The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty

Andrew Koppelman[*]

ABSTRACT: The First Amendment prohibits discrimination against religion. In a short time, mostly in cases challenging efforts to contain the Covid pandemic, the Supreme Court has transformed this familiar rule into new, more exacting doctrines that can exempt religious people from almost any law. This Essay taxonomizes these doctrinal variants, showing that they are dangerous, indefensible mutations of the most-favored-nation (MFN) theory of religious discrimination. These variants go well beyond the most attractive rationale for MFN. Their implications are so anarchic that the Court cannot possibly pursue them to the limits of their logic. Their deployment in practice will be necessarily selective and is likely to benefit claimants the judges like and to constrain laws the judges dislike.

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* John Paul Stevens Professor of Law and Professor (by courtesy) of Political Science, Department of Philosophy Affiliated Faculty, Northwestern University. Thanks to Alan Brownstein, Rick Garnett, Douglas Laycock, Christopher Lund, Michael McConnell, Jim Oleske, Jim Pfander, Laura Portuondo, Micah Schwartzman, Steven D. Smith, Nelson Tebbe, and Lael Weinberger for comments, to Janet Halley and Paul Horwitz for helpful conversations, and to Tom Gaylord for research assistance.

INTRODUCTION

The First Amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] In *Employment Division v. Smith*, the Court held that burdens on religion do not in themselves create any presumptive right to exemption from generally applicable laws.[2] However, the Court later explained in *Church of the Lukumi Babalu Aye v. Hialeah*, "the 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."[3] *Lukumi* held that, although religion is entitled to no special privileges, it is protected from discrimination.[4]

Since then, the Court has construed that protection with increasing breadth. It now embraces what has been called the "most-favored-nation" theory (hereinafter MFN), which holds that the denial of a religious exemption is presumptively unconstitutional if the state "treats some comparable secular activities more favorably."[5] That made sense in the context in which it was originally formulated, but the theory has mutated. The Court has broadened

1. U.S. CONST. amend. I.
2. *See* Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 883–86 (1990).
3. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).
4. *Id.* at 532, 545.
5. Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021).

its understanding of what counts as discrimination against religion, reaching beyond malice to include selective sympathy and indifference. Strict scrutiny applies even to a law that does not mention religion, so long as the law permits secular activities that the judges regard as comparable. The Court has been remarkably casual in its findings of underinclusiveness, repeatedly mischaracterizing the comparative harms of religious and secular claims.[6] It has declared that the mere possibility of an exception, even if it has never been exercised, triggers strict scrutiny.[7]

Even more protective variants have been proposed by Justices Kavanaugh, Alito, and Gorsuch. Kavanaugh argues that strict scrutiny should apply whenever some secular organizations are treated better than religious organizations.[8] Gorsuch has repeatedly mischaracterized the purpose of a challenged law in order to conclude that prohibited religious conduct impaired that purpose no more than conduct that the law permitted.[9] Alito has claimed that exceptions show that a law's purpose is not compelling—a conclusion that logically implies automatic accommodation, regardless of whatever harm the accommodation causes.[10] Gorsuch has been stubbornly resistant to evidence that religious accommodation for vaccine resistors would produce avoidable illness and death.[11]

The antivaccine movement was, only a few years ago, such a fringe group of cranks that even Donald Trump had to walk back his support for it once he was President.[12] In more than a century of litigation, no U.S. court had ever declared a right to refuse vaccination.[13] That helped the United States eradicate smallpox, nearly eliminate polio, and contain many other deadly diseases.

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6. *See, e.g.*, *id.*; Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–68 (2020).

7. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1879, 1881 (2021).

8. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting).

9. *See* Does 1-3 v. Mills, 142 S. Ct. 17, 18–19 (2021) (Gorsuch, J., dissenting); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734–40 (2018) (Gorsuch, J., concurring).

10. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2392 (2020) (Alito, J., joined by Gorsuch, J., concurring).

11. *Does 1-3*, 142 S. Ct. at 21–22 (Gorsuch, J., dissenting); *see* Dr. A. v. Hochul, 142 S. Ct. 552, 559 (2021) (Gorsuch, J., dissenting).

12. Helen Branswell, '*They Have to Get the Shots': Trump, Once a Vaccine Skeptic, Changes His Tune amid Measles Outbreaks*, STAT (Apr. 26, 2019), https://www.statnews.com/2019/04/26/trump-vaccinations-measles [https://perma.cc/VBH5-QEQR].

13. Lindsay F. Wiley & Steve Vladeck, *Why Carefully Designed Public Vaccination Mandates Can—and Should—Withstand Constitutional Challenge*, LAWFARE (Aug. 12, 2021, 8:01 AM), https://www.lawfareblog.com/Designed-Public-Vaccination-Mandates [https://perma.cc/N58S-BHPG]; WEN W. SHEN, CONG. RSCH. SERV., R46745, STATE AND FEDERAL AUTHORITY TO MANDATE COVID-19 VACCINATION 4 (2022). A few courts did invalidate requirements that exempted only members of organized churches that opposed vaccination, and so discriminated among religions. JAMES COLGROVE, STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA 180–85 (2006).

Yet now there is a movement among federal courts to make vaccine resistance a constitutional right—a movement that threatens to bring these diseases back.[14] It counts among its allies at least three of the nine justices of the Supreme Court.[15] They think they are defending religion from discrimination. They may already have a majority. It is too soon to tell.

How did the courts become a public health menace? Just as much of the story of Covid is one of increasingly dangerous mutations of the virus, so too is the law's story one of increasingly dangerous mutations of legal doctrine. The story begins with a decision involving animal sacrifice, in which a unanimous Court struck down a law because it was the product of religious bigotry.[16] The Court has unrecognizably reshaped that holding. This Essay traces how it happened and taxonomizes the variants.

In the very first religious accommodation case it confronted, in 1878, the Court speculated that such exemptions might entail the permissibility of human sacrifice.[17] That statement has often been denounced as overblown.[18] Yet it is now clear that the Court was right to worry.[19]

The MFN theory has been the object of extensive scholarly debate.[20] Almost all of it was written before the proliferation of new variants, which this Essay is the first to catalogue and critique.

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14. For a review of recent developments in the federal courts, see generally Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106 (2022) (reviewing Free Exercise challenges to vaccine mandates). Vaccine resistance is not necessarily religious and is sometimes associated with secularists on the left. Those resisters are unlikely to receive much help from the courts—and this is because they are secular rather than because they are on the left.

15. *See infra* Section III.B.2.

16. *See infra* Section II.A.

17. Reynolds v. United States, 98 U.S. 145, 166 (1878); *see also* Davis v. Beason, 133 U.S. 333, 343–44 (1890) (raising a similar human sacrifice question).

18. *See, e.g.*, Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 EMORY L.J. 1905, 1961–62, 1962 n.243 (2015); Garrett Epps, *"You Have Been in Afghanistan": A Discourse on the Van Alstyne Method*, 54 DUKE L.J. 1555, 1574–75 (2005); Arnold H. Loewy, *Rethinking Free Exercise of Religion After* Smith *and* Boerne*: Charting a Middle Course*, 68 MISS. L.J. 105, 124 (1998); Austin Sarat & Roger Berkowitz, *Disorderly Differences: Recognition, Accommodation, and American Law*, 6 YALE. J.L. & HUMANS. 285, 295–97 (1994).

19. *See infra* text accompanying notes 327–43.

20. *See, e.g.*, Rothschild, *supra* note 14, at 1131; Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, 37 J.L. & RELIGION 72, 78 (2022); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2414 (2021); Josh Blackman, *The "Essential" Free Exercise Clause*, 4 HARV. J.L. & PUB. POL'Y 637, 683–86 (2021); Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 5 AM. CONST. SOC'Y SUP. CT. REV. 221, 252–53 (2021); Vikram David Amar & Alan E. Brownstein, *"Most Favored-Nation" ("MFN") Style Reasoning in Free Exercise Viewed Through the Lens of Constitutional Equality:*, JUSTIA (May 21, 2021), https://verdict.justia.com/2021/05/21/most-favored-nation-mfn-style-reasoning-in-free-exercise-viewed-through-the-lens-of-constitutional-equality [https://perma.cc/JG8D-4V2Q]; Vikram David Amar & Alan E. Brownstein, *Exploring the Meaning of and Problems with the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach To Protecting Religious Liberty Under the Free Exercise Clause: Part One in a Series*, JUSTIA (Apr. 30, 2021), https://verdict.justia.com/2021

Part I describes the new rules of religious accommodation that the Court has laid down. Part II recounts the origin of the "most-favored-nation" theory. Part III taxonomizes the variants. I count eight of them, with varying degrees of virulence.[21] Part IV proposes an explanation for their emergence and shows that they imply protection for any religious activity, no matter how destructive.

I. THE NEW LAW OF RELIGIOUS ACCOMMODATION

Begin with where the law is now. *Tandon v. Newsom* was a 5-4 decision enjoining California's Covid-19 order limiting more than three households from gathering in homes.[22] The Court declared the order could not be applied to religious groups that want to hold services in a home.[23] It explained 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."[24] This rule, announced without full briefing or argument, was then used to enjoin a rule that did not mention religion at all and whose authors almost certainly were not even thinking about religion.

The *Tandon* rule is an example of MFN: If any comparable activity is being treated better than religion, strict scrutiny applies.[25] The Court held that the rule discriminated against religion, because "California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time."[26]

Justice Kagan, dissenting, pointed out that those activities "pose lesser risks" because they can enforce mask wearing, the interactions are briefer, and ventilation is better.[27] That points to another innovation: persistent imprecision in deciding what counts as comparable activity.

/04/30/exploring-the-meaning-of-and-problems-with-the-supreme-courts-apparent-adoption-of-a-most-favored-nation-approach-to-protecting-religious-liberty-under-the-free-exercise-c [https://perma.cc/9869-WNP5]; Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282, 291–93 (2020); Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22–23 (2016); James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 299 n.25 (2013); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 640 (2003); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 195–203 (2002).

21. The eighth is however a theoretical construct implied by the interaction of some of the other versions, but never expressly embraced by any Justice.

22. Tandon v. Newsom, 141 S. Ct. 1294, 1296–98 (2021).

23. *Id.* at 1297–98.

24. *Id.* at 1296.

25. *Id.* at 1296–97.

26. *Id.* at 1297.

27. *Id.* at 1298 (Kagan, J., dissenting).

It is hard to find any law that cannot be characterized as excusing comparable activity, especially if, as the Court says, the comparison is based on whether the state ever tolerates any setback to its pertinent interests. Few government purposes, not even the most critical ones, are pursued with monomaniacal intensity.

The Court has described the compelling interest test as "the most demanding test known to constitutional law."[28] Once a court has decided that a law discriminates against religion, "strict scrutiny" amounts to a powerful presumption of unconstitutionality—as evidenced by the Court's extraordinary decision to issue an injunction against a law that had been upheld in the lower courts.[29]

In two recent dissenting opinions, Gorsuch has deployed this analysis to seek to enjoin state laws that mandated Covid vaccinations for health care workers.[30] If he succeeds—he was constrained by the absence of full briefing and argument, but may eventually assemble the votes for that result—vaccine resistance would become a constitutional right so long as it was religiously motivated, a right that could not be confined to Covid. Americans would again face polio, measles, rubella, tetanus, diphtheria, pertussis, and rotavirus.

II. THE INVENTION OF MOST-FAVORED-NATION

MFN was invented by Professor Douglas Laycock, who successfully argued a religious discrimination case at the Supreme Court and then offered a broad interpretation of its holding.[31] In fact, what he offered was more an extension than an interpretation. But there is a case to be made for the extension, at least as he originally formulated it, as an interpretation of the Free Exercise Clause. (His argument did not entail the later variants, some of which he has repudiated and for which he should not be blamed).

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28. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

29. Stephen I. Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html [https://perma.cc/BW9C-VLR7]. The Court's actions are extraordinary in other ways. "Using emergency orders pending appeal to change substantive law . . . arguably exceeds the justices' statutory authority to issue such relief." *Id.*; *see also* Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 734 (2022) ("For the sixth time in just over four months, the Court issued an emergency writ of injunction to block state COVID restrictions on religious liberty grounds while challenges to them proceeded through the lower courts."); *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 16–22 (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law) (explaining issues that have arisen due to use of the shadow docket).

30. *See infra* Section III.B.2.

31. *See infra* Section II.C.

A. *LUKUMI WAS THE PRECURSOR*

The present doctrinal development begins with *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, in which the Court invalidated a ban on animal sacrifice.[32] The Court had previously held in *Employment Division, Department of Human Resources of Oregon v. Smith* that there was no right to religious exemptions from neutral laws.[33] But this law was not neutral.[34] It targeted an unpopular religion of Caribbean immigrants.[35] The laws, the Court concluded, were "drafted with care to forbid few killings but those occasioned by religious sacrifice."[36] The state said that it had a legitimate interest in preventing cruelty to animals.[37] The Court retorted that the city "devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons."[38] In Hialeah, animals could be killed, sometimes painfully, for all sorts of nonreligious reasons.[39] Live rabbits were used to train greyhounds.[40] The city's laws, the Court said, "fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does."[41] That showed an impermissible purpose.[42] "The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of [Hialeah's] ordinances."[43]

The claim in *Lukumi* built on language in *Smith* distinguishing earlier cases in which the Court had overturned state refusals of unemployment benefits to claimants who refused work for religious reasons. Where there is "a system of 'individualized governmental assessment of the reasons for the relevant conduct,'"[44] the *Smith* court had declared, "government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'"[45] When Justice Scalia wrote that, he probably did not intend to lay down a sweeping new rule. Michael McConnell observes that this language had "one

32. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993).

33. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

34. *Lukumi*, 508 U.S. at 543.

35. *Id.* at 524–25.

36. *Id.* at 543.

37. *Id.* at 537.

38. *Id.* at 537–38.

39. *Id.* at 537.

40. *Id.*

41. *Id.* at 543. This sentence can be read out of context, to indicate that any underinclusiveness triggers strict scrutiny. "But underinclusion alone does not render a law non-generally applicable. The critical next step is determining whether the nature and degree of underinclusion is so 'substantial' that it suggests the regulation was 'drafted with care' to target religious practice." Brief of Church-State Scholars as Amicus Curiae in Support of Respondents at 11, Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021) (No. 21-15189). Thanks to Jim Oleske for the reference.

42. *See Lukumi*, 508 U.S. at 534.

43. *Id.*

44. *Id.* at 537 (quoting Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990)).

45. *Id.* (quoting *Smith*, 494 U.S. at 884).

function only: to enable the Court to reach the conclusion it desired in *Smith* without openly overruling any prior decisions."[46]

Lukumi is the source of the underinclusiveness rule that the Court adopted in *Tandon*. But the *Tandon* rule does not readily follow from *Lukumi*, which did not specify the standard it was applying. As James Oleske has shown in considerable detail, "the Court viewed *Lukumi* as an extreme case and deliberately left unclear the appropriate methodology for deciding closer cases."[47] *Lukumi* does not adopt any form of MFN. It is a precursor of MFN, not an example of it.

The *Lukumi* Court was divided on evidentiary questions,[48] but it agreed that hostility toward some unpopular religion was the trigger for strict scrutiny. Justice Kennedy, writing for the majority, concluded that the record of its enactment "discloses animosity to Santeria adherents and their religious practices."[49]

B. THE LIMITS OF LUKUMI

The issue was not the impact on the religion, or even whether the state is guilty of unintentional but culpable neglect. As the Court later explained, the question under *Lukumi* was whether a law "had the object of stifling or punishing free exercise."[50] A single secular exemption could hardly suffice to prove that

46. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1124 (1990).

47. Oleske, *supra* note 20, at 298. "As the Court explained: 'In this case, we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.'" *Id.* (quoting *Lukumi*, 508 U.S. at 543).

48. Kennedy, writing for the majority, concluded that the record of its enactment "discloses animosity to Santeria adherents and their religious practices." *Lukumi*, 508 U.S. at 542. Scalia, concurring, declined to join the part of Kennedy's opinion that examined the legislative history of the Hialeah ordinance, "because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers, i. e.*, whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria." *Id.* at 558 (Scalia, J., concurring in part and concurring in the judgment). Because the law "in fact singles out a religious practice for special burdens," it is invalid. *Id.* at 559. Like Kennedy, Scalia focuses on purpose, but he wants to avoid inquiries into legislative motive if he can. His solution in *Lukumi* is to discern the law's "object." *Id.* at 558. As he explains elsewhere, "the textualist routinely takes purpose into account, but in its concrete manifestations as deduced from close reading of the text. . . . The evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 20 (2012). The object of the law in *Lukumi* was improper.

Kennedy and Scalia offer different ways of answering the same question: Is the law targeting an unpopular religion for special burdens? Kennedy wrote for the Court, including Scalia, when he acknowledged the "many ways of demonstrating that the object or purpose of a law is the suppression of religion . . . ." *Lukumi*, 508 U.S. at 533.

49. *Lukumi*, 508 U.S. at 542.

50. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

religion was singled out.[51] The question of what to do if presented with such an exemption was not before the Court.

Impermissible purpose was indispensable to *Lukumi*'s analysis.[52] Its most fundamental difference from *Tandon* is that no such purpose was found in the California Covid regulation. That difference is clear in the remedies that the Court provided. In *Tandon*, the Court required a religious exemption comparable to the secular ones. In *Lukumi*, Oleske observes, "the remedy in the case went far beyond the granting of a religious exemption to ensure parity. Instead, the *Lukumi* Court *completely voided* Hialeah's ordinances after determining that they were 'designed to persecute or oppress a religion or its practices.'"[53] That is appropriate when the state has acted with an improper purpose, such as racism or the endorsement of a religion.[54]

So how did the *Lukumi* rule change?

C. THE MOST-FAVORED-NATION THEORY

In 1990, while *Lukumi* was still being litigated, Laycock suggested that it would be appropriate "that religion get something analogous to most-favored nation status. Religious speech should be treated as well as political speech, religious land uses should be treated as well as any other land use of comparable intensity, and so forth."[55] This approach has been called, following Laycock, the "most-favored-nation" rule, borrowing the name of a rule of some international trade treaties that entitle some nations to be treated at least as well as any other nation is being treated.

Laycock was the victorious counsel in *Lukumi*. He proposed in later litigation that the decision should be read broadly, to go beyond discriminatory purpose: "A single secular exception triggers strict scrutiny if it undermines the state interest allegedly served by applying the rule to religious conduct."[56] This of course was the MFN argument. He later observed that this argument could be used to support almost any claim for religious accommodation: "If a law with

51. *Id.* at 535 ("If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive.").

