and time spent in houses of worship.[185] The Justices' failure to distinguish among businesses posing differing health risks[186] does not bode well for sensible or credible analysis.

2. Sisolak

Calvary Chapel Dayton Valley v. Sisolak[187] mirrored *South Bay* in important respects. *Sisolak* involved a Nevada limitation on the number of individuals who could attend religious services.[188] Those in dissent suggested that the state of Nevada "directive blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause."[189]

Sisolak is more difficult to assess than *South Bay* because the opinion does not explain the church's actual practices. When Justice Alito argued in dissent that Nevada was treating churches unfairly, he wrote, "Family groups can be given places in the pews that are more than six feet away from others. Worshippers can be required to wear masks throughout the service or for all but a very brief time."[190] While those practices could be implemented, a separate question was whether in

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[182] *Id.* at 1613 (Roberts, C.J., concurring) ("Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.").

[183] *Id.* at 1614 (Kavanaugh, J., dissenting). Justices Thomas and Gorsuch joined his dissent. *See id.*

[184] *Id.* at 1614 (Kavanaugh, J., dissenting).

[185] *Cf.* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting); Daniel Farber, *The Long Shadow of* Jacobson v. Massachusetts: *Public Health, Fundamental Rights, and the Courts*, 57 SAN DIEGO L. REV. 833, 856 (2020) ("Some observers might have found it incongruous to say that businesses like pet grooming shops are comparable to churches, whether in the risks of spreading the virus or in other respects.").

[186] *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) ("And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.").

[187] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

[188] *See id.* at 2604 (Alito, J., dissenting) ("A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons.").

[189] *Id.* at 2607.

[190] *Id.* at 2606.

fact they were implemented.[191] One simply cannot tell what practices in fact took place. Nor can one tell whether there are other relevant differences which would justify the belief that there was a lower risk of exposure in the casinos than in houses of worship.

Perhaps Justice Alito was correct that Nevada was inappropriately favoring casinos.[192] But this would depend upon a fact-specific analysis that might include how people in fact behaved, for example, whether they would be more likely to be wearing masks in one setting rather than another, whether air purification systems were better in one place rather than another, et cetera.

A separate issue is whether free exercise guarantees require that whenever there is a secular exemption, there must be a religious exemption as well. *Smith* undercuts that understanding of free exercise guarantees,[193] and *Hialeah*'s holding that free exercise guarantees preclude targeting religion was the same position announced in *Braunfeld*, where secular but not religious exemptions were permitted.

Nevada had noted that houses of worship were subject to the same restrictions as were a variety of secular institutions.[194] But the fact that some secular and religious institutions were treated in the same way neither establishes that free exercise guarantees were respected nor that they were violated.[195] Rather, the relevant issue was whether there was some justifying difference with respect to protecting public health that would justify treating the different entities differently.

Justice Alito was aware that factual differences might be thought to justify treating some secular businesses more favorably than houses of worship. For example, he noted that in *South Bay* "the law was defended on the ground that in these facilities, unlike in houses of worship, 'people neither congregate in large groups nor remain

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[191] Justice Alito implies that the protective policies had not yet been implemented by the Church. *See id.* at 2609 ("[T]he State has made no effort to show that Calvary Chapel's *plans* would create a serious public health risk." (emphasis added)).

[192] *Id.* at 2606 ("The idea that allowing Calvary Chapel to admit 90 worshippers presents a greater public health risk than allowing casinos to operate at 50% capacity is hard to swallow . . . .").

[193] *See supra* note 122 and accompanying text (discussing the secular exception permitted in *Smith*).

[194] *Sisolak*, 140 S. Ct. at 2606 (Alito, J., dissenting) ("[F]acilities other than houses of worship, such as museums, art galleries, zoos, aquariums, trade schools, and technical schools, are also treated less favorably than casinos . . . .").

[195] Justice Alito notes that treating churches and some secular businesses less favorably does not justify treating casinos more favorably. *See id.* ("[O]bviously that does not justify preferential treatment for casinos.").

in close proximity for extended periods.'"[196] However, that difference notwithstanding, Justice Alito made quite clear that he dissented in *South Bay*,[197] thereby suggesting that the factual differences did not really affect his position. Two subsequent cases reinforce the suspicion that some members of the Court are not interested in whether relevant differences might justify not affording an exemption to religious entities.

