CONSTITUTIONAL CONSTRAINTS ON FREE EXERCISE ANALOGIES

The liberty enjoyed by the People of these States, of worshipping Almighty God agre[e]able to their Consciences, is not only among the choicest of their Blessings, but also of their Rights . . . .

— President George Washington[1]

Religious freedom is a fragile thing. Though "one of our most treasured and jealously guarded constitutional rights,"[2] in times of crisis it can sometimes seem "too extravagant to endure."[3] The novel coronavirus (COVID-19) pandemic of 2020 proved to be such a crisis. In crafting restrictions to protect public health, many state and local governments placed religious organizations on equal footing with their secular peers. Others, however, did not, and religious believers disfavored under state policies were quick to bring constitutional challenges. Pointing to what they saw as analogous secular activities receiving more favorable treatment, challengers asked whether the First Amendment allowed states to favor shopping malls, casinos, or acupuncture facilities over worship services.[4]

The COVID-19 cases exposed a longstanding problem in free exercise jurisprudence: the difficulty of evaluating purportedly generally applicable laws with secular exemptions. The Constitution clearly forbids laws that "single[] out a religious practice for special burdens"[5] or that discriminate "solely on account of religious identity."[6] But what about laws that privilege only *some* secular interests above their religious counterparts?

Courts deciding such cases often turn to analogy. If favored secular activities are sufficiently similar to the disfavored religious activity, the religious plaintiff will prevail. If favored secular activities are markedly different, however, the court will defer to the state and reject the free

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[1] Letter from George Washington to the Society of Quakers (Oct. 13, 1789), *in* 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 265, 266 (W.W. Abbot & Dorothy Twohig eds., 1993) (emphasis omitted).

[2] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 81 (2020) (Sotomayor, J., dissenting).

[3] Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

[4] *See, e.g.*, S. Bay United Pentecostal Church v. Newsom (*South Bay I*), 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (shopping malls); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting from denial of application for injunctive relief) (casinos); *Roman Cath. Diocese*, 141 S. Ct. at 66 (per curiam) (acupuncture facilities).

[5] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Scalia, J., concurring in part and concurring in the judgment).

[6] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017).

exercise challenge. Many COVID-19 free exercise cases have been decided using just this sort of analogical approach, including at the Supreme Court. Chief Justice Roberts, for instance, stated that he would defer to state policies when "only dissimilar activities" are given more lenient treatment than religious institutions.[7] However, the Chief Justice's reasoning revealed the key difficulty with free exercise analogizing: malleability. Under the analogical approach, whether a free exercise challenge survives often turns on a single judge's view of what constitutes "similar" or "analogous" activity, an inquiry that is not meaningfully constrained. Such malleability, in turn, can lead to unpredictable and inconsistent results.[8] Even in the most conscientious courts, free exercise analogizing in the absence of constitutional safeguards may amount to little more than making value judgments regarding the importance of religion.

The protections of the Free Exercise Clause should not be determined by ad hoc analogizing. This Note proposes an alternative approach: a rebuttable presumption in favor of plaintiffs who identify secular activities given preferential treatment. Part I introduces the analogical approach (and its pliability) through the lens of the COVID-19 free exercise cases, in which courts have struggled to draw consistent comparisons between religious and secular institutions when evaluating First Amendment claims. Part II defines the problem more sharply, scrutinizing the analogical approach in more detail and arguing that it invites overbroad discretion and judicial overreach. Part III offers a solution: a framework that preserves the constitutional guarantees of the First Amendment when judges engage in free exercise cases that lend themselves to analogical inquiry. Under this framework, the burden of proof shifts to the government when a religious plaintiff can point to a secular entity receiving favored treatment — regardless of whether that entity is analogous. Unless the government can show by clear and convincing evidence that disparate treatment is justified, the plaintiff's free exercise challenge should proceed, and the court should apply strict scrutiny.

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[7] *South Bay I*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).