52. It was also emphasized in Laycock's brief. "The preambles and accompanying resolutions recite, and the trial court found, that these ordinances were enacted for the express purpose of suppressing the religious ritual of animal sacrifice." Petitioners' Brief at 6, *Lukumi*, 508 U.S. 520 (No. 91-948) (citation omitted). There was, however, language in the brief that anticipated MFN: "If the City recognizes that there are acceptable reasons for killing animals, then it must classify religion among those acceptable reasons." *Id.* at 13–14.

53. Oleske, *supra* note 20, at 302 (quoting *Lukumi*, 508 U.S. at 547).

54. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239–45 (1976); Epperson v. Arkansas, 393 U.S. 97, 103 (1968).

55. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49. This passage was quoted with approval by Justice Kavanaugh in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting).

56. Brief of Constitutional Law Professors as Amici Curiae in Support of Appellees at 19, Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015) (Nos. 12-35221, 12-35223) [hereinafter *Stormans* Brief] (authored by Laycock et al.).

even a few secular exceptions isn't neutral and generally applicable, then not many laws are."[57]

Laycock's choice of the international trade analogy is potentially misleading because it implies that whenever there is a secular accommodation of any kind, there *must* be a religious one. He did not mean that. He never said that the religious claim should always prevail. He wanted to go beyond *Lukumi*, because the wrong he sought to remedy was not confined to a desire to harm: "oppressive laws may be enacted through hostility, sheer indifference, or iguorance [sic] of minority faiths."[58] MFN was useful as an evidentiary device: "Exemptions for secular interests without exemptions for religious practice reflect a hostile indifference to religion."[59]

Secular exemptions would place the burden of justification on the state. "In general, the allowance of any exemption is substantial evidence that religious exemptions would not threaten the statutory scheme. The state may conceivably have a compelling reason for denying some claims to religious exemption even though it grants other exemptions, but such cases should be quite rare."[60] The question, in this first formulation of MFN, is not discriminatory purpose, but whether the decision-maker paid too little attention to religious liberty. That could happen even with statutes that make no mention of religion. "Religion need not be singled out, and the state need not act with bad motive."[61]

This understanding of discrimination has deep roots in the theory of discrimination law. Prejudice sometimes contaminates decision-making and renders it illegitimate even in the absence of malign purpose.[62] Paul Brest

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57. Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 173.

58. Laycock, *supra* note 55, at 4.

59. *Id.* at 50.

60. *Id.*

61. *Stormans* Brief, *supra* note 56, at 2.

62. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 13–56 (1996). This idea is close to what Nelson Tebbe calls "equal value," and what Christopher Eisgruber and Lawrence Sager call "equal regard." *See generally* Tebbe, *supra* note 20; CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007). At the deepest theoretical level, I agree with them, but these terms are potentially confusing. Nondiscrimination really demands, not equality, but the necessarily unequal weighing of incommensurable considerations, purged of the improper influence of prejudice.

Joseph Raz observes that equality is a trivial entailment of almost any moral and political theory. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 220 (1986). Once a theory offers a complete statement of what is relevant regarding some issue, it necessarily implies that nothing else counts. *See id.* at 220–41. It will then be egalitarian in the sense that all cases with respect to which the relevant considerations are the same are to be treated the same, and all other considerations are excluded. *Id.* On the basis of a similar argument, Peter Westen concludes that the idea of "[e]quality is an empty vessel with no substantive moral content of its own." Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982).

This analytic point does not entail, as Westen claimed, that the language of equality ought to be abandoned. *See id.* at 537, 542, 596. The idea of equality typically stands for the substantive claim that certain alleged bases of unlikeness, classically race, sex, religion, and national origin,

observed in 1976 that a large part of the problem of discrimination is the tendency of decisions to reflect "racially selective sympathy and indifference," meaning "the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group."[63] That can also be true of religious discrimination: Michael Perry argues that unequal treatment may be "animated by diminished respect and concern for the religious group whose practice" is selectively burdened.[64]

But Brest conceded "the judicial unmanageability of a general rule requiring an extraordinary justification for practices that produce racially disproportionate effects."[65] The basic problem, Daniel Ortiz notes, is that claiming the state's decision-making is contaminated by illegitimate considerations and that the court ought to remedy it "requires the court to remake the government's decision without the impermissible motive and then to see whether the decision remains the same."[66] MFN is not a disparate impact test. It depends on a comparator. But the choice of a comparator involves at least as much discretion as a disparate impact test. Maybe more.

The countermajoritarian difficulty here is at its maximum.[67] Having established that the legislature is untrustworthy, the courts could respond by

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are not appropriate reasons for treating some people worse than others. *See* Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 248 (1983). An allegation of unjust inequality is hardly empty. It is a claim that some people's interests are wrongly being regarded as mattering less than others'.

The religion field is, however, one in which the terminological confusion can do real damage. There are many situations in which religious considerations are appropriately outweighed by secular ones. The language of equality may be one of the considerations that has made it hard for courts to see this.

63. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976).

64. Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siècle *Sketches*, 75 IND. L.J. 295, 303 (2000); *see also* Tebbe, *supra* note 20, at 2444 (endorsing the same argument). Laycock writes: "[E]xempting some secular conduct from a prohibition that applies to religious conduct implies a value judgment—that the secular conduct is more valuable, or more deserving of protection, than the religious conduct." *Stormans* Brief, *supra* note 56, at 2–3.

65. Brest, *supra* note 63, at 26. He thus noted but did not challenge the Court's argument in *Washington v. Davis* that

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

See id. at 25 (quoting Washington v. Davis, 426 U.S. 229, 248 (1976)).

66. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1113 (1989). Another analysis that reaches the same conclusion is David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 939 (1989).

67. The term, familiar to constitutional theorists, was coined by Alexander Bickel, who argued "that judicial review is a deviant institution in the American democracy." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (1962). This is because:

taking the political process into receivership and run it as an unbiased decision-maker would. The "unbiased" result would of course incorporate all the biases and political preferences of the judges.[68]

It would not, however, entail that religious claimants always win.[69] Sometimes an unbiased decision-maker would refuse to accommodate religion, even when secular accommodations are made. Laycock thought such occasions would be rare, but that was because he claimed—this is the weakest part of his argument—that most secular interests that are accommodated are likely to have relatively little weight. "This pattern of exemptions reflects a legislative judgment that the free exercise of religion is less important than the demands of some special interest group of no constitutional significance. But that is a judgment inconsistent with the constitutional guarantee."[70]

The fact that a state interest is not pursued to the limits of the possible is not, however, always, or even usually, a response to "the demands of some special interest group of no constitutional significance."[71] Sometimes it reflects a sober recognition of some countervailing urgent concern. The laws against speeding make exceptions for ambulances.[72] Laycock thus overstated his case when he claimed that laws "must apply to everyone, or at least to nearly everyone, and to all conduct that significantly undermines the state's alleged interest."[73]

Underinclusiveness is not the problem. Its significance is evidentiary. A law's underinclusiveness may be evidence of bias, but the bias may be present even without it. That means that, if what a court really cares about is selective sympathy, there will be a persistent temptation to cheat, to distort the MFN analysis to make it come out the right way.

One reason for treating religious claims more skeptically than secular ones is that the former can be hard to contain, especially if they involve an exemption that is desirable for secular reasons. Such claims, Vikram Amar and Alan Brownstein observe, "depend on a subjective determination of the claimant's sincerity. This means that there are risks of sham claims when religious

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> [It] is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens.

Id. at 16–17.

68. For another review of the cases, parallel to the present analysis, that concludes that the antidiscrimination approach has produced precisely this result on the present Court, see Tebbe, *supra* note 20, *passim*.

69. Unless, of course, that is the bias of the judge. *See infra* notes 317–22 and accompanying text.

70. Laycock, *supra* note 55, at 51.

71. *Id.*

72. *See, e.g.*, 625 ILL. COMP. STAT. 5/11-205(c) (1997) ("The driver of an authorized emergency vehicle may . . . [e]xceed the maximum speed limits so long as he does not endanger life or property.").

73. *Stormans* Brief, *supra* note 56, at 2.

claims of secular value are asserted, a concern that the state may not need to be as worried about when secular exemptions are granted."[74]

Laycock responds to this problem by suggesting that courts should hesitate to extend exemptions to claims with secular value, precisely because the government should neither encourage nor discourage religion.[75] Strict scrutiny should be satisfied where "allowing one exemption will trigger many others and undermine a law's basic coverage, not just a few of its applications."[76] That sensible proviso is not, however, built into the structure of the MFN analysis.[77]

One way of responding to the countermajoritarian difficulty is to intervene only in egregious cases. Dormant Commerce Clause claims typically allege selective sympathy and indifference: State legislators like local businesses more than their out-of-state competitors. The bias is certainly there, but it is hard to know whether it is the cause of any particular disparate impact. The Court's response has been to hold that a state law that creates an incidental burden on interstate commerce will be invalidated only if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[78] Courts sometimes, albeit rarely, strike laws down on this basis.[79] But the burden must be "clearly excessive."[80] In closer cases, courts understand the limits of their competence.[81]

Laycock was primarily thinking of easy cases, in which the refusal of accommodation would be hard to justify. In *Smith*, for instance, no legitimate state interest was harmed by Native American peyote ceremonies. The early victories of MFN all involved state interests that were not especially weighty: zoning ordinances that excluded churches and synagogues; landmarking laws; requirements that students live in dormitories; a rule forbidding counselors to

74. Amar & Brownstein, *Exploring the Meaning of and Problems with the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach To Protecting Religious Liberty Under the Free Exercise Clause: Part One in a Series*, *supra* note 20.

75. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1017 (1990) ("If we suspect that the original number of conscientious objectors is small, and that the number of non-objectors seriously tempted by the exemption is large, then denying the exemption appears to be more nearly neutral than granting it."); *see also infra* note 256 (quoting Laycock applying this analysis to vaccine resistance).

76. Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020-2021 CATO SUP. CT. REV. 33, 52.

77. Gorsuch, while embracing MFN analysis, responds differently, by proposing that the numbers somehow be arbitrarily limited and divided between religious and secular claimants in a nondiscriminatory way. *See infra* text accompanying note 283.

78. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

79. BRANDON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE, § 6.05, at 6-34–37 (2d ed. 2013).

80. *Pike*, 397 U.S. at 142.

81. Similarly, in cases of alleged racial discrimination, it is probative "if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977). This formulation resembles MFN, but with a strong presumption of constitutionality that must be overcome by a showing of discriminatory purpose.

refer same-sex couples to colleagues; and others of similarly low urgency.[82] Today, he writes, "typical cases about religious exemptions" in the lower courts "have involved Sabbath observance, grooming rules, Amish buggies and Mennonite tractors, unnecessary autopsies, churches feeding the homeless, and zoning rules that prevent religious groups from creating places of worship."[83]

Until recently, he did not focus on the more difficult, public health-related claims that were brought in the era of Covid.

D. MFN AS A TRIGGERING RIGHT

Some observers, however, took "most-favored-nation" literally, to mean that whenever there is any secular exemption, or even a gap in the statute's coverage, there must be a religious one.[84] That would be extraordinary even among constitutional rights. Amar and Brownstein note that it "seems to treat religious activity as preferred over all other activities, including the exercise of other fundamental rights."[85]

> [T]his places free exercise rights at the top of a hierarchy of protected rights; free exercise can never be treated worse, but can be treated better, than other fundamentally protected activities. So, for example, if a government allows reproductive rights clinics to remain open (albeit with restrictions) during a pandemic, it must also allow churches to be open, but not vice versa.[86]

Laycock did not contemplate that kind of priority. There are various degrees of favoring, and what Laycock proposed was to balance religious and secular interests in a way that would not significantly impede any important state interests. If the evil that MFN aims to remedy is selective sympathy and indifference, then courts should be suspicious when analogous secular interests are treated better than those of a minority religion and demand an explanation. That explanation might, however, be forthcoming.

Richard Fallon distinguishes between "abstract, triggering, scrutiny, and ultimate rights . . . ."[87] An abstract right "reflect[s] the values, goals, or purposes of" a legal provision.[88] Such a right "can be identified largely without reference

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82. Laycock, *supra* note 55, at 178 n.60.

83. *Id.* at 202–03 (footnotes omitted).

84. *See, e.g.*, Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 883 (2001) ("[S]elective laws that fail to pursue legislative ends with equal vigor against both religious practice and analogous secular conduct are not governed by *Smith*; such underinclusive laws are subject to surpassingly strict scrutiny under the Free Exercise Clause and *Lukumi*.").

85. Amar & Brownstein, *"Most Favored-Nation" ("MFN") Style Reasoning in Free Exercise Viewed Through the Lens of Constitutional Equity:*, *supra* note 20.

86. *Id.*

87. RICHARD H. FALLON, JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 6 (2019).

88. *Id.*

to the limits that competing interests would impose on its scope or reach."[89] Any such right is necessarily too vague to decide any actual case.[90]

A triggering right is "a right to have a particular test employed."[91] What the triggering right triggers is the application of some level of heightened scrutiny. After the New Deal, the default option for constitutional challenges to statutes is minimal scrutiny: the challenge will almost always be rejected and the statute upheld.[92] Constitutional rights are islands of more or less skeptical judicial scrutiny in an ocean of unquestioned legislative discretion. A triggering right will get a challenger onto an island. The identification of triggering rights involves intuitive judgments about interests. "The Supreme Court identifies, balances, and accommodates interests when it defines triggering rights by constructing them out of abstract rights."[93]

The familiar strict scrutiny formula of narrow tailoring and compelling interest, Fallon argues, obscures more than it reveals.[94] In fact, the level of skepticism varies with what the court takes to be the importance of the right: Declarations that there is a compelling interest often reflect the judge's view that the underlying rights claim is weak.[95] U.S. courts of appeals that apply strict scrutiny uphold the challenged statute almost one third of the time.[96] In religion cases, similarly, there was considerable variation in results.[97]

An ultimate right is the outcome of this analysis. It is the right possessed by a successful challenger to a statute.[98]

What Laycock proposed was a triggering right, not an ultimate right. If comparable secular interests are accommodated, but religious interests are not, then the state must explain why. There might indeed be circumstances where that inquiry will unearth selective sympathy and indifference. But often the state will have a reasonable explanation for the disparity. In that case, the exemption would be denied.

Discrimination claims are a contingent kind of triggering right. They depend on the availability of comparators. If the problem is really religious discrimination, then this contingency is unavoidable. But, as Christopher Lund observes, it means that the MFN "test is often completely unresponsive to factors that most may think more relevant to the constitutional inquiry,

89. *Id.* at 91.

90. *Id.* at 91–92.

91. *Id.* at 6.

92. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938) (holding that economic regulations that do not infringe on fundamental rights only need to pass rational basis review).

93. FALLON, *supra* note 87, at 7.

94. *Id.* at 54–61.

95. *Id.* at 56–57.

96. *Id.* at 43 (citing Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006)).

97. *See* ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT 16–17 (2020).

98. FALLON, *supra* note 87, at 48.

such as the government's interest in denying an exception and the claimant's interest in receiving one."[99]

There is also a crucial difference between religious discrimination and other discrimination claims. In most discrimination cases, we know what we are comparing with what. Job discrimination treats unequally those who are equally qualified for the job, a job whose description is generally uncontroversial. In MFN claims, however, it is often unclear what the state interest is and what comparator is appropriate.[100] This opens the door for judicial creativity.

This triggering right is also distinct from other rights claims that demand narrow tailoring. If a law infringes on a fundamental right or deploys a suspect classification, the trigger is engaged before the court is asked to address the underinclusiveness question. With MFN, underinclusiveness *is* the trigger. Alan Brownstein observes that MFN "requires the application of rigorous review to all laws with secular exemptions because that is the only way we can determine whether or not the law is underinclusive with regard to its stated purposes in some meaningful way."[101] That, Nelson Tebbe writes, "has the further consequence of short-circuiting the back end of the compelling interest test; by the time anyone asks whether a government policy is narrowly tailored to a compelling interest, they will have already determined that it was underinclusive with respect to any such interest."[102] That, we shall see, is what tends to happen in MFN-6.

Lund observes that there is still balancing, as there was in *Smith*: Courts must figure out what the legislature's aim is, how much it is set back by a secular exemption, and whether a religious exemption would set that interest back to the same extent.[103] But "now judges balance irrelevant factors," unrelated to the burden on religion or the cost of accommodating it.[104] A demand that religion be valued as much as any secular consideration, Tebbe notes, is more protective than *Smith*, "in that it applies even in the absence of a substantial

99. Lund, *supra* note 20, at 653.

100. This difficulty with any egalitarian theory of religious liberty is emphasized in Cécile Laborde, *Equal Liberty, Nonestablishment, and Religious Freedom*, 20 LEGAL THEORY 52, 52–53 (2014).

101. Brownstein, *supra* note 20, at 201.

102. Tebbe, *supra* note 20, at 2450. Tebbe thinks the most sensible response would be to:

> [F]irst accept the government's articulation of its interests for the purposes of determining comparability at the threshold stage, without necessarily deferring to its argument that its regulatory classes are tailored to that interest, and then assess the government's real purpose at the back end of the analysis, as part of the compelling interest calculation.

Id. at 2451. This is what the Court did in *Lukumi*, though there the trigger was the entire pattern of the legislative scheme rather than the mere presence of exceptions. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 536–37, 542 (1993).

103. *See* Lund, *supra* note 20, at 664.

104. *Id.*

burden."[105] This distortion in the doctrine may help to explain why judges feel impelled to twist it further.

III. THE EVOLUTION OF THE VARIANTS

Recently, members of the Court, and sometimes a majority, have developed variants of MFN that are considerably more far-reaching and skeptical than the modest heightened scrutiny suggested by *Lukumi*. In the remainder of this Essay, I will taxonomize these variants and consider their implications.

Five of these variants concern the triggering right. They make MFN more contagious, likely to infect laws that were previously immune.

The most basic form is the one Laycock proposed, using the existence of a single secular exception to trigger strict scrutiny. Call this MFN-1. A second variation attributes to the challenged law a different purpose than it actually has, and then declares that the state has discriminated by carving out a secular, but not a religious, exception to that purpose. Call this MFN-2. A third looks at whether a law has any exceptions at all, and, if religious reasons are not among those exceptions, automatically applies strict scrutiny. Call this MFN-3. Yet another is to ask whether government fails to pursue an interest with uncompromising zeal. If so, and there is no religious exemption, strict scrutiny applies. Call this MFN-4. In MFN-5, the Court scrutinizes a law that has always been applied uniformly and declares that, because it discerns a formal power somewhere that *could* grant exemptions, the regulation lacks general applicability and so triggers strict scrutiny.