B. Reversing Public Health Policy

In two separate cases, the Court has reversed state laws that were designed to reduce the spread of COVID-19. In these cases, religious entities and some secular entities were subject to greater restrictions than some other secular entities, but there were relevant differences between those subject to more severe restrictions and those subject to less severe restrictions. By ignoring those differences, the Court made clear that it was not only mischaracterizing past jurisprudence, but misapplying the overly protective standard that it had announced.

1. Cuomo

In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[198] the Court examined a New York law restricting the number of individuals who could attend religious services.[199] The district court had found that New York was treating religious institutions in the same way as or more favorably than it was treating nonreligious institutions posing the same risk.[200] While some secular businesses were subject to less severe restrictions,[201] the district court had found that the businesses treated more favorably than the religious institutions were relevantly dissimilar.[202] But if relevantly similar entities were receiving similar treatment, then there was no constitutional violation. As Justice Sotomayor noted in her dissent, "[t]he Constitution does not forbid States from responding to public health crises through regulations that

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[196] *Id.* at 2609 (quoting S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)).

[197] *Id.* at 2608–09 (Alito, J., dissenting) ("I dissented from that decision . . . .").

[198] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

[199] *Id.* at 66 ("In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25.").

[200] *See id.* at 76 (Breyer, J., dissenting) ("[T]he District Court . . . found that New York's regulations . . . treated 'religious gatherings . . . more favorably than similar gatherings' with comparable risks . . . .").

[201] *Id.* at 66 (majority opinion) ("Both the Diocese and Agudath Israel maintain that the regulations treat houses of worship much more harshly than comparable secular facilities.").

[202] *Id.* at 76 (Breyer, J., dissenting) ("But the court found these essential businesses to be distinguishable from religious services . . . .").

treat religious institutions equally or more favorably than comparable secular institutions, particularly when those regulations save lives."[203]

As a general matter, the district court is the finder of fact and the Court has explained why appellate courts should not be second-guessing the trier of fact. "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."[204] It is difficult to understand why the trier of fact's findings would be ignored, especially if there were various reasons that the practices at the religious institutions would be more likely to cause virus transmission.[205]

Justice Kavanaugh pointed out in his *Cuomo* concurrence that "once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class."[206] But part of the difficulty is in how to define the favored class—it should not simply be defined in terms of those who are less restricted regardless of the levels of risk posed by the different groups.[207] If there are relevant differences between those treated differently,[208] then dissimilar treatment might in fact be warranted rather than an indicator of unfair discriminatory treatment.[209]

2. Tandon

The same kind of difficulty arose in *Tandon v. Newsom*.[210] California had precluded more than three families from meeting together in in-home settings, whether the activities that would be pursued were religious or secular.[211] Some members of the Court objected because there was no similar limitation on businesses like "hardware stores and hair salons,"[212] even though those businesses were distinguishable

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[203] *Id.* at 81 (Sotomayor, J., dissenting).

[204] Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

[205] *Cuomo*, 141 S. Ct. at 79 (Sotomayor, J., dissenting) ("Unlike religious services, which 'have every one of th[ose] risk factors,' Brief for AMA 6, bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time.").

[206] *Id.* at 73 (Kavanaugh, J., concurring).

[207] *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) ("Comparability is concerned with the risks various activities pose . . . .").

[208] *See Cuomo*, 141 S. Ct. at 79 (Sotomayor, J., dissenting) (discussing "the conditions medical experts tell us facilitate the spread of COVID-19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time.").

[209] *See id.* at 66 (majority opinion) ("[T]he regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment.").

[210] *Tandon*, 141 S. Ct. at 1296.

[211] *Id.* at 1298 (Kagan, J., dissenting) ("California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households . . . .").