[8] *Compare, e.g.*, *id.* at 1613 (mem.) (denying plaintiffs' application for injunction), *and Calvary Chapel*, 140 S. Ct. at 2603 (mem.) (same), *with Roman Cath. Diocese*, 141 S. Ct. at 65 (per curiam) (granting injunction on similar facts). In the view of some commentators, such inconsistencies may be at least partially caused by the ideological beliefs of the judges deciding the cases, meaning that outcomes change along with the composition of courts. *See infra* p. 1791.

Defenders of analogical reasoning have persuasively challenged the idea that it is fatally indeterminate. *See, e.g.*, Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 769–73 (1993). This Note argues only that the analogical approach is problematic in free exercise cases of the kind described here, as the strikingly different outcomes in cases involving similar facts (like those cited above) attest. It does not suggest that analogy in other contexts (or in the abstract) has no place in legal reasoning.

I. Free Exercise in a Pandemic: The Analogical Approach in Action

The analogical approach to free exercise cases — like many of its attendant defects — is rooted in the foundation of modern Free Exercise Clause jurisprudence: the Court's landmark decision in *Employment Division v. Smith*.[9] The *Smith* Court declared that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[10] Accordingly, neutral and generally applicable laws are not subject to strict scrutiny under the First Amendment.[11] But *Smith* left largely unanswered the question of what constitutes a "generally applicable" law,[12] other than noting that a "system of individual exemptions" would not qualify.[13] The Supreme Court revisited the issue three years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[14] holding that city ordinances designed to outlaw ritual animal sacrifice by adherents of the Santeria religion specifically targeted the "central element" of Santeria worship[15] and thus fell "well below the minimum standard" of general applicability.[16] But in the decades following *Lukumi*, the Court has never ventured a holding on what that minimum standard might be.

Scholars and jurists familiar with this history "agree that *Smith* transformed free exercise into an equality right, [but] they differ on the precise brand of equality that is required."[17] In cases where religious activity is burdened under the law, some read *Smith* as requiring virtually all analogous secular activity to receive preferential treatment before a free exercise challenge can succeed, while others argue that a single secular exemption suffices.[18] When courts evaluate laws less extreme than the laser-targeted ordinance in *Lukumi* but that nonetheless "divvy up organizations into a favored or exempt category and a disfavored or non-exempt category,"[19] which of these standards should they apply? In

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[9] 494 U.S. 872 (1990).

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

[11] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

[12] Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. Rev. 1045, 1046–47 (2000).

[13] *Smith*, 494 U.S. at 884.

[14] 508 U.S. 520.

[15] *Id.* at 534.

[16] *Id.* at 543.

[17] Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 Calif. L. Rev. Online 282, 286 (2020).

[18] *Id.*

[19] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2611–12 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief).

other words, "how much analogous secular conduct can be left unregulated before a law ceases to be generally applicable?"[20]

Over the past few decades, courts have divided sharply over this question.[21] For instance, while the Third Circuit ruled that granting medical (but not religious) exemptions allowing police officers to grow facial hair was enough to trigger strict scrutiny,[22] the Tenth Circuit "refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption" and instead applied a "fact-specific inquiry" in a zoning case.[23] Where the Third Circuit saw medical exemptions as being obviously analogous to religious ones, the Tenth Circuit took a much broader view of general applicability. In these and other cases, the emergent pattern is that "confusion abounds in the lower courts, which interpret [*Smith*] in significantly divergent ways."[24]

While this confusion had been slowly simmering since *Smith*, it came to a boil in the free exercise cases arising from the COVID-19 pandemic. At the onset of the crisis, many state governments implemented shutdowns and stay-at-home orders.[25] Religious institutions, like secular businesses, were subject to restrictions severely limiting physical gatherings. Some states and municipalities, however, enforced policies subjecting religious institutions to a stricter standard than many of their secular peers. In the days leading up to Easter weekend, for instance, the county of San Bernardino, California, singled out religious activity by declaring that "faith-based services must be electronic only through streaming or online technology," with violators subject to a $1,000 fine, up to ninety days of imprisonment, or both.[26] Minnesota restrictions allowed shopping malls, restaurants, and bars to reopen with retailers operating at up to fifty percent capacity, but banned in-person religious

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[20] Douglas Laycock & Steven T. Collis, 2016 Roscoe Pound Lecture, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 11 (2016); *see also* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 160 (4th ed. 2016) ("How many exceptions must there be to a policy to make it less than neutral and generally applicable? One?").