These five variants all expand the set of laws that are subject to strict scrutiny. None of them logically entails anything about what courts should do when applying that scrutiny. It is in principle possible for that scrutiny to be applied in a sensible way, giving appropriate weight to the state's interests. However, MFN-2 typically distorts the application of strict scrutiny after triggering it. When the Court asks whether the state's interest is compelling, that inquiry is impaired, because the Court is already committed to a misunderstanding of the pertinent interest.

Other variants affect the way strict scrutiny is applied. MFN-6, ubiquitous in the Covid cases, makes strict scrutiny impossible to satisfy by treating as equivalents regulated actions that are radically different in their effects on the pertinent state interests. MFN-7 sweeps away the state interest more summarily by declaring that, however urgent it may be, it cannot possibly be compelling if the state has allowed exceptions to it.

The devices of MFN-1, MFN-2, MFN-3, MFN-4, and MFN-5, taken together, make it possible to find discrimination in any law at all. When combined with MFN-7 they could produce the most extreme variant of all, which

105. Tebbe, *supra* note 20, at 2426–27. With discrimination claims, it is appropriate to dispense with substantial burden, because the insult of discrimination is itself a burden. It would obviously be unconstitutional for a city to give a lollipop to every white child in its jurisdiction.

we will call MFN-8: Religion always wins. Religious motivation can excuse anyone from any law. MFN would here be transformed, from (to use Fallon's terminology) a triggering right to something closer to an ultimate right. No member of the Court has embraced this, and none ever will, because it really would entail anarchy. Instead, the judges will use MFN inconsistently, relying on their unstructured intuitions.

A. MFN-1: A Single Exception Triggers Strict Scrutiny

The evolution of MFN in the courts began in *Fraternal Order of Police v. Newark*, which Alito decided when he was still a judge on the Third Circuit Court of Appeals.[106] The city did not permit police officers to grow beards.[107] However, it exempted those with pseudo folliculitis barbae (PFB), a medical condition that makes shaving impossible.[108] Two Sunni Muslim officers, whose religion requires men to grow beards, claimed that they were being unconstitutionally discriminated against.[109] Alito agreed: A law discriminates when it "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection."[110] The police department impermissibly "ha[d] made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[111] "[W]e conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is *sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny* . . . ."[112] *Newark* thus adopted Laycock's MFN argument, as *Lukumi* had not.[113]

There are crucial differences from *Lukumi*. While the Hialeah ordinances were "drafted with care to forbid few killings but those occasioned by religious sacrifice,"[114] the claimants in *Newark* did not allege that the no-beards rule itself was adopted for the purpose of harming Muslims. The "hostility" was manifested only in the failure to make an exception for them.[115] The remedy was to create that exception, rather than to invalidate the underlying rule.

The test is still discriminatory purpose, but in *Newark* the failure to accommodate religion, while *any* comparable secular interest is accommodated,

106. Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 359–60 (3d Cir. 1999).

107. *Id.* at 360.

108. *Id.*

109. *Id.*

110. *Id.* at 365.

111. *Id.* at 366.

112. Oleske, *supra* note 20, at 308 (quoting *Newark*, 170 F.3d at 365 (emphasis added)).

113. Laycock later cited *Newark* with approval as an example of MFN. Laycock, *supra* note 55, at 178; Laycock & Collis, *supra* note 20, at 21.

114. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

115. *See Newark*, 170 F.3d at 364–65.

is taken as conclusive evidence of that forbidden purpose.[116] No further evidence is necessary, even though there is no evidence of intention to harm, nor any plausible way to construe the statutory scheme as having the object of harming minorities.[117] Under *Lukumi*, strict scrutiny is triggered because the law is gerrymandered to target religion, which is treated worse than any secular activity.[118] That was not the case in *Newark*.

Alito makes the same move in one of the early cases challenging gathering restrictions during the Covid pandemic. Nevada's attendance limit of fifty people at worship services "blatantly discriminates against houses of worship"[119] because sports arenas and casinos are permitted to operate at fifty percent of capacity, revealing "considered yet discriminatory treatment of places of worship."[120] As already noted, the Court embraced this approach, which we can call MFN-1, in *Tandon v. Newsom*.[121] To that extent, Laycock has won. But *Tandon* was not the victory for which he had hoped.

The plaintiffs' success in *Newark* was based on the existence of a clear secular comparator—the exception for PFB.[122] But if the problem is selective sympathy and indifference, then success should not turn on the happenstance of a comparator. Lund observes "the viability of the constitutional claim in *Newark* hinges on the existence and prevalence of this skin condition. . . . We see then how precarious the plaintiff's claim in *Newark* actually was. If there were effective treatments for PFB (other than shaving), then the plaintiffs would have lost."[123]

A better justification for the result in *Newark* would not depend on any comparator. It would be that comparator or not, the state interest was not especially pressing and would not have been appreciably jeopardized by religious

116. Oleske observes that "the Third Circuit explicitly and repeatedly relied on the Supreme Court's prior characterizations of the selective-exemption rule as a tool for protecting against 'discriminatory treatment' when government decision-making 'tends to exhibit hostility . . . towards religion' or suggests 'discriminatory intent.'" Oleske, *supra* note 20, at 307 (quoting *Newark*, 170 F.3d at 362, 365, 365 n.5 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)) (quoting from *Lukumi*, 508 U.S. at 538)).

117. The fact that in *Lukumi* underinclusiveness was merely evidence rather than proof of bad intent is emphasized in *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 701–02 (9th Cir. 1999), *vacated*, 220 F.3d 1134 (9th Cir. 2000). On the other hand, Alito later deployed his analysis from *Newark* without mentioning discriminatory purpose. *See* Blackhawk v. Pennsylvania, 381 F.3d 202, 209–15 (3d Cir. 2004).

118. *Lukumi*, 508 U.S. at 536, 546–47.

119. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2607 (2020) (Alito, J., dissenting).

120. *Id.* at 2605. He joins Gorsuch's opinion making a similar inference in *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527, 529–30 (2020) (Gorsuch, J., dissenting).

121. *See supra* notes 22–27 and accompanying text.

122. *See* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 367 (3d Cir. 1999).

123. Lund, *supra* note 20, at 647.

accommodation.[124] The medical exemption would then be understood as evidence supporting a finding of selective sympathy and indifference. That of course would mean overruling *Smith* and directly balancing the interests. More generally, MFN-1 can be useful, but that usefulness is evidentiary, helping to determine whether religion has been devalued, and its usefulness is intertwined with the larger question of *Smith*.

MFN-1 has not been universally embraced. Justice Kagan, joined by Justices Breyer and Sotomayor, writes: "A government cannot put limits on religious conduct if it 'fail[s] to prohibit nonreligious conduct that endangers' the government's interests 'in a similar or greater degree.'"[125] That might sound like MFN, but actually, it is simply *Lukumi*.[126]

Since then, MFN has kept mutating.

B. MFN-2: Misconstruing the State Interest

The emergence of new variants that perceive discrimination everywhere began with a case that did not mention MFN at all. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Gorsuch's concurrence offered a kind of argument that would later frequently reappear: misconstruing the interest that the state is pursuing in order to claim that the state is pursuing it in a

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124. The same reasoning supports the result in another well-known MFN case, *Rader v. Johnston*, relieving religious claimants from a requirement that college freshmen live in dormitories for their first year. Rader v. Johnston, 924 F. Supp. 1540, 1543, 1558 (D. Neb. 1996). The school excused students from the requirement for an enormous range of secular reasons, but not for religious ones. *Id.* at 1544.

125. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720–21 (2021) (Kagan, J., dissenting) (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 543 (1993)); *see also* Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting) ("The First Amendment requires that a State treat religious conduct as well as the State treats comparable secular conduct."); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting) ("[States imposing Covid-related restrictions] may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict."). Justices Breyer, Sotomayor, and Kagan also joined Chief Justice Roberts's opinion for the Court in *Fulton v. City of Philadelphia*, which stated that "[a] law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (citing *Lukumi*, 508 U.S. at 542–46).

126. Oleske is right:

> Although she wrote that a state must "treat religious conduct as well as the State treats comparable secular conduct," she didn't clarify whether she meant "as well as the State *generally* treats comparable secular conduct" or "as well as the State treats *any* comparable secular conduct." Only the latter would be an endorsement of the most-favored-nation theory.

Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSblog (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990 [https://perma.cc/2XHC-WJP7].

discriminatory way.[127] The Delphic majority opinion in that case may have been embracing Gorsuch's logic, but it is hard to be certain. He has deployed the same variant in his opinions in the Covid vaccination cases.

1. Gorsuch's *Masterpiece Cakeshop* Concurrence

Masterpiece Cakeshop involved a challenge to an antidiscrimination statute by Jack Phillips, a baker who refused to make a cake for a same-sex wedding.[128] Gorsuch thought that religious bias was revealed by a second set of cases that arose at about the same time. (Unpacking Gorsuch's errors will be a somewhat complex undertaking, and, because this is not expressly an MFN case, readers who find themselves too deep in the weeds may want to skip ahead to the next section).

William Jack requested cakes displaying antigay inscriptions.[129] When bakers refused, he sued them for religious discrimination.[130] The Colorado courts rejected his claims because the bakers would not sell such cakes to anyone. Gorsuch, however, thought the cases were alike:

> [A]ll of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). . . . In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.[131]

Gorsuch observes that Phillips is happy to sell his products to gay people.[132] He just will not engage in conduct that endorses same-sex weddings.[133] "[A] cake celebrating same-sex marriage" is part of an event in which he is unwilling to participate.[134] Gorsuch thought that, because Phillips and the bakers who refused Jack's order were alike declining to send messages, their different treatment revealed discrimination against Phillips's religion.[135]

That claim was not confined to Gorsuch's concurrence. Kennedy's majority opinion summarily declared an "indication of hostility [in] the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the

127. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734–40 (2018) (Gorsuch, J., concurring).

128. *Id.* at 1724 (majority opinion).

129. *Id.* at 1734–35 (Gorsuch, J., concurring).

130. *Id.* at 1735.

131. *Id.* at 1735–36.

132. *Id.* at 1736.

133. *See id.* at 1736, 1738.

134. *Id.*

135. *Id.* at 1736.

Commission."[136] This is, perhaps, an early embrace of MFN-2 by the Court.[137] If so, it is so conclusory that we must look to Gorsuch for an account of what the reasoning might be.

The difference in treatment is, however, easily explained by the fact that the Colorado Anti-Discrimination Act, like every other statute, prohibits only a subset of human conduct. Kagan responded that what Phillips refused to sell "was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike."[138] Jack's case is different, because the bakers would not have sold the cake he requested to anyone. Those cakes manifested his religious views, but there is no obligation to sell products that manifest religious views. A vendor of hats is permitted to omit yarmulkes from its inventory. The actions of the bakers in Jack's case were not excused by exceptions to the statute. They were outside its coverage.

The reason why discrimination on the basis of some activities, such as participation in a same-sex wedding, is LGBTQ+ discrimination, is because such participation is a near-perfect proxy for the protected class. A merchant who will not admit customers wearing yarmulkes is discriminating against Jews. A merchant who will not sell cakes to same-sex couples is discriminating against gay people. Protection from LGBTQ+ discrimination must rely on such proxies, because being gay is a concealable identity. Before there can be discrimination, the victim must voluntarily do something to identify herself as gay.[139]

If antidiscrimination protection of gay people has any point at all, it is to outlaw this kind of discrimination. It exists in order to remove the pressure on gay people to hide their identities. The conduct is the object of protection. Similarly with the prohibition of religious discrimination. One cannot know that a target of discrimination is Mormon, for example, unless that person discloses that he is one. Discrimination against those who wear yarmulkes and hijabs is religious discrimination, even though the wearing of those items is conduct and not status.

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136. *Id.* at 1730 (majority opinion).

137. It is also arguable that it simply reflects Kennedy's confusion about what had happened in the courts below. *See* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 144–45 (2018).

138. *Masterpiece Cakeshop*, 138 S. Ct. at 1733 n.* (Kagan, J., concurring).

139. The Vatican in 1992 opposed antidiscrimination protection on this basis:

> An individual's sexual orientation is generally not known to others unless he publicly identifies himself as having this orientation or unless some overt behavior manifests it. As a rule, the majority of homosexually oriented persons who seek to lead chaste lives do not publicize their sexual orientation. Hence the problem of discrimination in terms of employment, housing, etc., does not usually arise.

Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons, CONGREGATION FOR THE DOCTRINE OF THE FAITH (July 24, 1992), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19920724_homosexual-persons_en.html [https://perma.cc/2TK2-6UCT].

Gorsuch does not dispute this. Rather, he claims that this is why Jack's case is analogous to that of Phillips's: "[J]ust as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths."[140] Gorsuch evidently thought that if Colorado was going to construe its antidiscrimination law so expansively on behalf of gay people, in fairness it also must do so for religious conservatives like Jack.[141] His formulation however manipulates the level of abstraction by specifying that the comparator expresses "religious opposition," rather than just "opposition." Opposition to same-sex weddings is not characteristic of any specific religion, however, so failing to accommodate such opposition does not discriminate against any specific religion.[142]

Religious views are always expressed by persons of particular faiths. That tautology does not mean that the prohibition of discriminatory acts, which happen sometimes to be motivated by religion, manifests hostility to those religions.

Gorsuch thought the state was playing games with the level of generality at which it understood the two cases:

> If "cakes" were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack's requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Mr. Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper.[143]

This reasoning overlooks the level of generality at which the Colorado law actually operates. The state explained in its brief: "If a retail bakery will sell a

140. *Masterpiece Cakeshop*, 138 S. Ct. at 1736 (Gorsuch, J., concurring).

141. *See id.* at 1736–37.

142. This is similar to Gorsuch's claim that "cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation." *Id.* at 1736. This is as much of an understatement as a claim that yarmulkes are usually worn by Jews. *See* Jim Oleske, *Justice Gorsuch, Kippahs, and False Analogies in* Masterpiece Cakeshop, TAKE CARE (June 19, 2018), https://takecareblog.com/blog/justice-gorsuch-kippahs-and-false-analogies-in-masterpiece-cakeshop [https://perma.cc/K85N-327V]; *see also* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 731–39 (critiquing a similar argument by Thomas Berg and Douglas Laycock).

143. *Masterpiece Cakeshop*, 138 S. Ct. at 1739 (Gorsuch, J., concurring).

cake of a particular design to some customers, it has no constitutional right to withhold that same cake from others because of their race, sex, faith, or sexual orientation."[144] The bakers Jack approached would not have sold the cakes he requested to anyone. The state's brief continues:

> But businesses do not violate public accommodations laws when, relying upon general terms of service, they decline to sell products with particular designs to all of their customers. Businesses trigger those laws only when they refuse to sell a product to customers because of their protected characteristics, despite selling the same product to others.[145]

Phillips would have sold the identical cakes to heterosexual couples.

The significance of Gorsuch's *Masterpiece Cakeshop* concurrence is clearer after the subsequent case of *Tandon*. Recall that the Court there declared that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[146]

The Court explained that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."[147] Then, with Gorsuch in the majority, it mischaracterized the state's interest and the danger to it.[148] In *Masterpiece Cakeshop*, Gorsuch similarly mischaracterizes the operation and object of the regulation he is construing.[149] He defies the interpretation of Colorado law that has been proffered by Colorado itself, and so anticipates *Tandon*.

2. Gorsuch's *Dr. A. v. Hochul* Dissent

Gorsuch also deploys MFN-2 in *Dr. A. v. Hochul*, in which a state allowed medical but not religious exemptions from a vaccine requirement for health care workers:

> [T]he State speculates that a religious exemption could undermine the purpose of its vaccine mandate differently from a medical exemption if *more people* were to seek a religious exemption than a medical exemption. But this Court's general applicability test doesn't turn on that kind of numbers game. At this point in the proceedings, the only question is whether the challenged law contains an exemption for a secular objector that "undermines the government's asserted

144. Brief for Respondent at 15, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).
145. *Id.* at 17.
146. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).
147. *Id.*
148. *See id.* at 1296–98.
149. *See Masterpiece Cakeshop*, 138 S. Ct. at 1736–40 (Gorsuch, J., concurring).

> interests in a similar way" an exemption for a religious objector might. . . . If the estimated number of those who might seek different exemptions is relevant, it comes only later in the proceedings when we turn to the application of strict scrutiny.[150]

Gorsuch takes the pertinent state interest to be getting people vaccinated in order to achieve herd immunity.[151] But the state asserted a different interest: promoting public health.[152] That end is not promoted by vaccinating people for whom it is medically contraindicated. It is promoted by vaccinating the religious. It is not true that the secular exemption "undermines the government's asserted interests in a similar way."[153] He can reach that conclusion only by mischaracterizing the government interests.[154]

A judge who feels free to do this is absolutely unconstrained. He can find religious discrimination in any law he likes, by deeming any boundary to a statute's scope—and all statutes are bounded; none regulate all of human conduct[155]—to be an exception to the purpose of the statute.

One source of the problem is the indeterminacy that always accompanies attributions of underinclusiveness to a statute. Such attributions necessarily point to some purpose that goes beyond the statute's explicit terms. Every statute perfectly serves the purpose that appears on its face. A law that prohibits the driving of blue Volkswagens on Tuesdays is narrowly, indeed perfectly, tailored to the purpose of banning the driving of blue Volkswagens on Tuesdays.

Rules do of course have purposes that go beyond enforcing each rule as stated, and we often reasonably infer a purpose from the terms of the statute. But if purpose is sometimes contestable, then judges will be tempted to construe it in a way that lets them come out the way they want to. Robert Nagel anticipated MFN-2 when he wrote that courts that are inclined to condemn a statute's rationality sometimes are tempted to "ignore the clear import of a statute's terms to formulate a fictional statutory goal to which the terms are not rationally related."[156]

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150. Dr. A. v. Hochul, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting) (citations omitted) (quoting Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

151. *See id.* at 556–57.

152. *Id.* at 556.

153. *Fulton*, 141 S. Ct. at 1877.

154. *Cf.* Laycock: "[T]hese medical exceptions don't undermine the government's interest in saving lives, preventing serious illness or preserving hospital capacity. By avoiding medical complications, those exceptions actually serve the government's interests." Douglas Laycock, *What's the Law on Vaccine Exemptions? A Religious Liberty Expert Explains*, CONVERSATION (Sept. 15, 2021, 8:15 AM), https://theconversation.com/whats-the-law-on-vaccine-exemptions-a-religious-liberty-expert-explains-166934 [https://perma.cc/89YR-LAJD].