[212] *Id.*

in important ways from homes in terms of the risks that would be posed in the differing settings.[213]

The *Tandon* Court had reasoned that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[214] But two points must be made. One is that *Smith* suggests that this test overstates the protections offered. In *Smith*, individuals using a controlled drug were subject to prosecution unless a physician prescribed the drug.[215] But that meant that exemptions to the prohibition could be provided for secular reasons (health), even if not for religious reasons (sacramental use). The state interest in preventing the use of such drugs would be comparable,[216] but the *Smith* Court had upheld the regulation as applied to the respondents who had used peyote for sacramental purposes.[217]

Hialeah had precluded the targeting of religion. But that was nothing new and the *Hialeah* Court was echoing a position espoused in *Braunfeld*, where the Court had upheld a law requiring some businesses to close on Sunday while others were permitted to stay open.

The *Braunfeld* Court had explained: "Abhorrence of religious persecution and intolerance is a basic part of our heritage."[218] The Court had also made clear that targeting religion was unacceptable. "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[219] But the Court was unwilling to infer that the granting

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[213] *Id.* ("First, 'when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting,' with participants 'more likely to be involved in prolonged conversations.' Second, 'private houses are typically smaller and less ventilated than commercial establishments.' And third, 'social distancing and mask-wearing are less likely in private settings and enforcement is more difficult.' These are not the mere musings of two appellate judges: The district court found each of these facts based on the uncontested testimony of California's public-health experts." (citations omitted) (quoting Tandon v. Newsom, 992 F.3d 916, 924–25, (9th Cir. 2021))).

[214] *Id.* at 1296.

[215] Emp. Div. v. Smith, 494 U.S. 872, 874 (1990) ("Oregon law prohibits the knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner." (citing OR. REV. STAT. § 475.992(4) (1987))).

[216] *Cf. id.* at 905 (O'Connor, J., concurring) ("Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.").

[217] *Id.* at 874 ("Respondents Alfred Smith and Galen Black . . . ingested peyote for sacramental purposes at a ceremony of the Native American Church . . . .").

[218] Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

[219] *Id.* at 607.

of secular exemptions to a law without also granting religious ones constituted invidious discrimination.[220] Further, notwithstanding the Court's warning that discrimination might be found if "the State may accomplish its purpose by means which do not impose such a burden,"[221] the *Braunfeld* Court was unwilling to infer discrimination or find a violation of free exercise guarantees even though other states had "cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday,"[222] and that approach might well have been "the wiser solution to the problem."[223]

The *Hialeah* Court had discussed "the Nation's essential commitment to religious freedom"[224] and had explained that "a law targeting religious beliefs as such is never permissible . . . ."[225] But the question at hand is what counts as targeting religion and the *Hialeah* Court cited *Braunfeld* with approval,[226] so *Hialeah*'s position on what counts as a violation of free exercise should be understood in light of what *Braunfeld* permitted.

Judges and commentators sometimes cite *Hialeah*'s statement that "the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason'"[227] to show how demanding free exercise guarantees are.[228] But this discussion of religious hardship comes from *Smith* where religious hardship did not require that the state exempt the respondents from the existing requirement.

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[220] *Id.* ("But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance . . . .").

[221] *Id.*

[222] *Id.* at 608.

[223] *Id.*

[224] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993).

[225] *Id.* at 533.

[226] *Id.* at 532 ("[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." (citing *Braunfeld*, 366 U.S. at 607)).

[227] *Id.* at 537 (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990) (quoting *Bowen*, 476 U.S. at 708)).

[228] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609 (2020) (Kavanaugh, J., dissenting); *see also* Dan T. Coenen, *Free Speech and the Law of Evidence*, 68 DUKE L.J. 639, 678 (2019) ("[A] straightforward logical argument is available based on the Court's declaration in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* building on *Smith* and *Sherbert*, that a state 'may not refuse . . . without compelling reason' to recognize a constitutional hardship exception 'in circumstances in which individualized exemptions from a general requirement are available.'"); Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert*, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1202 (2005) (discussing the robustness of the religious hardship exception); Laycock, *supra* note 13, at 176 ("But the rule that secular exceptions generally require religious exceptions . . . was there in *Smith* if one read carefully.").

Further, *Smith* was quoting from *Bowen v. Roy*,[229] and a consideration of that case helps clarify what the announced policy means.