[21] *See* Laycock & Collis, *supra* note 20, at 11 ("There is a circuit split on such questions.").

[22] Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 364–66 (3d Cir. 1999).

[23] Grace United Methodist Church v. City of Cheyenne, 427 F.3d 775, 784 (10th Cir. 2005), *vacated on other grounds on reh'g*, 451 F.3d 643 (10th Cir. 2006); *see also id.* at 785 (citing *Fraternal Order of Police* as a contrasting example).

[24] Kaplan, *supra* note 12, at 1046.

[25] *See* Daniel Strauss & Maanvi Singh, *US Governors and Coronavirus: Who Has Responded Best and Worst?*, THE GUARDIAN (Apr. 17, 2020, 6:20 AM), https://www.theguardian.com/us-news/2020/apr/17/us-governors-coronavirus-best-worst-andrew-cuomo [https://perma.cc/BT2W-4J95] ("America's governors are playing an outsized role in day-to-day life across the country, and have emerged on the frontlines of efforts to curb the coronavirus pandemic.").

[26] *Public Health Officer Orders Face Covering, Electronic-Only Religious Services*, SAN BERNARDINO CNTY. (Apr. 7, 2020), https://wp.sbcounty.gov/cao/countywire/?p=5854 [https://perma.cc/V9N7-XWGY].

worship involving more than ten people, regardless of circumstances.[27] This disparity caused significant backlash when several churches announced their intention to reopen in defiance of the governor's orders (but with health precautions and a thirty-three percent attendance limit in place).[28] In response, the governor backed down, loosening restrictions on worship services to allow for reopening at twenty-five percent capacity.[29]

Although the Minnesota conflict ended in compromise, religious institutions in other states were not as fortunate.[30] Some religious plaintiffs sought relief through litigation, filing requests for preliminary injunctions that ultimately reached the Supreme Court. In *South Bay United Pentecostal Church v. Newsom*[31] (*South Bay I*), a California church challenged an executive order imposing an attendance limit of twenty-five percent capacity (with a maximum of 100) on religious institutions, but not on "factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, [or] cannabis dispensaries."[32] And in *Calvary Chapel Dayton Valley v. Sisolak*,[33] a Nevada church sought relief from restrictions that placed a hard cap of fifty worshippers on religious institutions but permitted fifty *percent* capacity in "many favored facilities that host indoor activities . . . includ[ing] bowling alleys, breweries, fitness facilities, and most notably, casinos" — a much softer limit that allowed, in some cases, thousands of patrons at once.[34]

The Court denied relief in both *South Bay I* and *Calvary Chapel* without opinion.[35] Chief Justice Roberts, however, authored a brief concurrence in *South Bay I* emphasizing the Court's duty not to "second-guess[]" the more institutionally competent and politically accountable executive

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[27] *See Minnesota Churches' Challenge to COVID-19 Executive Order*, BECKET, https://www.becketlaw.org/case/minnesota-churches [https://perma.cc/BP4B-WJLE].

[28] *See* Opinion, *The First Amendment Faithful*, WALL ST. J. (May 20, 2020, 7:23 PM), https://www.wsj.com/articles/the-first-amendment-faithful-11590017004 [https://perma.cc/K2F2-EB3M].

[29] *See Minnesota Churches' Challenge*, *supra* note 27; Scott McClallen, *Walz Allows Churches to Open Wednesday After Backlash*, CTR. SQUARE (May 23, 2020), https://www.thecentersquare.com/minnesota/walz-allows-churches-to-open-wednesday-after-backlash/article_fa1a9040-9d31-11ea-9923-27bf244aa4c8.html [https://perma.cc/ZN9A-QB6W].