155. "All laws are selective to some extent . . . ." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993). "Considered as a whole, American law is not generally applicable." Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 855 (2022).

156. Robert Nagel, Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 154 (1972).

Note that MFN-2 is merely a triggering right that generates strict scrutiny. It does not say anything about how a court should proceed when it applies that scrutiny. Because MFN-2 misconceives the state interest, however, it makes it likely that the strict scrutiny analysis will be botched, because the court is already committed to misunderstanding the interest that the state is promoting.[157]

C. MFN-3: Favored Classes That Do Not Include Religion

Another possibility is that strict scrutiny is triggered whenever a law enumerates exceptions and does not include religion in those exceptions. The law need not mention religion. Unlike in MFN-1, in deciding whether to apply strict scrutiny, the court need not inquire into the law's purpose. MFN-3 has no place for the declaration in *Tandon* that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."[158] The mere facial exclusion of religion from a set of exceptions suffices. Thus, for example, Gorsuch in *Dr. A.* emphasizes that what those with medical excuses get is an *exemption*, an express exception from a general law.[159]

The clearest example of this move is Kavanaugh's dissent in *Calvary Chapel Dayton Valley v. Sisolak*, which argues that strict scrutiny should be triggered whenever the law expressly advantages any class that excludes the religious, regardless of whether the exception is consistent with the state's underlying interest:

> First, does the law create a favored or exempt class of organizations and, if so, do religious organizations fall outside of that class? That threshold question does not require judges to decide whether a church is more akin to a factory or more like a museum, for example. Rather, the only question at the start is whether a given law on its face favors certain organizations and, if so, whether religious organizations are part of that favored group.[160]

The absence of a religious exemption is itself evidence of discrimination. Nelson Tebbe observes that this was different from earlier versions of MFN

157. This, we shall see, is precisely what happens in MFN-6. *See infra* Section III.F.

158. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

159. *See* Dr. A. v. Hochul, 142 S. Ct. 552, 552 (2021) (Gorsuch, J., dissenting). To the extent that this is what Gorsuch is up to, it does not matter (and so perhaps we can explain why Gorsuch ignores the ample evidence presented to him) that a religious exemption would undermine the state interest far more than a medical exemption would. *See infra* notes 262–69 and accompanying text.

160. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting); *cf.* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 73 (2020) (Kavanaugh, J., concurring) ("[O]nce a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class."). Kavanaugh appears to have had a similar argument in mind in his account of purportedly "comparable secular businesses" in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614–15 (2020) (Kavanaugh, J., dissenting).

because Kavanaugh "did not require the church to show that the exempted and regulated categories were comparable in order to shift the burden of justification to the government."[161] Gorsuch similarly cited, as evidence of discrimination, the fact that California's "spreadsheet summarizing its pandemic rules even assigns places of worship their own row."[162]

The Court does not expressly adopt this approach in *Roman Catholic Diocese of Brooklyn v. Cuomo*, but it does ignore the comparability question, focusing solely on the denial of preferential treatment to churches.[163] Josh Blackman persuasively argues that the Court here silently embraced Kavanaugh's approach.[164] Gorsuch's concurrence explains what was offensive about New York's list of "essential businesses":

> The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.[165]

New York used "essential" as a term of art, a label for permitted activities. It reflected a judgment that the danger of Covid in specific contexts, combined with the importance of the activity, warranted a partial relaxation of public health measures.[166] Both Kavanaugh and Gorsuch are offended by the withholding

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161. Tebbe, *supra* note 20, at 2416.

162. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (2021) (Gorsuch, J., making a statement).

163. *See Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66–67.

164. Josh Blackman, *Why Exactly Was New York's COVID-19 Regime Not "Neutral"?*, REASON: THE VOLOKH CONSPIRACY (Nov. 26, 2020, 4:45 PM), https://reason.com/volokh/2020/11/26/why-exactly-was-new-yorks-covid-19-regime-not-neutral [https://perma.cc/HZJ4-XG34].

165. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 69 (Gorsuch, J., concurring). This claim is elaborated and defended in Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, 37 J.L. & RELIGION 72, 84–88 (2022). Storslee relies on New York's definition of "an 'essential business' as any that 'provid[ed] products or services that are required to maintain the health, welfare, and safety of the citizens of New York State.'" *Id.* at 85 (alteration in original) (quoting *Frequently Asked Questions for Determining Whether a Business Is Subject To a Workforce Reduction Under Recent Executive Order Enacted to Address COVID-19 Outbreak*, EMPIRE STATE DEV. (Mar. 22, 2020), https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_032220.pdf [https://perma.cc/54BP-C99H]). This, he argues, relies "on a subjective, value-based appraisal" that religion is unimportant to citizens' health, welfare, and safety. *Id.* One does not, however, improperly devalue religion by judging that keeping people alive is more important than allowing uninhibited religious exercise.

166. Michael Dorf speculated that perhaps Kavanaugh "conflated questions of risk with the question whether a service is essential." Michael C. Dorf, *For Four SCOTUS Conservatives, Insufficient Discrimination in Favor of Religion Is Discrimination Against Religion*, DORF ON L. (June 2, 2020), http://www.dorfonlaw.org/2020/06/for-four-scotus-conservatives.html [https://perma.cc/9GBQ-CZGH].

from religious activities of what they take to be an honorific, even if those activities are far more hazardous than activities that are included on the list.[167]

MFN-3 has surprising implications, which Kavanaugh does not consider. It conflicts with familiar Establishment Clause and Free Exercise Clause limits on government support for churches. To take his example of museums: Many of them receive direct subsidies from the state. Is strict scrutiny triggered if churches are excluded from the favored class of subsidy recipients? The state will sometimes coerce people to return to entities from which they have fled: escaped prisoners and runaway children, for example. Yet those who stop attending church are not compelled to return. Does that discriminate against religion?

The strangest manifestation of MFN-3 is the inference that religion is unconstitutionally disfavored when a statute, without exempting the religious, contains *exceptions that are constitutionally required.* This move—perhaps one should call it a subvariant—appears in Alito's dissent in *Yeshiva University v. YU Pride Alliance*[168] and in the Court's opinion in *Kennedy v. Bremerton*.[169]

In *Yeshiva*, Alito, joined by three other Justices, dissented from the denial of expedited relief to an Orthodox Jewish university that had been required by state antidiscrimination law to recognize an LGBTQ+ student group.[170] Alito observed that the statute "treats a vast category of secular groups more favorably than religious schools like Yeshiva."[171] Private clubs were exempted by the statute, including "large groups like the American Legion and the Loyal Order of Moose."[172] Alito thought that this triggered strict scrutiny and so required exemption, because "there has been no showing that granting an exemption to Yeshiva would undermine the policy goals of the [antidiscrimination statute] to a greater extent than the exemptions afforded to hundreds of diverse secular groups."[173]

The private club exception, however, is constitutionally required. The First Amendment protects freedom of association,[174] and this exception forbids the state from requiring private clubs to accept members they do not

167. Their view thus may turn on the misunderstanding of a word. *Cf.* Clinton v. City of New York, 524 U.S. 417, 469 (1998) (Scalia, J., concurring in part and dissenting in part) ("The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court.").

168. *See* Yeshiva Univ. v. YU Pride All.,143 S. Ct. 1, 2–3 (2022) (Alito, J., dissenting).

169. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).

170. *Yeshiva*, 143 S. Ct. at 1.

171. *Id.* at 2 (Alito, J., dissenting).

172. *Id.* at 2–3.

173. *Id.* at 3. This statement creates some doubt as to whether Alito is deploying MFN-3 or MFN-4: He stresses the existence of the statutory exception, but he claims that strict scrutiny applies because the state is allowing its policy goals to be undermined in some cases. *Id.*

174. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 11.5, at 1266–76 (6th ed. 2019).

want absent a compelling interest. If the discretionary character of exemptions is troubling, then this one should not be, because it was not discretionary.

The Court implicitly embraced this subvariant in *Kennedy*, in which a high school football coach insisted on praying on the fifty-yard line after games.[175] The school would not permit him to do that.[176] It believed, based on Supreme Court authority, which at that time was still good law, that it was required to avoid creating the impression of endorsement of religion.[177] The Court, citing "the prohibition against governmental endorsement of religion,"[178] had declared that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief."[179] This interpretation of the clause had been questioned in numerous Supreme Court concurring and dissenting opinions,[180] but the Court itself never overruled it. It finally did overrule the endorsement test in *Kennedy* itself,[181] but that does not mean that the district or the lower courts were wrong to follow the law in place at the time. The Court has repeatedly made it clear that its decisions are binding unless and until it expressly overrules them.[182]

The *Kennedy* Court might have discarded the test without disparaging the school district or the lower courts, by acknowledging that they were obeying the law as it stood. It had done so before.[183] It could have ruled in favor of the religious claimant and rejected the interpretation of the Establishment Clause claim that the lower courts had sustained, without accusing anyone of

175. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415 (2022).

176. *Id.*

177. *Id.* at 2426.

178. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 593 (1989).

179. *Id.* at 594.

180. *See Kennedy*, 142 S. Ct. at 2428 n.4 (collecting cases).

181. *Id.* at 2427.

182. Bosse v. Oklahoma, 580 U.S. 1, 3 (2016); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Agostini v. Felton, 521 U.S. 203, 237 (1997).

183. For example, in one case the Court observed that one of its precedents was "aptly described as" containing "infirmities" and resting upon "wobbly, moth-eaten foundations." *State Oil*, 522 U.S. at 20 (quoting Khan v. State Oil Co., 93 F.3d 1358, 1363 (7th Cir. 1996), *vacated*, 522 U.S. 3 (1997)). Judge Richard Posner, writing for the Seventh Circuit, had nonetheless applied that precedent, observing that "the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are to leave the overruling to the Court itself." *Khan*, 93 F.3d at 1363. Posner declared that the pertinent precedent "was unsound when decided, and is inconsistent with later decisions by the Supreme Court. It should be overruled. Someday, we expect, it will be." *Id.*

> But all this is an aside. We have been told by our judicial superiors not to read the sibylline leaves of the *U.S. Reports* for prophetic clues to overruling. It is not our place to overrule [the pertinent Supreme Court decision]; and [that decision] cannot fairly be distinguished from this case.

Id. at 1364. The Supreme Court declared that Posner "was correct in applying [stare decisis] despite disagreement . . . for it is this Court's prerogative alone to overrule one of its precedents." *State Oil*, 522 U.S. at 20. It then took up Posner's invitation and overruled the precedent. *Id.* at 22. Thanks to Judge Diane Wood for calling my attention to this case.

discriminating against religion.[184] But instead it insinuated that the district had been as hostile to religion as the defendant in *Lukumi*.[185]

Gorsuch, writing for the Court, acknowledged that "the District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause."[186] Yet he concluded that by doing so it had badly misunderstood its legal obligations:

> Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy's message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own "vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other," placed itself in the middle, and then chose its preferred way out of its self-imposed trap.[187]

Reliance on the *Lemon* rule triggered strict scrutiny, because "the District failed to act pursuant to a neutral and generally applicable rule."[188] Its action "discriminate[s] on its face."[189] "The Constitution neither mandates nor tolerates that kind of discrimination."[190]

But the government's undisputed object in *Kennedy* was to obey the law, as declared by the Supreme Court.[191] If there was a "trap," it was not "self-imposed": It had been imposed by the Court. Gorsuch repeatedly cites *Lukumi*. But the law in *Lukumi* targeted an unpopular religion and was "drafted with care to forbid few killings but those occasioned by religious sacrifice."[192] *Lukumi* concluded that the record of its enactment "discloses animosity to Santeria adherents and their religious practices."[193] Does obeying the law, when doing so disadvantages a religious claimant, disclose animosity toward religion?[194]

There is a final problem with declaring that exceptions per se trigger strict scrutiny. Frederick Schauer has shown "that there is no logical distinction

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184. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845–46 (1995) (holding that a selective refusal to fund religious student publications "would *risk* fostering a pervasive bias or hostility to religion" (emphasis added)).

185. *Kennedy*, 142 S. Ct. at 2422.

186. *Id.* at 2426.

187. *Id.* at 2427 (quoting Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768 (1995)).

188. *Id.* at 2422.

189. *Id.* (alteration in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)).

190. *Id.* at 2433.

191. *Id.* at 2420.

192. *Lukumi*, 508 U.S. at 543.

193. *Id.* at 542.

194. The analysis of the preceding paragraphs is more fully developed in Andrew Koppelman, *Religious Liberty as a Judicial Autoimmune Disorder: The Supreme Court Repudiates Its Own Authority in* Kennedy v. Bremerton, 74 HASTINGS L.J. (forthcoming 2023).

between exceptions and what they are exceptions to."[195] Laws contain exceptions because it fortuitously happens "that the language available to circumscribe a legal rule or principle is broader than the regulatory goals the rule or principle is designed to further."[196] The question of whether to exempt Quakers from military service, for example, arises only because the idea of military service does not, in the English language, automatically exclude religious pacifists. In the vaccination case, everything turns on the happenstance that there is no single word for "health-promoting vaccinations." If there were, then those with medical reasons for going unvaccinated would simply never have been within the facial coverage of the (exceptionless) law.[197]

D. MFN-4: Departures from a Monomaniacal Baseline

Recall that *Tandon* declared that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."[198] This formulation, MFN-4, ignores any countervailing interests to those that justified the regulation.[199] In other words, if the interest that justifies a restriction is not pursued single-mindedly, if the state trades off that interest for any other consideration (say, preventing starvation) and there is no religious exemption, strict scrutiny is triggered.

Unlike MFN-3, it does not matter if there is no express exception. The law in *Tandon* was an exceptionless restriction on in-home gatherings.[200] Similarly, in *Danville Christian Academy, Inc. v. Beshear*, a Kentucky Covid regulation applied equally to both religious and secular schools, while a different

195. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 872 (1991).

196. *Id.*

197. It has been suggested that exceptions might trigger burden-shifting without any use of analogy if a plaintiff can "point to a secular institution or activity that has been granted an exemption from the law at issue." Note, *Constitutional Constraints on Free Exercise Analogies*, 134 HARV. L. REV. 1782, 1796 (2021). The question of what counts as an exemption is as open-ended and contestable as the question of whether permitted secular activities are analogous to forbidden religious ones.

198. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

199. A report by the Columbia Law School Law, Rights, and Religion Project notes the implication:

> [T]he only permitted factor in comparing a church and a grocery store is the government's interest in stopping the spread of COVID—not, for example, its interest in ensuring public access to food. Since both churches and grocery stores present a risk of COVID transmission, the Court treated them as "comparable" and found that the failure to regulate them equally was discrimination.

ELIZABETH REINER PLATT, KATHERINE FRANKE & LILIA HADJIIVANOVA, COLUM. L. SCH., L., RTS. & RELIGION PROJECT, WE THE PEOPLE (OF FAITH): THE SUPREMACY OF RELIGIOUS RIGHTS IN THE SHADOW OF A PANDEMIC 12 n.* (2021); *see also* Doe v. San Diego Unified Sch. Dist., 22 F.4th 1099, 1106 (9th Cir. 2022) (Bumatay, J., dissenting) ("[T]he Supreme Court's commands in *Tandon* . . . renders nearly irrelevant the *reason* why secular exemptions are granted.").

200. *See Tandon*, 141 S. Ct. at 1297.

regulation applied lesser restrictions to stores and restaurants.[201] In his dissent, Gorsuch argued that the lower "court had an obligation to address the plaintiffs' argument that the two [orders], considered together, resulted in unconstitutional discrimination against religion. Whether discrimination is spread across two orders or embodied in one makes no difference; the Constitution cannot be evaded merely by multiplying the decrees."[202]

The fundamental error of MFN-4 is presuming that laws normally serve a single purpose, so that any compromise of that purpose is anomalous and should arouse suspicion. That presumption defies reality. (MFN-4 is thus a subspecies of MFN-2.) Most regulatory goals, R. George Wright observes, "[are] in fact a complex, unspecified, weighted function of various conflicting, overlapping, and only occasionally mutually supporting interests[.]"[203] The Court once understood this:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.[204]

It is not just exceptions that undermine the purposes of rules. The rules themselves, by limiting their own application, undermine their own purposes *pro tanto*. Speed limits have the purpose of limiting traffic accidents, but that purpose would be best served by a speed limit of zero. Or ambulances and fire trucks could be held to the same speed limits as everyone else. We care about many things other than reducing the number of accidents. To that extent we undermine the purpose of speed limits, but that does not make speed limits arbitrary, irrational, or discriminatory. Each purpose must compete with others. Our pattern of rules and exceptions is the product of an enormous variety of interlocking, competing, mutually interdependent, incommensurable considerations. It is not possible to isolate any one of them and presume that the state is determined to maximize them. Practical decisions don't work that way.[205]

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201. Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527, 527–28 (2020).

202. *Id.* at 529 (Gorsuch, J., dissenting).

203. R. George Wright, *Free Exercise and the Public Interest After* Tandon v. Newsom, 2021 U. ILL. L. REV. ONLINE 189, 192.

204. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (footnote omitted).

205. Lon L. Fuller argues that this is a reason for judicial restraint in *The Forms and Limits of Adjudication*. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

Tandon precommits the Court to reducing statutory purposes to a singular interest, to which of course almost any statute will then fail to be narrowly tailored. This move entails strict scrutiny across a broad range of cases.

E. MFN-5: Inventing Exceptions That Aren't There

In *Fulton v. City of Philadelphia*, the Court cited *Lukumi* as authority for the proposition that "[a] law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[206] But here the Court vastly expanded the scope of that rule to encompass cases in which no exceptions had actually been made. The formal possibility that an exception *could* be made in some future case triggered strict scrutiny.

Every city contract in Philadelphia prohibited the contractor from discriminating on the basis of sexual orientation.[207] A Catholic social service agency's contract was terminated because, in certifying foster parents, it could not comply with that provision.[208] The agency understood certification of prospective foster families to endorse their relationships, so it would not certify same-sex couples.[209] Chief Justice Roberts, writing for the Court, seized on a boilerplate provision, which had never been used, saying the nondiscrimination provision applied "unless an exception is granted by the Commissioner or the Commissioner's designee, in [their] sole discretion."[210]

No entity had ever been treated better than the religious claimants. Ira Lupu and Robert Tuttle observe that "the non-discrimination norms in fact had been uniformly and consistently applied to every social welfare agency."[211] The state had never "permitt[ed] secular conduct that undermines the government's asserted interests in a similar way,"[212] and the agency argued repeatedly that it had no authority to do so.[213] The mere option (which had never been exercised) of making exceptions to a regulation sufficed to make the regulation lack general

206. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021).