At issue was the refusal of Stephen Roy and Karen Miller to furnish their child's Social Security number as a condition of receiving AFDC (Aid to Families with Dependent Children) benefits.[230] While much of the trial had involved whether the parents could be forced to obtain a Social Security number for their child even though doing so would contravene their religious beliefs,[231] the last day of trial revealed that the child had already been assigned a Social Security number.[232] Apparently, Roy's beliefs had evolved, and he had come to believe that obtaining a Social Security number was prohibited after he had already secured one for his daughter.[233] However, the fact that the child already had a Social Security number did not moot the issue, because Roy had a sincere religious belief precluding the use of that number.[234]

The *Bowen* plurality reasoned that Roy's sincere religious belief could not prevent the government from using the Social Security number.[235] But Roy was not merely asserting that the government should not use the number but also that he should not be required to furnish that number to the government as a condition of receiving benefits.[236]

When rejecting that free exercise guarantees required that Roy be exempted from providing the number, the plurality reasoned that the requirement "may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious

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229 Bowen v. Roy, 476 U.S. 693 (1986) (plurality opinion).

230 *Id.* at 695 ("The question presented is whether the Free Exercise Clause of the First Amendment compels the Government to accommodate a religiously based objection to the statutory requirements that a Social Security number be provided by an applicant seeking to receive certain welfare benefits and that the States use these numbers in administering the benefit programs.").

231 *See id.* ("Appellees contended that obtaining a Social Security number for their 2-year-old daughter, Little Bird of the Snow, would violate their Native American religious beliefs.").

232 *Id.* at 697.

233 *See id.* at 696 ("At trial, Roy testified that he had recently developed a religious objection to obtaining a Social Security number for Little Bird of the Snow.").

234 *Id.* at 697 ("Roy, however, was recalled to the stand and testified that her spirit would be robbed only by 'use' of the number.").

235 *Id.* at 700 ("[A]ppellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter.").

236 *Id.* at 695 ("They refused to comply, however, with the requirement . . . that participants in these programs furnish their state welfare agencies with the Social Security numbers of the members of their household as a condition of receiving benefits.").

reasons."[237] This was the kind of reasoning offered in *Braunfeld*—the state was not compelling the individual to open his business on his Sabbath but instead was merely enforcing a law that might have some detrimental economic consequences on the plaintiff.[238]

The *Bowen* plurality distinguished *Sherbert* by noting that, in *Sherbert*, the state had created a system of individualized exemptions but had refused to grant an exemption to someone on religious grounds. The plurality reasoned that the state's "refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."[239] But this is a surprising view to take. Why should the refusal to accord an exception for religious activity automatically suggest animus but the refusal to accord an exception for other legitimate reasons not also indicate animus?[240]

The South Carolina law at issue in *Sherbert* did not exempt mothers with children from the requirement that they accept offered employment,[241] and one would infer from the *Bowen* reasoning that animus against women with children should have been attributed to South Carolina. Such a politically unfavorable position does not seem plausibly imputed to the state.[242] Too little was said to know whether there was additional evidence of religious animus.[243]

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[237] *Id.* at 703.

[238] *See supra* note 73 and accompanying text.

[239] *Bowen*, 476 U.S. at 708.

[240] Sherbert v. Verner, 374 U.S. 398, 420 (1963) (Harlan, J., dissenting) ("The fact that these personal considerations sprang from her religious convictions was wholly without relevance to the state court's application of the law. Thus in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits *because* she was a Seventh-day Adventist.").

[241] Judson Mills v. S.C. Unemployment Comp. Comm'n, 28 S.E.2d 535, 536 (S.C. 1944) ("[C]laimant being unable to find anyone else to care for her children, was compelled to give up her work and remain at home and care for them. She has been offered work on the third shift at Judson on several occasions since quitting but has refused each time, stating that she was only available for work on the first or second shifts."); *id.* at 537 ("Pauline Moss Gaines, is hereby declared to have been unable and unavailable for work within the purview of the South Carolina Unemployment Compensation Act and therefore not eligible to receive unemployment compensation benefits . . . .").