207. *Id.* at 1879–80.

208. *Id.* at 1875–76.

209. *Id.* at 1876.

210. *Id.* at 1878 (quoting Supplemental Joint Appendix at 16–17, *Fulton*, 141 S. Ct. 1868 (No. 19-123)).

211. Lupu & Tuttle, *supra* note 20, at 227.

212. *Fulton*, 141 S. Ct. at 1877.

213. Rothschild, *supra* note 14, at 1119–20. It is also a category mistake to speak of permitted conduct; at issue was a contract rather than a coercive law, and the problem was that the Catholic agency would not fulfill the contract according to its terms. Marty Lederman, *What* Fulton v. Philadelphia *Is—and Isn't—About*, BALKINIZATION (Nov. 4, 2020, 2:39 AM), https://balkin.blogspot.com/2020/11/what-fulton-v-philadelphia-is-and-isnt.html [https://perma.cc/6EQW-FLLW]. Rothschild observes the radical implications of this extension of MFN: "Contracts are by their very nature individualized, and drafting them involves case-by-case determinations, which in turn involve discretion. *Fulton*'s formalistic rule would seem to subject to strict scrutiny *all* requirements in *all* government contracts with *all* religious objectors." Rothschild, *supra* note 14, at 1121–22 (footnote omitted).

applicability.[214] The Court called this "a system of individual exemptions,"[215] even though it brutalizes the concept of a "system" to make the term denote an arrangement of elements none of which actually exist.[216]

Strict scrutiny, the Court declares, applies to any law that has any kind of manual override for its mechanism.[217] Quite a lot of what government does involves the exercise of discretion.[218] In those cases, is the denial of religious accommodation always subject to strict scrutiny?[219]

F. MFN-6: COMPARING APPLES AND WATERMELONS

The variants we have considered thus far all trigger strict scrutiny. The remaining variants concern what happens when that scrutiny is applied.[220]

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214. *Fulton*, 141 S. Ct. at 1878.

215. *Id.*

216. The doctrinal concern with individualized exemptions originated in the plurality opinion in *Bowen v. Roy*, 476 U.S. 693, 708 (1986), from which the *Smith* Court adopted it. *See* Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990). The *Roy* plurality declared: "If a state creates such a mechanism [for individualized exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent." *Roy*, 476 U.S. at 708. It is impossible to infer discriminatory intent from the never-used boilerplate provision of Philadelphia's contract, and even if such an inference could be made, that is a question of fact that should have been remanded to the district court, not decided for the first time by an appellate tribunal.

217. *See Fulton*, 141 S. Ct. at 1878.

218. Lael Weinberger has proposed yet another, even more extreme variant of MFN, in response to Alito's worry in *Fulton* that the provision allowing discretion could simply be repealed. Lael Weinberger, *Religious Liberty, Exceptions, and Targeting*, NAT'L REV. (July 16, 2021, 12:33 PM), https://www.nationalreview.com/bench-memos/religious-liberty-exceptions-and-targeting [https://perma.cc/HRY6-TVEQ]. If the government were to do that in order to avoid granting a religious exemption, Weinberger argues, that should be considered hostile targeting of religion. *Id.* The state then would be forbidden to make any effort to constrain the enormous range of exemptions potentially called into existence by *Fulton*'s unexpected announcement of MFN-5.

219. One might respond that the *Fulton* Court didn't really mean what it said, and that the invented "system" was a way for the Court to avoid deciding broader legal questions on which it was irreparably fragmented. *See* Lupu & Tuttle, *supra* note 20, at 228 (offering evidence for this possibility). The Court used a similar stratagem to avoid the large issues in *Masterpiece Cakeshop*. *See* Kendrick & Schwartzman, *supra* note 137, at 138–45; Bernard Bell, *A Lemon Cake: Ascribing Religious Motivation in Administrative Adjudications – A Comment on Masterpiece Cakeshop (Part II)*, YALE J. ON REG (June 20, 2018), http://yalejreg.com/nc/a-lemon-cake-ascribing-religious-motivation-in-administrative-adjudications-a-comment-on-masterpiece-cakeshop-part-ii [https://perma.cc/3FF9-3C2X]. This is, of course, a less honest way to avoid a decision than the ancient device of dismissing cert as improvidently granted—an option that was, perhaps, impossible in these cases because the judges in the majority could not bear the prospect of allowing the lower court decisions to stand. However, when the Supreme Court resorts to these tricks, the result is not confined to these cases. These distortions of normal procedure are now law. MFN-5 is available to any lower court judge who wants to strike down a statute they dislike.

220. Because MFN was originally formulated as a triggering right, one might object that what I have called MFN-6 and MFN-7 are not really instances of most favored nation analysis at all, because they only come into play after strict scrutiny has been triggered. Unlike other deployments of strict scrutiny, however, they depend for their operation on the distortion of comparators, which is the central characteristic of the abuse of MFN. Strict scrutiny normally involves direct balancing and does not depend on comparison with other things that the state is doing. I therefore regard

Tandon describes a triggering right. But the balancing that is thus triggered is distorted if the Court systematically misperceives the comparative burden on government interests, minimizing the damage to the pertinent interest when a religious exemption is sought. This, of course, distorts what *Tandon* contemplates by deeming two activities similar that are not similar in their effect on the asserted government interest—as Kagan put it, "requir[ing] that the State equally treat apples and watermelons."[221] This move, which we will call MFN-6, has been ubiquitous in the Covid cases.[222] In response to church capacity limits during Covid lockdowns, it became the position of a majority of the Court as soon as Justice Barrett replaced Justice Ginsburg. With respect to vaccines, where religious exemptions could create a public health disaster, it only commands three votes so far.[223]

MFN-6 is a mutated version of MFN-2 and is often a consequence of its application. One may understand it as a complication of a preexisting pathology.[224] MFN-2 misconstrues the coverage of a statute in order to find exceptions where there are none. MFN-6 similarly misconstrues the statutory scheme, here failing to perceive the sought exemption's damage to the government interest. They have in common a failure to understand what government is doing and why it is doing it.

1. The Covid Church Cases

The comparators' problem became salient when the Court narrowly divided in *South Bay United Pentecostal Church v. Newsom*.[225] The Court declined to issue an emergency stay on an allegedly discriminatory order limiting

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them as mutations (arguably more radical mutations) of the original version. As I explain below, MFN-6 arises directly from MFN-2. *See infra* note 224 and accompanying text. Thanks to Laura Portuondo for raising this issue.

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

222. For a thorough overview of these cases, more sympathetic than mine to the Court's work, see generally Blackman, *supra* note 20. For a less technical account with more attention to political context, see generally LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT (2021).

223. *See infra* Section III.F.2 (discussing opinions by Gorsuch joined by Thomas and Alito).

224. Rothschild observes "that once a court establishes that the government has acted discriminatorily against religion, that court will likely not conclude the government has a necessary reason to *discriminate*." Rothschild, *supra* note 14, at 1135.

225. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Kagan, J., in chambers) (mem.). The task of assigning risk levels has been assigned to courts by statute in two states, which codified MFN with respect to disease control measures. *See* Act of Mar. 29, 2021, ch. 192, sec. 1, § 12(a)(2), 2021 N.D. Laws (codified as amended at N.D. CENT. CODE § 23-01-05(12)(d)(2)) (stating that disease control orders may not "[t]reat religious conduct more restrictively than any secular conduct of reasonably comparable risk, unless the government demonstrates through clear and convincing scientific evidence that a particular religious activity poses an extraordinary health risk"); An Act to Provide Protections for the Exercise of Religious Freedom, ch. 3, § 1, 2021 S.D. Sess. Laws (codified at S.D. CODIFIED LAWS § 1-1A-4) ("[N]o state agency . . . may . . . [t]reat religious conduct more restrictively than any secular conduct of reasonably comparable risk . . . .").

church attendance.[226] Roberts, concurring, noted that the necessary level of restriction "is a dynamic and fact-intensive matter subject to reasonable disagreement" and that the appropriate comparators were activities subject to similar restrictions: "lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."[227]

Kavanaugh, dissenting, clearly had some form of MFN in mind when he complained that "comparable secular businesses" were not subject to the limit, "including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."[228] In the later case of *Calvary Chapel Dayton Valley v. Sisolak*, he declared that "State[s] may not impose strict limits on places of worship and looser limits on restaurants, bars, casinos, and gyms, at least without sufficient justification for the differential treatment of religion."[229]

The fact that religion was treated differently of course merely shifted the burden of proof. Kavanaugh claimed that the state had not carried that burden, that the restriction was "inexplicably applied to one group and exempted from another."[230] But the distinction was not inexplicable. The state and the district court had proffered an explanation, which Roberts cited: "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."[231] What was inexplicable was Kavanaugh's silence about that argument.

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

227. *Id.*

228. *Id.* at 1614 (Kavanaugh, J., dissenting).

229. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2610 (2020) (Kavanaugh, J., dissenting).

230. *S. Bay*, 140 S. Ct. at 1614–15 (Kavanaugh, J., dissenting) (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020)).

231. *Id.* at 1613 (Roberts, C.J., concurring). The district judge, whose findings of fact the Supreme Court is required to accept unless clearly erroneous, said:

> I note that in plaintiffs' case, plaintiffs are proposing services involving groups of 200 to 300 congregants per service, and beginning with Bible classes of ten to 100 people, and that they describe practices—or Bishop Hodges describes practices consisting of having people with special needs or sickness come stand around an alter where hands are laid on them and they are anointed, challenging congregants to all approach the alter at once to come believing, come praying, and practicing baptism by full immersion in the water on a weekly or daily basis.
>
> This seems to me to be a higher-risk environment than one where you just pick something up either at curbside or walk through a store, pick something up, pay for it, and walk out. It's not a value judgment. It's not a judgment about what's more important or what's more valuable than the other. It's simply a determination of what activity poses the higher risk for infecting others.

Transcript of Telephone Conference: Motion Hearing at 7, *S. Bay*, 140 S. Ct. 1613 (No. 20cv0865). The judge similarly found, after hearing the plaintiffs' arguments:

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, decided after Barrett replaced Ginsburg, the Court reversed its position.[232] The Court invalidated New York's Covid regulations because they "single out houses of worship for especially harsh treatment."[233] The dispute once again turned on whether the permitted activities were like the restricted ones. Gorsuch thought it unfair that comparable restrictions were imposed on "hardware stores, acupuncturists, and liquor stores."[234] Sotomayor objected that "New York treats houses of worship far more favorably than their secular comparators,"[235] citing a regulation "requiring movie theaters, concert venues, and sporting arenas subject to New York's regulation to close entirely, but allowing houses of worship to open subject to capacity restrictions."[236]

In *Tandon*, the Court invalidated yet another Covid restriction, this time one that did not even mention religion. The exempted activities were far less dangerous, and so did far less damage to the pertinent state interest, than the group indoor gatherings that the religious plaintiffs sought. Linda Greenhouse's assessment is fair: "Hostility was simply to be inferred any time the government treated religious activity less advantageously than secular activity," by the use of "a careful selection of facts and a creative drawing of inferences."[237]

The basic problem in these cases is nicely stated by Zalman Rothschild: "Virtually every entity and activity will be both similar and dissimilar to other entities and activities depending on the level of generality at which one analyzes them, resulting in the possibility that almost any secular exception can give rise to a constitutional right to a religious exception."[238] Each faction on the Court had a different narrative about the relative danger of the various regulated and nonregulated activities, and since the comparisons depend so much on unverifiable predictions about how safe the religious gatherings will be, there was plenty of room for each side to rely on its intuitions. More ominously, the

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> And it seems to me that a religious service falls within Stage 3 not because it's a religious service, but because the services involve people sitting together in a closed environment for long periods of time. Thus, any burden placed by classifying church services as Stage 3 are not because of a religious motivation, but because of the manner in which the service is held, which happens to pose a greater risk of exposure to the virus. And I note, there's lots of other things: The SATs; the California Bar exam; lots of other events that involve people sitting together in a closed environment for long periods of time that are also not being allowed to go forward.

Id. at 26–27.

232. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65–66 (2020).

233. *Id.* at 66.

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

235. *Id.* at 80 (Sotomayor, J., dissenting).

236. *Id.* Laycock had earlier criticized challenges to New York's regulations. Douglas Laycock, *Do Cuomo's New Covid Rules Discriminate Against Religion?*, N.Y. TIMES (Oct. 9, 2020), https://www.nytimes.com/2020/10/09/opinion/cuomo-synagogue-lockdown.html [https://perma.cc/V39A-NATV].

237. GREENHOUSE, *supra* note 222, at 83.

238. Rothschild, *supra* note 20, at 285.

comparison also involved precisely the kind of value judgments that legislatures undertake.[239] MFN invites courts to assume legislative power and issue decisions that are entirely unconstrained by law. This does not necessarily condemn MFN-1, but it does demand that MFN be deployed with a degree of circumspection and deference that is absent from the variants deployed in the Court's recent decisions.

Some Covid gathering restrictions were severe enough that they were arguably problematic even under MFN-1. Nevada limited churches to no more than fifty people, regardless of the size of the building, while permitting gambling casinos to operate at fifty percent capacity.[240] New York would not permit more than ten people to attend a religious service, even in an immense cathedral.[241] Roberts, generally deferential to public authorities, thought a "determination . . . that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero . . . reflect[ed] not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake."[242] A judge might reasonably think that these restrictions crossed the line laid down in *Newark*.[243] But that did not entail the stretching of comparators that occurred in the other Covid cases. Nor the new variants, beyond MFN-1, that we have been examining here.

2. The Antivaxx Subvariant

The most dangerous manifestation of MFN-6 is Gorsuch's dissents in *Does v. Mills*[244] and *Dr. A. v. Hochul*,[245] two cases in which a divided Court declined to block state requirements that health care workers be vaccinated against the coronavirus notwithstanding their religious objections.[246] Three Justices thought

239. Eugene Volokh observes "that whether two kinds of conduct should be treated alike calls for the same sort of normative and practical judgment about government interests (and rival private interests) that is called for by the decision about whether certain conduct should be restricted." Brief of Professor Eugene Volokh as Amicus Curiae in Support of Neither Party at 29, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

240. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603–04 (2020) (Alito, J., dissenting).

241. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 75 (Roberts, C.J., dissenting) ("Numerical capacity limits of 10 and 25 people . . . seem unduly restrictive. And it may well be that such restrictions violate the Free Exercise Clause."); *id.* at 69 (Gorsuch, J., concurring) ("These restrictions apply even to the largest cathedrals and synagogues, which ordinarily hold hundreds.").

242. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring).

243. Thanks to Rick Garnett for pressing me on this point.

244. Does 1-3 v. Mills, 142 S. Ct. 17, 18–22 (2021) (Gorsuch, J., dissenting).

245. Dr. A. v. Hochul, 142 S. Ct. 552, 552–59 (2021) (Gorsuch, J., dissenting).

246. *See Does 1-3*, 142 S. Ct at 18 (Gorsuch, J., dissenting); *Dr. A.*, 142 S. Ct. at 552 (Gorsuch, J., dissenting). For another vaccine case involving health care workers, in which Thomas, Alito, and Gorsuch indicated that they would grant the application for injunctive relief, see *We The Patriots USA Inc. v. Hochul*, 142 S. Ct. 734, 734 (2021) (mem.); and *We The Patriots USA, Inc. v.*

that, because the state exempted those whose health would be endangered by them, it must also allow religious exemptions.

Gorsuch, joined by Thomas and Alito, wrote in *Does*:

> Where many other States have adopted religious exemptions, Maine has charted a different course. There, healthcare workers who have served on the front line of a pandemic for the last 18 months are now being fired and their practices shuttered. All for adhering to their constitutionally protected religious beliefs. Their plight is worthy of our attention.[247]

The earlier Covid decisions involved a temporary emergency. Lockdowns and capacity limits were going to last only as long as it took to develop and distribute vaccines, which, it was reasonable to hope, would eventually get Covid under control. Vaccine resistance is different.

An apparently permanent feature of the human condition is the existence of deadly, contagious diseases—smallpox, polio, measles, and others. Measles, for example, kills about 140,000 people each year worldwide.[248] One of the great innovations of modern science is the creation of vaccines that can prevent them. America has almost completely eradicated these plagues through near-universal vaccination.[249] When a traveler brings measles into the country, almost everyone she encounters has received a shot, and the disease spreads no further. With the resurgence of antivaxx ideology, now augmented by judicial determination to hamstring legal requirements, these plagues may return.

Hochul, 17 F.4th 266, 272 (2d Cir. 2021). An injunction was likewise denied in *Keil v. City of New York*, 142 S. Ct. 1226, 1226 (2022) (mem.), but no dissent was recorded.

In these cases, no jurisdiction was attempting to force people to be vaccinated. The question rather was whether vaccination could be made a condition for certain privileges, such as the right to be employed as a health care worker. *See We The Patriots USA*, 17 F.4th at 294. The burden on the religious believer was financial: One would have to forego certain economic opportunities. *See id.* at 294; Kane v. De Blasio, 19 F.4th 152, 171 (2d Cir. 2021). This was the same burden resisted by "Typhoid Mary" Mallon, an asymptomatic carrier of typhoid whose insistence on working as a cook, which was the highest paying work available to her, led to multiple deaths. Filio Marineli, Gregory Tsoucalas, Marianna Karamanou & George Androutsos, *Mary Mallon (1869–1938) and the History of Typhoid Fever*, 26 ANNALS GASTROENTEROLOGY 132, 132–33 (2013).

247. *Does 1-3*, 142 S. Ct. at 22 (Gorsuch, J., dissenting).

248. *See More than 140,000 Die from Measles as Cases Surge Worldwide*, WORLD HEALTH ORG. (Dec. 5, 2019), https://www.who.int/news-room/detail/05-12-2019-more-than-140-000-die-from-measles-as-cases-surge-worldwide [https://perma.cc/QY59-CNHV].

249. It hasn't been easy. For historical accounts of the difficulties of accomplishing near-universal vaccination in the United States, see generally MARK NAVIN, VALUES AND VACCINE REFUSAL: HARD QUESTIONS IN ETHICS, EPISTEMOLOGY, AND HEALTH CARE (2018); ELENA CONIS, VACCINE NATION: AMERICA'S CHANGING RELATIONSHIP WITH IMMUNIZATION (2015); MARK A. LARGENT, VACCINE: THE DEBATE IN MODERN AMERICA (2012); COLGROVE, *supra* note 13.