[242] *Cf.* Alistair E. Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After* United States v. Lopez, 88 CALIF. L. REV. 1575, 1581 (2000) ("In the words of political consultant Joe Cerrell, 'Crime is always safe . . . . It's good for the political routine, for the political road show. I put this right up there with motherhood and apple pie, the fear of crime.'" (quoting Beth Shuster, *Living in Fear*, L.A. TIMES, Aug. 23, 1998, at A1)).

[243] The *Sherbert* Court did suggest that religious favoritism was at issue, because state law precluded anyone from being forced to work on Sunday. *See Sherbert*, 374 U.S. at 406 ("South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty.").

Even were there no additional evidence of improper motivation, that would not be dispositive with respect to how the case should have been decided. If religious interests could be accommodated[244] without harming others,[245] then free exercise guarantees might nonetheless have afforded protection to Sherbert.[246]

The *Bowen* plurality explained that "given the diversity of beliefs in our pluralistic society and the necessity of providing governments with sufficient operating latitude, some incidental neutral restraints on the free exercise of religion are inescapable."[247] The plurality also cautioned that "legitimate interests are implicated in the need to avoid any appearance of favoring religious over nonreligious applicants."[248]

Yet, the *Bowen* plurality's explanation was surprising in light of its treatment of *Sherbert*. Eligibility for AFDC benefits was subject to certain rules, which themselves included exceptions.[249] Further, as a matter of due process guarantees, individualized hearings would be required before AFDC benefits could be terminated.[250]

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[244] *See supra* notes 76–78 and accompanying text (discussing accommodation of the needs of those celebrating the Sabbath on a day other than Sunday); *see also* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 949 (1989) ("If those ends can reasonably be achieved without the imposition of the free exercise burden, relief from the burden may be in order.").

[245] *See* Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others: Review Essay of Paul A. Offit's Bad Faith: When Religious Belief Undermines Modern Medicine*, 104 GEO. L.J. 1111, 1122 (2016) ("The Free Exercise Clause of the First Amendment thus does not provide a basis for challenging laws that prevent harms to others . . . .").

[246] The *Sherbert* Court did not base its decision on religious animus, instead merely suggesting that the State's interest was not sufficiently strong to justify withholding the unemployment compensation from Sherbert. The Court compared the issue before it to the issue that had arisen in *Braunfeld*, implying that the implicated state interests in *Braunfeld* had been stronger. *See Sherbert*, 374 U.S. at 408. That said, Justice Brennan, who wrote the *Sherbert* opinion, *see id.* at 399 ("Mr. Justice Brennan delivered the opinion of the Court."), suggested in his *Braunfeld* dissent that the implicated state interests were not sufficiently strong to justify the state refusal to exempt the plaintiffs. *See* Braunfeld v. Brown, 366 U.S. 599, 613–14 (1961) (Brennan, J., dissenting).

[247] Bowen v. Roy, 476 U.S. 693, 712 (1986) (plurality opinion).

[248] *Id.* at 707.

[249] *Cf.* Bowen v. Gilliard, 483 U.S. 587, 589 (1987) ("Congress amended the statute authorizing Federal Aid to Families with Dependent Children (AFDC) to require that a family's eligibility for benefits must take into account, with certain specified exceptions, the income of all parents, brothers, and sisters living in the same home.").

[250] *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding that pretermination hearings were required before AFDC benefits could be terminated).

Roy and Miller had been receiving AFDC benefits,[251] and those benefits had been terminated when Roy and Miller had refused to provide the requested social security number.[252] Given that rules about who could receive AFDC benefits contained exceptions and that individualized hearings were required before such benefits could be terminated, one would expect that the free exercise exemption would have to be afforded.[253] That an exemption was not afforded suggests that free exercise guarantees have not been as robust as some Justices imply, and that the *Bowen* plurality's suggestion about when religious animus may be attributed should not be taken at face value.[254] It may well be that the Court's presumption that animus is at issue when faiths do not get preferential treatment is not automatic but, instead, selectively triggered. In any event, if religious hardship meant what several of the current Justices imply that it means, several of the very cases from which the test comes would have been decided differently.