Much of Gorsuch's argument involves the abuse of MFN-2, the variant he developed in *Masterpiece Cakeshop*: misconstruing the law's purposes in order to conjure up unfairness.[250] He pointed out that:

> [Maine] allows those invoking medical reasons to avoid the vaccine mandate on the apparent premise that these individuals can take alternative measures (such as the use of protective gear and regular testing) to safeguard their patients and co-workers. But the State refuses to allow those invoking religious reasons to do the very same thing.[251]

Why would a state allow medical but not religious exemptions? The medical part is easy. The state's real aim is not maximizing vaccinations, but preventing disease and death. That would not be served by forcing vaccines on those who would be endangered by them. The state interest is compelling, and its rule is narrowly tailored. MFN-2 here leads to MFN-6: An exception is deemed to reveal unfairness even though the reasons for the exception don't apply to the religious objector.

Religious accommodations always involve a guess about whether there will be so many claims that the law's purpose will be thwarted—whether the exemption of the Catholic Mass from the 1919 Volstead Act's prohibition of alcohol would lead huge numbers to convert to Catholicism just so they can imbibe (it didn't), or whether exempting all pacifists would hamstring the military draft (at the end of the Vietnam War, it did).[252]

When *Does* was decided, it was clear that religious exemptions would prolong the pandemic. Only fifty-eight percent of the adult population was fully vaccinated.[253] Vaccine resistance had become a marker of Republican political identity.[254] Many claims for religious exemption had been phony even before Covid,[255] but this political development exacerbated that tendency. Because it is hard to contradict someone's assertion that her objection is sincere, religious objections were easily abused.[256] A quarter of the workforce of the

250. *See supra* Section III.B.

251. *Does 1-3*, 142 S. Ct. at 19 (Gorsuch, J., dissenting).

252. Andrew Koppelman, *The Story of* Welsh v. United States*: Elliott Welsh's Two Religious Tests*, *in* FIRST AMENDMENT STORIES 293, 314–15 (Richard W. Garnett & Andrew Koppelman eds., 2012).

253. *US Coronavirus Vaccine Tracker,* USA FACTS (Mar. 15, 2023), https://usafacts.org/visualizations/covid-vaccine-tracker-states [https://perma.cc/NHR5-9FFF].

254. *See* Don Albrecht, *Vaccination, Politics and COVID-19 Impacts*, 22 BMC PUB. HEALTH, no. 96, 2022, at 1, 3–5; David Leonhardt, *Red Covid*, N.Y. TIMES (Oct. 1, 2021), https://www.nytimes.com/2021/09/27/briefing/covid-red-states-vaccinations.html [https://perma.cc/XJ4T-PJPU].

255. *See* Dorit Rubinstein Reiss, *Religious Exemptions To Vaccines and the Anti-Vax Movement*, HARV. L.: BILL OF HEALTH (July 16, 2021), https://blog.petrieflom.law.harvard.edu/2021/07/16/religious-exemptions-to-vaccines-and-the-anti-vax-movement [https://perma.cc/H7AX-VGAS]; Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1586–88 (2014).

256. Colleen Long & Andrew DeMillo, *As COVID-19 Vaccine Mandates Rise, Religious Exemptions Grow*, AP NEWS (Sept. 15, 2021), https://apnews.com/article/joe-biden-health-religion-los-angeles-

Los Angeles Police Department had claimed religious exemptions, and almost forty percent of the city's police were still not vaccinated.[257] The MFN doctrine has made the inquiry more difficult: Some courts have held that even an assessment of objectors' sincerity counts as an individualized system of exemptions that triggers strict scrutiny,[258] which would mean that any claim of a religious objection must be blindly accepted.

Gorsuch says Maine needn't worry, citing its high vaccination rate.[259] But that might be the result of the very regulation he wants to trash. How can he know? He can't commission behavioral models or publish them for comment. He can't revise his decree if he guesses wrong.[260]

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arkansas-3ba53f2f00e1ab7105d7d128f2b1e65d [https://perma.cc/R2P7-FHVP]; Ruth Graham, *Vaccine Resisters Seek Religious Exemptions. But What Counts as Religious?*, N.Y. TIMES (Sept. 15, 2021), https://www.nytimes.com/2021/09/11/us/covid-vaccine-religion-exemption.html [https://perma.cc/YK4Y-ENHT]. Laycock suggests that, given the widespread faking of claims, states should be permitted to reject them all.

> Assuming that some of these claims are sincere, there are many false claims for every sincere claim. Absent some unusually strong evidence of sincerity in an individual case, these claims are all insincere by a preponderance of the evidence. That is, if the overwhelming majority of a set of claims is insincere, then it is more likely than not that each individual claim within the set is also insincere. And the burden of proving sincerity is on the religious claimant.

Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations Before the H. Subcomm. on Workforce Prots. & H. Subcomm. on C.R. & Hum. Servs. of the H. Comm. on Educ. & Lab., 117th Cong. 15 (2021) (statement of Douglas Laycock, Professor, University of Virginia).

257. *See* Tim Dickinson, *Will a City Mandate Cause Thousands of Unvaccinated L.A. Cops to Walk Off the Job? We're About to Find Out*, ROLLING STONE (Oct. 7, 2021), https://www.rollingstone.com/politics/politics-features/will-a-city-mandate-cause-thousands-of-unvaccinated-l-a-cops-to-walk-off-the-job-were-about-to-find-out-1237989 [https://perma.cc/745D-7PHH].

258. Rothschild, *supra* note 14, at 1126–27, 1132–33.

259. *See* Does 1-3 v. Mills, 142 S. Ct. 17, 21–22 (2021) (Gorsuch, J., dissenting).

260. Maine also cited its interest in "preventing COVID–caused absences that could cripple a facility's ability to provide care." *Id.* at 19. Gorsuch retorts that "unvaccinated medical objectors are equally at risk." *Id.* at 20. But people with genuine medical exemptions are extremely rare, usually well under one percent of the population. *See* Brief of Public Health Associations and Scholars of Public Health as Amicus Curiae in Support of Respondents at 10, *Does 1-3*, 142 S. Ct. 17 (No. 21A90). They have never caused a disease outbreak. *See id.* at 8.

> More precisely, the CDC estimated that during the 2018-19 school year just 0.3% of kindergarteners were medically exempt from vaccine requirements while 2.2% were exempt for non-medical reasons, including religious belief. In some states the percentage of kindergarteners claiming non-medical exemptions has risen as high as 7.5%, while, over a similar time period, no state had a rate of medical exemptions over 1.5% (with a median medical exemption rate of just 0.2%).

Id. at 10 (footnote omitted); *accord* CDC COVID-19 Response Team & Food & Drug Admin., *Allergic Reactions Including Anaphylaxis After Receipt of the First Dose of Pfizer-BioNTech COVID-19 Vaccine — United States, December 14–23, 2020*, 70 MORBIDITY MORTALITY WKLY. REP. 46, 46 (2021) (indicating very few individuals suffer from allergic reactions stemming from the Pfizer-BioNTech COVID-19 vaccine).

Gorsuch declared that "medical exemptions and religious exemptions are on comparable footing when it comes to the State's asserted interests."[261] The record indicates otherwise.

The Court of Appeals had held that Maine had satisfied strict scrutiny, if it were applicable, "by showing that it considered alternative means of achieving its goals and that those alternatives were inadequate."[262] Specifically, the trial court found:

> Maine CDC rejected twice-weekly testing as inadequate given the speed at which the Delta variant is transmitted . . . . Similarly, Maine CDC rejected daily antigen testing as insufficient because the most effective tests . . . require 24 to 72 hours to produce results and the faster rapid-antigen tests are too inaccurate and in short supply. Symptom monitoring as a standalone measure was rejected because the virus can be transmitted by persons who are asymptomatic. Similarly, sole reliance on the use of PPE was rejected because, even if worn correctly, PPE will not stop the spread of COVID-19 in healthcare settings.[263]

A Supreme Court amicus brief by a coalition of health associations elaborated on the reasons why medical exemptions are not comparable to religious exemptions.[264] Religious exemptions, but not medical exemptions, have been linked to significant outbreaks of disease.[265] Those with medical exemptions do

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261. *Does 1–3*, 142 S. Ct. at 20 (Gorsuch, J., dissenting). Gorsuch's reasoning here contrasts unfavorably with *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, in which then-judge Alito understood that relaxation of the no-beard requirement for undercover officers "does not undermine the Department's interest in uniformity because undercover officers 'obviously are not held out to the public as law enforcement person[nel].'" Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) (quoting Reply Brief in Support of the Appellants, City of Newark, Newark Police Department and Employees of the City of Newark, Appeal at 9, *Newark*, 170 F.3d 359 (No. 97-5542)). "[T]he Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing." *Id.* at 366.

262. Does 1-6 v. Mills, 16 F.4th 20, 32 n.9 (1st Cir. 2021).

263. Does 1-6 v. Mills, 566 F. Supp. 3d 34, 40 (D. Me. 2021) (citations omitted). These points are elaborated in Opposition of State Respondents to Emergency Application for Writ of Injunction at 26–31, *Does 1-3*, 142 S. Ct. 17 (No. 21A90).

264. Brief of Public Health Associations and Scholars of Public Health as Amicus Curiae in Support of Respondents, *supra* note 260, at 8–9.

265. *Id.*

> For instance, in New York during the 2018-19 school year, 654 people, mostly children, contracted measles. The outbreak was heavily concentrated among those 26,000 children with religious exemptions, and, as a result, the state revoked that exemption to its vaccine mandate for school children. Similarly, in 2015, California suffered a measles outbreak linked to children visiting Disneyland who were "unvaccinated because of personal beliefs." As a result, California also revoked its non-medical exemptions to vaccine mandates. The measles outbreak in California came just five years after that state suffered a pertussis outbreak involving 9,000 reported cases in which ten infants died, a dramatic increase over the norm. Clusters of nonmedically exempt individuals—such as those who obtained religious exemptions—played an

not cluster geographically.[266] Religious claimants do.[267] Vaccine resistance tends to concentrate in communities of like-minded people.[268] As a consequence, a worker with a religious exemption is far more dangerous to patients than one with a medical exemption.[269]

Gorsuch did offer a kind of response. He speculated that government may soon have no compelling interest in stemming the spread of Covid.[270] Contemplate this paragraph:

> I accept that what we said 11 months ago remains true today—that "[s]temming the spread of COVID–19" qualifies as "a compelling interest." At the same time, I would acknowledge that this interest cannot qualify as such forever. Back when we decided *Roman Catholic Diocese*, there were no widely distributed vaccines. Today there are

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> important role in causing the outbreak, with one study concluding that outbreaks were more than twice as likely in communities with such a cluster.

Id. (footnotes omitted). On the effects of clustering, see generally Tracy A. Lieu, G. Thomas Ray, Nicola P. Klein, Cindy Chung & Martin Kulldorff, *Geographic Clusters in Underimmunization and Vaccine Refusal*, 135 PEDIATRICS 280 (2015); and David E. Sugerman et al., *Measles Outbreak in a Highly Vaccinated Population, San Diego, 2008: Role of the Intentionally Undervaccinated*, 125 PEDIATRICS 747 (2010) (finding that vaccine refusal clustered geographically and substantial rates of undervaccination occurred at private schools). An earlier episode occurred in 1972, when a polio outbreak at a Christian Science high school in Greenwich, Connecticut left eleven children partially paralyzed. Franklin M. Foote, George Kraus, M. DeWayne Andrews & James C. Hart, *Polio Outbreak in a Private School*, 37 CONN. MED. 643, 643–44 (1973). A useful compilation of similar episodes is *Some Outbreaks of Vaccine-Preventable Disease in Groups with Religious or Philosophical Exemptions to Vaccination*, CHILD, INC., http://childrenshealthcare.org/?page_id=200 [https://perma.cc/NMB8-SD9X].

266. Brief of Public Health Associations and Scholars of Public Health as Amicus Curiae in Support of Respondents, *supra* note 260, at 11.

267. *Id.* at 10.

268. *See id.* at 9–11.

269. *Id.* at 10–11. I also note that in the vaccine case, the abuse of comparators is more obvious than in the church attendance cases. It was not clear that churches, if exempted from lockdown restrictions, would not act prudently to prevent the spread of disease. See, for example, the elaborate precautions proposed by the complaining church, as described in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting). On the other hand, after the Court ruled in favor of a large church service, but refused to strike down the ban on singing during that service in *South Bay United Pentecostal Church v. Newsom*, the church proceeded to defy that ban by putting a group of unmasked singers on the stage, who were joined by a number of unmasked audience members. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (Kagan, J., in chambers); Jim Oleske (@JimOleske), TWITTER (Feb. 7, 2021, 4:46 PM), https://twitter.com/JimOleske/status/1358547609875484672 [https://perma.cc/5CGV-Z6KE]. Covid was a novel problem, and it was hard to predict what measures would be most effective, or how much of a danger religious accommodations would produce. Vaccination is different. We aren't guessing. We already know a lot about the dangers of religious exemptions. Treating them as though they were the same as medical exemptions is, as Charles Black wrote in another context, "the only kind of law that can be warranted outrageous in advance—law based on self-induced blindness, on flagrant contradiction of known fact." Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960). (Every source I have quoted was part of the record).

270. Does 1-3 v. Mills, 142 S. Ct. 17, 20–21 (Gorsuch, J., dissenting).

> three. At that time, the country had comparably few treatments for those suffering with the disease. Today we have additional treatments and more appear near. If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.[271]

It is hard to know what future Gorsuch imagines. The wonderful new interventions he cites so triumphantly had been less successful than everyone had hoped, in large part because of the very vaccine resistance that he is trying to abet. There were 1,819 new Covid deaths reported on October 29, 2021, the day before Gorsuch's opinion was announced.[272]

Gorsuch is, one hopes, not fool enough to think that the disease is about to be eradicated. If that is right, then he can only mean that *the level of death will decline to a point that is acceptable to him*—so acceptable that the state will no longer have a compelling interest in preventing those deaths. He will vote to order religious exemptions even if the state proves that thousands will die as a result.[273]

If the state has no compelling interest in preventing a few thousand deaths, then the September 11th plotters who are still being held at Guantanamo have a plausible claim to be released forthwith. Their sincere religiosity is not in doubt, and, compared with the toll of Covid, the nearly three-thousand people they murdered are a drop in the bucket.[274]

The logic here has nothing specifically to do with Covid. It necessarily implies that there is already no compelling interest in refusing religious (while allowing medical) exemptions for any other vaccine. Right now, illnesses such as measles and rubella hardly ever kill anyone. This is an artifact of widespread vaccination. To conclude that there is therefore no compelling interest is, as Ginsburg wrote in another context, "like throwing away your umbrella in a rainstorm because you are not getting wet."[275] Most Americans don't remember

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271. *Id.* (alteration in original) (footnotes omitted) (citation omitted) (quoting Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020)).

272. *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://web.archive.org/web/20211102020527/https://covid.cdc.gov/covid-data-tracker/#trends_dailydeaths [https://perma.cc/KF4E-98WK].

273. In fact, he already has voted to constrain vaccine mandates, in a case that involved delegated administrative power rather than religious exemptions. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 667–70 (2022) (Gorsuch, J., concurring). He did not dispute a finding that the order he invalidated would save thousands of lives. *See id.* That decision involved embarrassingly conclusive reasoning. *See* Andrew Koppelman, *The Supreme Court's Embarrassing OSHA Decision*, SMERCONISH.COM (Jan. 25, 2022), https://www.smerconish.com/exclusive-content/the-supreme-courts-embarrassing-osha-decision [https://perma.cc/5MP7-JVX7]; Andrew Koppelman, *The Supreme Court, Vaccination and Government by Fox News*, HILL (Jan. 14, 2022, 2:00 PM), https://thehill.com/opinion/judiciary/589763-the-supreme-court-vaccination-and-government-by-fox-news [https://perma.cc/4KEN-QS7D].

274. Laycock, on the other hand, has declared "that vaccination is an easy case for refusing exemption." Laycock, *supra* note 256, at 2.

275. Shelby County v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

(but may soon learn) the fear that your child will die of measles or diphtheria, or be paralyzed by polio.

The accuracy of Gorsuch's final sentence—"If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency"[276]—is beyond question. Its relevance is doubtful. It treats as a rare emergency an enduring aspect of life: These diseases cannot be eradicated but can be made harmless by vaccination. Must an indefinite state of emergency exist before the state can require health care workers, who are in daily contact with very vulnerable people, to be immunized against deadly plagues that they might transmit to those people? How about requiring children to be vaccinated before they attend school?[277]

Barrett, joined by Kavanaugh, concurring, left uncertain whether Gorsuch could eventually assemble a majority for his position.[278] She said the Court should be cautious of decisions made "on a short fuse without benefit of full briefing and oral argument."[279] Her earlier votes showed that she is nearly as skeptical of public health measures against Covid as Gorsuch and may eventually join him in mandating religious exemptions. She ought to understand that every court that would decide religious challenges to vaccines faces the same informational deficit.

A few weeks later, dissenting in *Dr. A. v. Hochul*, Gorsuch repeated many of his claims, this time joined only by Alito.[280] This opinion extended the earlier analyses in two novel directions. First, as noted earlier,[281] he declared that even if religious claims were far more numerous, and would thereby defeat the pertinent state interest completely, strict scrutiny would still apply.[282]

His other innovation, one of the most remarkable assertions about religious liberty ever to appear in the U.S. Reports, concerned the appropriate remedy:

> If the estimated number of those who might seek different exemptions is relevant . . . a State might argue, for example, that it has a compelling interest in achieving herd immunity against certain diseases in a population. It might further contend the most narrowly tailored means to achieve that interest is to restrict vaccine exemptions to a

276. *Does 1-3*, 142 S. Ct. at 21 (Gorsuch, J., dissenting).

277. Every state has school immunization requirements. Six of them do not allow religious exemptions. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF STATE LEGISLATURES (May 25, 2022), https://www.ncsl.org/health/states-with-religious-and-philosophical-exemptions-from-school-immunization-requirements [https://perma.cc/BGY2-LLAB]. After the recent measles outbreaks, the American Medical Association called on all states to eliminate their nonmedical exemptions. James Colgrove & Abigail Lowin, *A Tale of Two States: Mississippi, West Virginia, and Exemptions To Compulsory School Vaccination Laws*, 35 HEALTH AFFS. 348, 349 (2016).

278. *Does 1-3*, 142 S. Ct. at 18 (Barrett, J., concurring).

279. *Id.*

280. Dr. A. v. Hochul, 142 S. Ct. 552, 552–59 (2021) (Gorsuch, J., dissenting).

281. *See supra* text accompanying note 150.

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

> particular number divided in a nondiscriminatory manner between medical and religious objectors. With sufficient evidence to support claims like these, the State might prevail.[283]

In other words, if some people would be harmed by vaccines—if those people are among the tiny number whom no ethical doctor would vaccinate—Gorsuch thinks that the fair solution is *to force vaccines on them* in order to make room for the objections of the religious. States do not now compel anyone to be vaccinated, but they commonly do require vaccination before children may attend school. Some do not permit religious excuses.[284] Gorsuch's proposal necessarily entails that schools that seek to contain the number of exemptions must select the exempted in a way that does not discriminate between medical and religious objectors, and tell some children who cannot be safely vaccinated that unless they expose themselves to that danger, they will not be permitted to attend public school.

Of course, this would not even address one of the state's principal concerns, which is that vaccine resistors tend to be geographically clustered, to spread the disease among themselves,[285] and so to present far greater risks than those with medical excuses. This is the most urgent interest that the state is pursuing, but Gorsuch chooses to focus on different interests. Here, once more, the deployment of MFN-2 has facilitated MFN-6.[286] He misconstrues the state interest (MFN-2), and then denounces the state for treating religion worse than other actions that (he mistakenly thinks) sets back the state's interests to a similar degree.

Recall that Laycock thought that, MFN notwithstanding, courts should be wary of extending exemptions to claims with secular value.[287] With vaccines, as noted earlier, claims for religious exemption are frequently shams.[288] One problem for any exemption is that, once it is granted, the cost of claiming it is low and so sincerity is almost impossible to determine.[289] Gorsuch proposes to impose costs on the medically vulnerable for the sake of many who are only

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283. *Id.* at 556–57.

284. *See supra* note 277.

285. *See supra* text accompanying notes 265–67.

286. An alternative explanation for Gorsuch's position is that he is deploying MFN-5. "*Fulton*'s application to *Mills* may not have been required, but it was certainly not foreclosed given the most-favored-nation logic embedded in *Fulton*. According to that logic, any discretion—even purely theoretical discretion—is fatal when the government does not provide exemptions for religion." Rothschild, *supra* note 14, at 1131.

287. *See supra* note 75 and accompanying text.

288. *See supra* note 255 and accompanying text.

289. In economic terms, once an exemption is available, it is impossible to determine its "shadow price"—the cost that the objector is willing to bear to avoid having to obey the law. *See* Michael W. McConnell & Richard A. Posner, *An Economic Approach To Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 51–53 (1989). The large number of people who first claimed religious exemption from vaccination and then relented when such exemptions became hard to get suggests that for many, the shadow price was low.

pretending to be religious. Moreover, both cases involved health care workers. Gorsuch is willing to endanger, not only the workers, but their patients.[290]

One of the principal attractions of the idea of religious liberty has always been that the exercise of one person's religion doesn't hurt anyone else. In Thomas Jefferson's classic formulation: "it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[291] Today the pocketpickers and legbreakers are ascendant.

G. MFN-7: EXCEPTIONS MEAN THE INTEREST ISN'T COMPELLING

An even more radical variant holds that a pattern of exceptions signifies that the interest at issue cannot be compelling. The religious claimant would inevitably win, whatever the consequences. Call this MFN-7.

The *Lukumi* Court declared: "It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'"[292] This sentence described evidence of the statute's object, not a categorical rule.[293] It is an overstatement: Not even the most compelling interests are pursued singlemindedly.[294] The Court quoted this passage with approval in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[295] a case in which the government's interest—keeping a tiny amount of a

290. The pathologies of Gorsuch's proposal extend beyond vaccines to any instance of exemption claims that have secular value, where "allowing one exemption will trigger many others and undermine a law's basic coverage, not just a few of its applications." Laycock & Berg, *supra* note 76, at 52. In such cases, Laycock and Berg think strict scrutiny should be satisfied, and they observe that the Court has so held. *Id.* Gorsuch however seems to imagine that any exemption granted for secular reasons should be allocated by something like a lottery, with the secular claims competing with an indeterminate and perhaps growing number of allegedly religious ones.

291. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 231 (2d ed. 1794).

292. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (Scalia, J., concurring in part and concurring in judgment) (alteration in original) (quoting Florida Star v. B.J.F., 491 U.S. 524, 541–42 (1989)) (quoting Smith v. Daily Mail Pub'g Co., 443 U.S. 97, 103 (1979)).

293. *See id.* at 547.

294. *See supra* notes 203–05 and accompanying text.

295. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418, 433 (2006). Because this case was decided under the Religious Land Use and Institutionalized Persons Act, rather than the Free Exercise Clause, it involved direct balancing rather than an MFN claim of discrimination. *Id.* at 436. The underinclusiveness of the law was cited as evidentiary rather than as a trigger for strict scrutiny or as resolving the compelling interest inquiry. *Id.* at 434–35. The same statute was the basis of *Holt v. Hobbs*, invalidating a rule prohibiting Muslim prisoners from growing short beards, while permitting equally long hair in secular contexts. Holt v. Hobbs, 574 U.S. 352, 355 (2015). The Court declared that "'[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct,' which suggests that 'those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.'" *Id.* at 368 (alteration in original) (quoting *Lukumi*, 508 U.S. at 546).

hallucinogenic tea out of the hands of a tiny immigrant sect—was already of doubtful strength.[296]

This view is briefly embraced in *Fulton*, in which the theoretical possibility of an exception to contractual requirements was enough to trigger MFN.[297] "The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."[298] These opaque sentences don't make clear whether the (fictitious) exceptions show the city itself does not regard its interests as compelling (implied by the first sentence), or whether the interest is not compelling in the Court's independent judgment (implied by the second sentence). If it is the former, then in any case where the Court perceives an exception (or the theoretical availability thereof), it will follow that there is no interest sufficient to justify a burden on religious exercise.

Alito most fully develops this variant—and offers it as a manifestation of judicial modesty!—in his concurrence in *Little Sisters of the Poor v. Pennsylvania*:

> If we were required to exercise our own judgment on the question whether the Government has an obligation to provide free contraceptives to all women, we would have to take sides in the great national debate about whether the Government should provide free and comprehensive medical care for all. Entering that policy debate would be inconsistent with our proper role, and RFRA does not call on us to express a view on that issue. We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest.
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> "'[A] law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" . . . [H]ere, there are exceptions aplenty. The ACA—which fails to ensure that millions of women have access to free contraceptives—unmistakably shows that Congress, at least to date, has not regarded this interest as compelling.[299]

The inference is not simply that, if there are exceptions, there must be strict scrutiny and the government must show a compelling interest. Rather—

296. *Gonzales*, 546 U.S. at 427–30. Alito also deemed this reasoning "arguable," without deciding the question, in his opinion for the Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727–28 (2014). He likely avoided the issue because Kennedy, who provided the fifth vote, was unwilling to endorse this analysis. Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 85 (2015).

297. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

298. *Id.* at 1882 (citation omitted).

299. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring) (alterations in original) (citation omitted) (quoting *Lukumi*, 508 U.S. at 547).

this is what makes this variant more virulent than the others—*the presence of exceptions is taken to show that the interest is not compelling at all.* If that is right, then it does not matter how urgent the interest is or how necessary the law is to that interest. Women's health, their need to control their fertility, the likelihood that unintended pregnancies will produce low birth weight babies, even the likely increase in the number of abortions, all disappear from view.[300] The Court will take that question to be foreclosed by exceptions. But a compelling interest is indispensable to a state's case for denying religious exemptions. The state then automatically loses. The exemption will automatically be granted. If the government allows any "appreciable damage" to the interest that a law promotes, if it allows an exemption for any secular reason, then there *must* be a religious exemption.

Whether or not Alito's approach was adopted by the Court in *Fulton*, neither he nor any other member of the Court will pursue MFN-7 to the limits of its logic. They are not anarchists. Instead, I confidently predict that they will cheat, allowing the state to pursue interests that they, in their entirely unconstrained discretion, deem worthy.

H. THE VARIETIES OF MFN

In short, MFN can mean many different things. To review:

MFN-1 is the original strain, the skeptical but satisfiable scrutiny Laycock proposed. It takes any secular exemption from a generally applicable law, where a religious exemption has been denied, to trigger strict scrutiny. It is instantiated by then-Judge Alito's Third Circuit opinion in *Newark*. It is already some distance from *Lukumi*, which cited not a single secular exemption, but a law from which all animal killings were permitted except those that were religiously motivated.

MFN-2 misconstrues the coverage of a statute, so that activity that is simply not within the law's scope is taken to be an exception to it.

MFN-3 triggers strict scrutiny whenever a law has an exception that is not religious.

MFN-4 is a more contagious variant, imposing strict scrutiny whenever a state's purpose is not pursued with maniacal intensity.

MFN-5 reaches the same result when the law is not mindlessly mechanical and there is even the theoretical possibility of a secular accommodation. It is not clear that there is any way for the state to immunize itself from this variant, since discretion in administration is inevitable.

The effects of MFN-2, MFN-3, MFN-4, and MFN-5 are not necessarily worse than MFN-1. The Court needs to be persuaded that the alleged discrimination is justified, but that can be done if the state interests are sufficiently strong.

300. On these interests, see Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 58–59 (2014).

None of these variants are committed to any particular evaluation of whatever interest the state proffers.

MFN-6, on the other hand, means that the comparison will be done sloppily, with very different setbacks of the state's interest treated as if they were equally weighty. Judges will be oblivious of distinctions between the comparators, even with respect to matters of life and death.

MFN-7 declares that any judicial finding of underinclusiveness will automatically entail exemption, because the interest will be deemed not to be compelling.

There are even more virulent comorbidities. If, for example, a court conjures up exceptions that are not there (MFN-5), and then says that the existence of those exceptions shows that the state's interest is not compelling (MFN-7), then the conclusion is stronger than either variant standing alone: The religious claim must be accommodated, regardless of the harm a religious exemption will bring about. The same result can be reached by combining MFN-2 with MFN-6: The law's purpose is mischaracterized, and then the law is deemed to poorly fit that purpose.

Even MFN-1 can be abused in this way. Recall that in *South Bay United Pentecostal Church v. Newsom*, Kavanaugh used disparate treatment to establish strict scrutiny, but then offered no response to the state's justifications.[301] We can now see that this was a silent shift from MFN-1 to MFN-6. But it went beyond MFN-6 because he did not even address the distinctions that were proffered. He acted as though it did not matter what the state said.

Call it MFN-8: Religion always wins.

IV. EXPLAINING THE HYPERTROPHY OF MFN

What could the judges be thinking?

I here offer a hypothesis. They appear to be in the grip of a narrative in which militant secularists in government are trying to persecute religious conservatives, who have only the Court to protect them. That narrative is sometimes true—the Court's critics often don't notice that—but not nearly so often as the judges think. They tend to perceive a situation that calls for constant judicial intervention and perhaps even neglect of the procedural niceties that normally distinguish judges from autocrats.

New evolutionary variants often emerge in response to some abrupt change in the environment. Here, there have been new developments in the culture wars, in particular the growing tendency to label religious conservatives as bigots because of their attitudes toward homosexuality.[302] This is perhaps the extrinsic shock that generated the evolutionary leaps we have been describing.

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301. *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614–15 (2021) (Kavanaugh, J., dissenting) (denying application for injunctive relief).

302. On that tendency, see KOPPELMAN, *supra* note 97, at 21–31.

A. THE PERSECUTION NARRATIVE

The power of this persecution narrative, and the urge it generates to ignore formalities, is on display in *Christian Legal Society v. Martinez*.[303] The Hastings College of Law, a state institution, has a nondiscrimination policy forbidding official student organizations from discriminating on the basis of, inter alia, sexual orientation and religion.[304] CLS requires members and officers to follow moral principles that include the belief that sexual activity should not occur outside of marriage between a man and a woman and forbids "unrepentant homosexual conduct."[305] The organization also excludes those who reject the religious convictions of its Statement of Faith.[306] The school refused to recognize CLS because it violates the policy.[307]

CLS sued, claiming, inter alia, religious discrimination.[308] The Supreme Court rejected the claim, because the nondiscrimination policy was a "reasonable and viewpoint-neutral" condition on access to official recognition.[309]

CLS also claimed, and Alito's dissent agreed, that the policy was a pretext for viewpoint discrimination.[310] Those claims were inconsistent with the record before the Court. Ginsburg, writing for the Court, responded: "Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance."[311] Alito protested that it had not been adequately addressed below, but the district court's opinion declared that "CLS has not presented any evidence demonstrating that Hastings exempts other registered student organizations from complying with the Nondiscrimination Policy" and "CLS has not submitted any evidence of discriminatory intent."[312]

Alito's frustration was justified. The university did not have CLS in mind when it adopted the nondiscrimination policy. But that meant that, if the administrators in fact were biased against the religious views of CLS, they could hurt the organization simply by leaving the existing policy in place.

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303. *See* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 716–18 (2010) (Alito, J., dissenting).

304. *Id.* at 670 (majority opinion).

305. *Id.* at 672.

306. *Id.*

307. *Id.* at 672–73.

308. *Id.* at 673.

309. *Id.* at 697.

310. *Id.* at 707 (Alito, J., dissenting).

311. *Id.* at 697 (majority opinion).

312. Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484, 2006 WL 997217, at *26 (N.D. Cal. May 19, 2006). It is also arguable that CLS conceded too much in its stipulation of the facts in the court below. *See* Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 509–10 (2011).

Alito is right that "it is fundamentally confused to apply a rule against religious discrimination to a religious association."[313] The brief for CLS observed that its members

> are not trying to impose their moral principles on others, but to adhere to those principles themselves, to associate with others who share them, and to express those principles to the rest of the student body. We cannot imagine why government in a free society would think itself entitled to interfere with that.[314]

The policy does not even promote diversity: "There can be no diversity of viewpoints in a forum if groups are not permitted to form around viewpoints."[315] The "nominally neutral" policy "systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream."[316]

A sensible nondiscrimination policy thus would make an exception for religious groups like CLS. But that does not mean that the contrary view violates the Constitution. *Martinez* is correctly decided, but the policy it upholds is misguided. The decision to leave it unchanged may reflect prejudice against unpopular religious views, but the judiciary cannot remedy inaction.

Alito strains against these limits. Episodes like this one reinforce the suspicion that facially neutral policies are being used to oppress conservative Christians. That suspicion is manifest in *Masterpiece Cakeshop* and *Fulton*, in both of which legislative compromise was possible and the religious dissenters could have been accommodated without any significant setback to the state's legitimate interests.[317] Had that happened, these cases would never have made it to the Supreme Court, because the suits would never have been filed in the first place. But they were not accommodated because the pertinent religious views were too distasteful to the majority. Thus, Alito has said: "[f]or many today, religious liberty is not a cherished freedom. It's often just an excuse for bigotry, and it can't be tolerated, even when there is no evidence that anybody has been harmed."[318] In this, he reflects the views of large majorities of evangelicals and religious Republicans, who believe that religious liberty is under threat in America.[319]

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313. *Martinez*, 561 U.S. at 727 (Alito, J., dissenting) (quoting Brief of American Islamic Congress & Coalition of African American Pastors et al. as Amici Curiae in Support of Petitioners at 3, *Martinez*, 561 U.S. 661 (No. 08-1371)).

314. Brief for Petitioner at 44–45, *Martinez*, 561 U.S. 661 (No. 08-1371).

315. *Id.* at 50.

316. *Id.* at 51. The brief was written by Prof. Michael McConnell, one of America's leading advocates for religious liberty. *Id.* at 1.

317. *See* KOPPELMAN, *supra* note 97, at 70, 81–82.

318. Josh Blackman, *Video and Transcript of Justice Alito's Keynote Address to the Federalist Society*, REASON: THE VOLOKH CONSPIRACY (Nov. 12, 2020, 11:18 PM), https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society [https://perma.cc/5UYA-A99F].

319. *Is Religious Liberty a Shield or a Sword?*, PRRI (Feb. 10, 2021), https://www.prri.org/research/is-religious-liberty-a-shield-or-a-sword [https://perma.cc/B6E4-8DZW].

That suspicion, however, now appears to dominate every religion case that comes before the Justices. The pattern is stark. "Across the Warren, Burger, and Rehnquist Courts the religious side prevailed about half the time, with gradually increasing success. In the Roberts Court, the win rate jumps to [eighty-three percent]."[320] Of all the Justices who have sat on cases since 1953, those who voted most often for the religious side belonged to the current conservative bloc on the court: Brett Kavanaugh (one hundred percent), Neil Gorsuch (eighty-eight percent), Clarence Thomas (ninety-one percent), John Roberts (eighty-eight percent), and Samuel Alito (eighty-eight percent).[321] This data was compiled before Barrett joined the Court.

The pattern is also pronounced with respect to Covid cases in the lower federal courts:

> A close examination of over one hundred federal court adjudications of these challenges reveals a telling phenomenon: in deciding free exercise challenges by religious plaintiffs to COVID-19 lockdown orders, [zero percent] of Democratic-appointed judges sided with religious plaintiffs, [sixty-six percent] of Republican-appointed judges sided with religious plaintiffs, and [eight-two percent] of Trump-appointed judges sided with religious plaintiffs.[322]

These judges are so caught up in a narrative of discrimination against religion that they are blinded to the facts before them. They cannot comprehend the justifications that are proffered.

The persecution narrative is true some of the time. As I have noted elsewhere, because of the indiscriminate application of antidiscrimination norms, "conservative Christians may not be able to be wedding vendors, counselors, social workers, or psychologists, they may not be able to control the content or staffing of their educational institutions, and various other agencies face the denial of funding."[323] But the judges apply the same narrative to situations where nothing like that is actually happening. In *Obergefell v. Hodges*,[324] in which same-sex couples merely asked for the same legal recognition that Alito's own family has, he took as a reason to deny such recognition its impact on the social status of his tribe.[325]

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320. Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 324.

321. *Id.* at 328.

322. Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1068 (2022).

323. KOPPELMAN, *supra* note 97, at 64.

324. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015) (recognizing marriage rights for same-sex couples).