CONCLUSION

The U.S. Supreme Court has indicated that it now views free exercise guarantees as extremely robust. The current approach is problematic in at least two respects. First, the cases cited cannot plausibly be understood to support the position attributed to them, because the decisions themselves do not incorporate the imputed policy and, in addition, the decisions themselves are self-consciously within the (alleged) existing jurisprudence[255] and so are being construed in a way that is utterly out of context. Second, the application of the existing standard is so blind to factors that the standard itself considers important that the Court does not seem to be applying the overly protective standard that it, itself, has announced.

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[251] *Bowen*, 476 U.S. at 695 ("Appellees Stephen J. Roy and Karen Miller applied for and received benefits under the Aid to Families with Dependent Children program and the Food Stamp program.").

[252] *Id.* ("The Pennsylvania Department of Public Welfare thereafter terminated AFDC and medical benefits payable to appellees on the child's behalf . . . .").

[253] *Cf.* Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 673–74 (1991) (discussing the "less rigorous standard . . . in *Bowen v. Roy* . . . .").

[254] *Cf.* Samuel D. Brooks, Note, *Native American Indians' Fruitless Search for First Amendment Protection of Their Sacred Religious Sites*, 24 VAL. U. L. REV. 521, 522 (1990) ("Native American Indians have yet to obtain the free exercise protection the first amendment guarantees.").

[255] Some commentators suggest that *Smith* was not plausibly construed to be within the existing jurisprudence, Court's claims to the contrary notwithstanding. *See supra* note 145 and accompanying text.

The United States is extremely religiously diverse,[256] which is probably one of the reasons that the Court has had some difficulty in applying its free exercise protections consistently.[257] Now, the Court is announcing a standard that is even more protective than we have had in the past, which suggests that the Court is going to be even more hard-pressed to apply it uniformly. Worse still, the Court does not seem worried about maintaining even the appearance of impartiality and seems quite willing to impute animus when some faiths are not given preferential treatment but turn a blind eye when other faiths are singled out for adverse treatment.[258] The Court's free exercise rulings cannot help but erode confidence in the Court and have a variety of negative effects.[259]

The Court's foray into public health is alarming.[260] The Court has offered an implausible account of free exercise jurisprudence to yield an unsustainable, overly

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[256] Town of Greece v. Galloway, 572 U.S. 565, 595 (2014) ("[O]ur country has become more diverse . . . ."); Van Orden v. Perry, 545 U.S. 677, 703 (2005) (Breyer, J., concurring) (discussing "today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs . . . ."); *see also* Andrew Koppelman, *Gay Rights, Religious Liberty, and the Misleading Racism Analogy*, 2020 BYU. L. REV. 1, 8 (2020) (describing "the United States [as] probably the most religiously diverse nation in the history of the world.").

[257] *Cf.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988) ("[I]ncidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.").

[258] *Cf.* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 80 (2020) (Sotomayor, J., dissenting) ("Just a few Terms ago, this Court declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a 'Muslim Ban,' originally conceived of as a 'total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.' If the President's statements did not show 'that the challenged restrictions violate the "minimum requirement of neutrality" to religion,' it is hard to see how Governor Cuomo's do." (citations omitted) (first quoting Trump v. Hawaii, 138 S.Ct. 2392, 2417 (2018); and then quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993))).

[259] *Cf.* Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 364 (2014) ("When the citizenry comes to view the courts as corrupt, it sets off a cascade of deleterious effects: they will not trust the judicial branch to keep the other branches in check, thereby fostering a perception that the Executive and the Legislature are veering towards tyranny.").

[260] *See Cuomo*, 141 S. Ct. at 78 (Breyer, J., dissenting) ("The elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to 'changing facts on the ground.' And they can do so more quickly than can courts. That is particularly true of a court, such as this Court, which does not conduct evidentiary hearings. It is true even more so where, as here, the need for action is immediate, the information likely limited, the making of exceptions difficult, and the disease-related circumstances rapidly changing." (citing S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring))); *see also S. Bay United Pentecostal Church*, 140 S. Ct. at 1613–14 ("Our Constitution

protective principle, and has misapplied the very principle it has articulated, thereby putting the lives and health of American citizens at risk. Recent free exercise cases bode poorly for the Court, the free exercise of religion, and the cohesion and welfare of society.

principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." (citations omitted) (first quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905); then quoting Marshall v. United States, 414 U.S. 417, 427 (1974); and then quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985))).