325. *Id.* at 741 (Alito, J., dissenting) (writing that the decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy"). More recently, he and Justice Thomas complained that recognition of same-sex couples' right to marry "enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots." *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (Thomas, J., respecting the denial of certiorari). The branding

B. A LAW UNTO HIMSELF

The first time the Supreme Court considered a proposed principle of religious accommodation involved a Mormon, George Reynolds, who was convicted of bigamy.[326]

> [H]e asked the court to instruct the jury that if they found from the evidence that he "was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be 'not guilty.'"[327]

Judicial balancing of the kind that strict scrutiny requires was not what Reynolds requested or what the Court rejected.[328] The precise question on appeal was whether the trial court had improperly refused to give that instruction.[329] The Supreme Court accurately observed that the proposed rule would make every person who invoked religious reasons "a law unto himself."[330] Religious claims would always win. Thus the Court's *reductio ad absurdum*: "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[331]

What, however, is the state's interest when it forbids human sacrifice, and does it ever tolerate secular setbacks to that interest? Murder is prohibited to further the interest in protecting unwilling homicide victims. But the state protects only *some* of them. "Even the bans on intentional homicide," Eugene Volokh observes, "have exceptions—execution of a lawful sentence, killing in war, police killing of a dangerous fleeing felon, killing in self-defense or in defense of another, and disconnecting life-sustaining equipment at a patient's

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certainly happens, but it is delusional to think it is caused by *Obergefell* or would stop if that decision were overturned.

The Covid cases may also be evidence of what I have called Long Trump Syndrome: The former President's skepticism toward efforts to contain the disease continues to derange the Republican Party even after he has left office. Andrew Koppelman, *Has the Supreme Court Been Infected with Long Trump Syndrome?*, HILL, (Nov. 2, 2021, 7:30 AM), https://thehill.com/opinion/judiciary/579406-the-supreme-court-and-long-trump-syndrome [https://perma.cc/6N4V-6R38].

326. Reynolds v. United States, 98 U.S. 145, 161, 168 (1878).

327. *Id.* at 161–62.

328. Richard Fallon observes that the compelling interest test, which balances rights against interests, is a twentieth century innovation in constitutional law. "Through most of constitutional history, the Court conceived its task as marking the conceptual boundaries that defined spheres of state and congressional power on the one hand and of private rights on the other"—which meant that "the Court did not view itself as weighing or accommodating competing public and private interests." FALLON, *supra* note 87, at 14. Even the *Lochner* Court's examination of the reasonableness of statutes, which now appears to many as involving excessive judicial discretion to invalidate laws, was regarded by the Court "as a definitional requirement of valid exercises of the police power." *Id.* at 15.

329. *Reynolds*, 98 U.S. at 162.

330. *Id.* at 167.

331. *Id.* at 166.

request."[332] Certain secular reasons for killing are favored over all religious reasons. The law "devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons."[333] It "treats some comparable secular activities more favorably than"[334] religious homicide.

This of course is MFN-2, and Gorsuch's opinion in *Masterpiece Cakeshop* shows how it can be elaborated in the human sacrifice context. If "homicide" were the relevant level of generality, then those who kill in self-defense would have to be punished. If "killing for reasons that the perpetrator thinks morally justified" were the relevant level of generality, both would have to be excused.

> In short, when the same level of generality is applied to both cases, it is no surprise that the [killings] have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case . . . —can you engineer the . . . outcome, handing a win to [killing in self-defense] but delivering a loss to [human sacrifice]. Such results-driven reasoning is improper.[335]

MFN-3 is easy. As just noted, all homicide laws have express exceptions. They have no express exceptions for religious motivation. Thus strict scrutiny would automatically be triggered. Similarly with MFN-4: The state is evidently willing to compromise its interest in avoiding involuntary death of innocents for secular reasons. MFN-5: In the American legal system, prosecutors have discretion about which criminal cases to bring.[336] This is closer to a "system of exceptions"[337] than the law in *Fulton* because, unlike *Fulton*, the discretion is in fact routinely exercised.

As noted earlier, MFN-1, MFN-2, MFN-3, MFN-4, and MFN-5 only bring us to strict scrutiny, but do not say what courts should do when they get there.

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332. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1540 (1999).

333. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–38 (1993).

334. Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021).

335. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1739 (2018) (Gorsuch, J., concurring).

336. Justice Robert Jackson, while he was Attorney General, observed:

> [T]hat [a prosecutor] must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

Robert H. Jackson, Att'y Gen. of the U.S., Dept. of Just., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940), *quoted in* Morrison v. Olson, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting). *A fortiori*, prosecutorial discretion is a "system of exceptions" by the criterion laid down in *Fulton*.

337. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

MFN-6 is the practice of mischaracterizing the weight of the pertinent interests. If self-defense is not a comparable secular activity, how about the building of public highways, which we know will kill tens of thousands of random innocents annually? Does it not devalue religion to give mere convenience in transportation greater urgency than duties to God?[338]

The MFN-7 reasoning of Alito's *Little Sisters* opinion is of course infinitely adaptable:

> If we were required to exercise our own judgment on the question whether [human sacrifice is ever in fact divinely commanded], we would have to take sides in [a great philosophical debate that divided Kant and Kierkegaard when they considered the story of Abraham and Isaac]. Entering that policy debate would be inconsistent with our proper role . . . . We can answer the compelling interest question simply by asking whether [the legislature] has treated [preventing the death of unwilling victims] as a compelling interest.

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338. Since strict scrutiny involves balancing, one can accomplish the same end by giving such weight to religious interests as to override any state interest. Josh Blackman takes this line in his critique of Judge Frank Easterbrook's opinion in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020). *See* Blackman, *supra* note 20, at 671–73. Churches complained that there were no numerical limits on certain workplaces that the state had deemed essential. *Pritzker*, 962 F.3d at 342–43, 346. Easterbrook responded to this argument: "[I]t is hard to see how food production, care for the elderly, or the distribution of vital goods through warehouses could be halted." *Id.* at 347. He explained:

> Reducing the rate of transmission would not be much use if people starved or could not get medicine. That's also why soup kitchens and housing for the homeless have been treated as essential. Those activities *must* be carried on in person, while concerts can be replaced by recorded music, movie-going by streaming video, and large in-person worship services by smaller gatherings, radio and TV worship services, drive-in worship services, and the Internet. Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways.

Id.

Blackman thinks Easterbrook made an impermissible value judgment when he held that:

> [C]ooking, elder care, and deliveries were more important to our polity than religious worship. . . . [T]he Illinois governor and Judge Easterbrook purported to decide for others whether virtual services are sufficient to "feed the spirit." People of faith do not get to decide if the substitutes are adequate.

Blackman, *supra* note 20, at 671–72. Blackman argues that "the state must treat so-called 'life-sustaining' businesses in the same fashion as 'soul-sustaining' groups." *Id.* at 673 (footnote omitted). The claim that "life-sustaining" and "soul-sustaining" activities must be treated the same is drawn from *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 611, 614, 616 (6th Cir. 2020).

This logic is readily available in the human sacrifice case. When the police interfere with religiously motivated homicides, they make an impermissible value judgment, preferring life-sustaining over soul-sustaining activities. Moreover, the state has no constitutional obligation to protect citizens from private violence, see *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196–97 (1989), while it does have an obligation to respect free exercise. And so forth.

> "'[A] law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" . . . [H]ere, there are exceptions aplenty. The [law of self-defense, the building of roads, etc.] unmistakably shows that [the legislature], at least to date, has not regarded this interest as compelling.[339]

Alito, in his defense of religious exemptions, makes much of the fact that at the time the First Amendment was written "more than half of the State Constitutions contained free-exercise provisions subject to a 'peace and safety' carveout or something similar."[340] These provisions, he thinks, prove the case for judicial exemptions: "If, as *Smith* held, the free-exercise right does not require any religious exemptions from generally applicable laws, it is not easy to imagine situations in which a public-peace-or-safety carveout would be necessary."[341] Yet MFN-7 asks, if the state makes exceptions to its protection of peace and safety, can peace and safety really be compelling interests?[342]

The point I have been arguing is not merely hypothetical. When the Court licensed indoor gatherings that certainly spread Covid, did the Court not bring about the deaths of innocent people for the sake of other people's religious beliefs? The Court protects human sacrifice so long as it is actuarial.[343] We are already at the bottom of the slippery slope.

C. THE UNBIASED BASELINE

The fundamental difficulty lies in how one understands the basis for a right to religious accommodation. If the problem is selective sympathy and indifference, then the solution is to govern as an unbiased government would. But what attitude toward religion would an unbiased government have? What would an unbiased government's reasons be for granting or refusing an accommodation?

Two justifications for such accommodation point in different directions. One can see the influence of both, and the tension between them, in the work of Michael McConnell, one of the country's most prominent defenders of accommodations.

McConnell often articulates a liberal ideal. The purpose of free exercise is "protecting pluralism—the right of individuals and institutions to be

339. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring) (fifth and sixth alteration in original) (citation omitted) (quoting *Lukumi*, 508 U.S. at 547).

340. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1902 (2021) (Alito, J., concurring).

341. *Id.* at 1903. For a critique of Alito's deployment of these "carveouts" as purported evidence of the First Amendment's original meaning, see generally Andrew Koppelman, *Justice Alito, Originalism, and the Aztecs*, 54 LOY. U. CHI. L.J. (forthcoming 2023).

342. Alito repudiates the reasoning of *Reynolds*, but he asserts without explanation that his "discussion does not suggest that *Reynolds* should be overruled." *Fulton*, 141 S. Ct. at 1913 n.75.

343. This point was made in conversation by Micah Schwartzman.

different, to teach different doctrines, to dissent from dominant cultural norms and to practice what they preach."[344] He shares this vision with most scholarly defenders of religious liberty.[345] It also has obviously shaped the work of some Supreme Court Justices, notably William Brennan, the inventor of free exercise strict scrutiny,[346] for whom McConnell was once a law clerk.[347] This ideal obviously entails limits on accommodation, which roughly correspond to the old liberal idea that one can exercise one's liberty as one likes so long as one does not harm others.[348] The liberty of others matters as much as one's own. McConnell writes that:

> [I]t must be conceded that the Supreme Court before *Smith* did not really apply a genuine "compelling interest" test. . . . Even the Justices committed to the doctrine of free exercise exemptions have in fact applied a far more relaxed standard to these cases, and they were correct to do so.[349]

The liberal ideal is not inconsistent with singling out religion for special treatment. The state cannot possibly recognize each individual's unique identity-constituting attachments. It can, at best, protect broad classes of ends that many people share. "Religion is such a class."[350] Because it is so important for many people, it is an appropriate category of protection.[351] But at the most fundamental level of analysis, religion is not superior to other ends and aspirations.[352] Liberalism, William Galston has argued, aims at "maximum feasible accommodation of diverse legitimate ways of life."[353]

But McConnell sometimes offers a different rationale, building on this passage from James Madison's *Memorial and Remonstrance*: "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him," and "every man who becomes a member of any

344. Michael W. McConnell, *On Religion, the Supreme Court Protects the Right to Be Different*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/opinion/supreme-court-religion.html [https://perma.cc/X4ES-6F6C].

345. Laycock is among them. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 313 (1996).

346. Sherbert v. Verner, 374 U.S. 398, 402–03 (1963).

347. *Michael W. McConnell*, STAN. L. SCH., https://law.stanford.edu/directory/michael-w-mcconnell [https://perma.cc/Y3PW-BSMK].

348. For contemporary elaborations of this old idea, see Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 785 (2017–18); and Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 366 (2014).

349. McConnell, *supra* note 46, at 1127.

350. Andrew Koppelman, *How Could Religious Liberty Be a Human Right?*, 16 INT'L. J. CONST. L. 985, 986 (2018).

351. *Id.*

352. *Id.* at 1002–03.

353. WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 119 (2002).

particular Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign."[354] McConnell often makes this quotation a premise for an argument (never stated by Madison) that religion ought to be a basis for exemptions because it involves a duty to God.[355] From it he infers "that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable."[356] Religion has a unique claim to accommodation, because "[n]o other freedom is a duty to a higher authority."[357] Even those who do not believe in God should understand the value of avoiding "conflicts with what are perceived (even if incorrectly) as divine commands."[358]

The argument has persuaded a number of prominent religious liberty scholars.[359] It also supports Alito's claim "that the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the 'exercise of religion') the right to do so without hindrance."[360]

The difficulty should be obvious. If divine commands always take precedence over secular ones, then that won't change when the divine commands are construed in a radically illiberal way, to create obligations to harm or even kill other people. Michael Paulsen, who embraces the priority of God's demands over those of the state, observes "that there is no compelling-interest override written into the Free Exercise Clause"[361]; and that the compelling interest

354. James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 THE WRITINGS OF JAMES MADISON 183, 184–85 (Gaillard Hunt ed., 1901) (1785).

355. When he presents his argument for religious accommodation, he frequently begins by quoting this passage from Madison. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453, 1497 (1990); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 29 (2000); Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1246–47 (2000).

356. McConnell, *The Origins and Historical Understanding*, *supra* note 355, at 1453.

357. McConnell, *The Problem of Singling Out Religion*, *supra* note 355, at 30; *see also* McConnell, *supra* note 46, at 1152 ("To recognize the sovereignty of God is to recognize a plurality of authorities and to impress upon government the need for humility and restraint. To deny that the government has an obligation to defer, where possible, to the dictates of religious conscience is to deny that there could be anything like 'God' that could have a superior claim on the allegiance of the citizens—to assert that government is, in principle, the ultimate authority.").

358. McConnell, *The Problem of Singling Out Religion*, *supra* note 355, at 30.

359. *See* KOPPELMAN, *supra* note 97, at 93–97 (citing Kathleen Brady, Steven D. Smith, and Michael Paulsen).

360. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1897 (2021) (Alito, J., concurring). Alito's concurrence cites McConnell's scholarship more than a dozen times. *See id.* at 1883–926.

361. Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1207 (2013). McConnell recognizes the difficulty, and responds:

> Any limitation on the absolute character of the freedom guaranteed by the First Amendment must be implied from necessity, since it is not implied by the text. And while I do not deny that there must be implied limitations, it is more faithful to the text to confine any implied limitations to those that are indisputably necessary.

McConnell, *supra* note 46, at 1116. His liberalism is evident in his implicit understanding of what counts as necessity. Many societies have functioned for centuries with conceptions of religion that obligate adherents to harm or kill for religious reasons.

"formulation subtly implies ultimate state supremacy, rather than the priority of God."[362] This is MFN-8.

As it happens, though, most proponents of exemptions are liberals of some stripe. They want exemption under the description of freedom, not of duties to God that override all secular considerations. They don't really want to hurt anyone, and they don't believe that God wants them to hurt anyone. For them the question of human sacrifice is not a serious one, because it is not something that a just and loving God would demand.[363]

The same is, I am sure, true of Gorsuch. He says horrible things about vaccine exemptions, but it seems clear that this is only because he has not thought them through and is distracted by the persecution narrative. He does not want to unleash plagues on United States. He does not mean to force vaccinations on those who would be harmed by them. He should think more carefully before he writes.[364]

CONCLUSION

The trouble is not the imminent return of the Aztecs. It is that the variants of MFN have created an unbounded principle, placing religion in such a privileged position that any exemption at all can be justified. MFN compares any burden on religion with inadequately specified alternatives instead of directly weighing the burden against the cost of accommodating it.[365] The strict scrutiny regime before *Smith* involved a lot of discretion, but at least the right questions were being asked, and judicial intuitions were focused on the right problems. What is distinctive about the new variants is that the state interests tend to disappear from the (explicit) analysis altogether.

MFN-3, MFN-4, and MFN-5 are in opinions of the Court. MFN-6, the abuse of comparators, is ubiquitous in the recent shadow docket Covid cases. MFN-2 and MFN-7 have commanded less than a majority. But they are embraced by Thomas, Alito, and Gorsuch. Kavanaugh and Barrett have been coy about whether they will join them, but they have shown sympathies in that direction.

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362. Paulsen, *supra* note 361, at 1210.

363. *See, e.g.*, ROBERT MERRIHEW ADAMS, FINITE AND INFINITE GOODS: A FRAMEWORK FOR ETHICS 277–91 (1999) (discussing the problem of Abraham and Isaac). Thanks to Sam Fleischacker for calling my attention to this book.

364. I write of Gorsuch with particular disappointment, because the biggest litigation in which I ever played a significant role was predicated on the assumption, vindicated by the result, that he is a conscientious jurist who will follow an argument where it leads even if it contradicts his political preferences. *See generally* Brief of William N. Eskridge Jr. & Andrew M. Koppelman as Amici Curiae in Support of Employees, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107). For defenses of the *Bostock* decision, see generally Andrew Koppelman, Bostock *and Textualism: A Response to Berman and Krishnamurthi*, 98 NOTRE DAME L. REV. REFLECTION 89 (2022); Andrew Koppelman, Bostock, *LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1 (2020).

365. *See supra* text accompanying notes 99, 104.

Laycock's original conception of MFN has been left far behind. Once more, these developments are not his fault. The rule he proposed, like many legal rules, involved some judicial discretion. Any such rule presupposes that the discretion will be used responsibly. Contemplating the Court's Covid decisions, he says:

> There's a lot of hostility to the idea of religious freedom in practice, and these claims, especially if they prevail, will make it much worse . . . . First people claiming religious exemptions were blamed, inaccurately for the most part, for interfering with other people's sex lives. Now they will be blamed, far more accurately, for killing large numbers of Americans.[366]

The new variants create a multitude of situations in which the rule is effectively MFN-8: The weight of the state's interest, no matter how urgent, is ignored. So long as the state allows *any* secular exception (and the Court will sometimes find such exemptions where they do not exist), religious people must be exempted as well.

MFN had its roots in a sensible point: The fact (if it is a fact) that the state does not pursue its asserted interest in a nonreligious context may point toward prejudice against some minority religion. But that is different from a mechanical rule declaring that a burden on religion is invalid whenever the state fails to pursue its goals relentlessly.

There is much to be said for religious accommodation, and even for giving judges a role in it.[367] But that involves a great deal of discretion and judgment, which are now in short supply on the Court. Even if there is a legitimate job for a court here, it may not be a suitable job for *this* Court.[368] These Justices may be too biased toward religious claimants.

Even from the standpoint of religious liberty, the hypertrophy of MFN reasoning, its massive distension, is a disaster. One does religious freedom no favors by tightly associating it with disease and death.

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366. Andrew Koppelman, *How Religious Liberty Was Distorted in the Age of COVID-19*, HILL (Nov. 21, 2021, 8:00 AM), https://thehill.com/opinion/judiciary/582478-how-religious-liberty-was-distorted-in-the-age-of-covid-19 [https://perma.cc/BGM7-HZER] (interview with Laycock). Frederick Schauer showed decades ago that any slippery slope argument depends on a prediction that doing the right thing in the instant case will, in fact, increase the likelihood of doing the wrong thing in the danger case. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 365 (1985). Such arguments also depend on some degree of distrust of future decision-makers. Today the evidence pointing toward such distrust is steadily mounting.

367. KOPPELMAN, *supra* note 97, at 93–107; ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 107–08 (2013).

368. On the attractions of the principle and the limitations of the present Supreme Court, see generally Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267 (2021).