[30] In December 2020, six states still imposed restrictions on religious activity more severe than Minnesota's. *COVID-19 and Religious Liberty*, BECKET, https://www.becketlaw.org/covid-19-religious-worship [https://perma.cc/5ZRM-ESPN].

[31] 140 S. Ct. 1613 (2020).

[32] *Id.* at 1614 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

[33] 140 S. Ct. 2603 (2020).

[34] *Id.* at 2605 (Alito, J., dissenting from denial of application for injunctive relief) (internal citations omitted).

[35] *See id.* at 2603 (mem.); *South Bay I*, 140 S. Ct. at 1613 (mem.). The vote in each case was five to four.

branch on public-health issues.[36] The Chief Justice briefly considered the argument that secular activities given favored treatment were analogous to worship services, but summarily rejected it:

> Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. *Similar or more severe restrictions apply to comparable secular gatherings*, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or *treats more leniently only dissimilar activities*, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.[37]

Churches might be subject to heavy restrictions, Chief Justice Roberts reasoned, but so are their peer institutions. The only secular entities subject to looser restrictions were so unlike churches that disparate treatment failed to raise constitutional concerns. Lecture halls, theaters, and sports arenas are like churches, and they were treated like churches; grocery stores, banks, and laundromats are not, and they were not. The challenged law was therefore generally applicable under *Smith*.

The dissenting Justices also applied the analogical approach. But where the Chief Justice saw "only dissimilar activities," they saw "comparable secular businesses" — a phrase Justice Kavanaugh repeated seven times throughout his brief dissenting opinion in *South Bay I*.[38] In his view, supermarkets and shopping malls enabled gatherings of many people in close proximity for significant periods of time just as much as churches did.[39] Justice Kavanaugh argued that because the favored businesses and disfavored churches presented comparable health risks, California's "restrictions [were] inexplicably applied to one group and exempted from another."[40] With no "compelling justification" to act otherwise, California therefore could not "take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship."[41] The dissents in *Calvary Chapel* traced similar lines of argument. Justice Gorsuch noted that casinos and multiplexes were just as prone to "[l]arge numbers and close quarters" as churches,[42] and Justice Alito went even further, arguing that

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[36] *South Bay I*, 140 S. Ct. at 1614 (Roberts, C.J., concurring in denial of application for injunctive relief). Chief Justice Roberts sided with the majority in both cases.

[37] *Id.* at 1613 (emphasis added).

[38] *Id.* at 1614–15 (Kavanaugh, J., dissenting from denial of application for injunctive relief). Justice Kavanaugh was joined by Justices Thomas and Gorsuch.

[39] *See id.* at 1615.

[40] *Id.* at 1614 (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam)).

[41] *Id.* at 1615.

[42] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief).

"activities that occur in casinos frequently involve far *less* physical distancing and other safety measures than" the worship services in question.[43]

In November 2020, the Court split again over the question of analogous secular conduct — but this time, it came out the other way. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[44] the Court enjoined enforcement of strict occupancy limits on religious services in New York that exempted many secular businesses (including "non-essential" businesses).[45] The majority held that excluding large stores, factories, and schools from the restrictions placed on churches produced "troubling results" and "single[d] out houses of worship for especially harsh treatment."[46] In dissent, Justice Sotomayor argued that, as in *South Bay I*, any favored secular institutions were categorically distinct; in fact, New York's restrictions "treat[ed] houses of worship far more *favorably* than their secular comparators."[47] Two and a half months later, the Court granted an injunction against California restrictions categorically banning in-person worship, but allowed a state prohibition on indoor singing.[48] Concurring Justices again emphasized that state restrictions imposed against religious institutions must be generally applicable to be valid.[49]

The Supreme Court's internal debate over the pandemic free exercise cases may have dominated the headlines, but judicial disagreement over general applicability was rampant in the lower courts as well. Some applied the Chief Justice's narrower view of analogous secular activity

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[43] *Id.* at 2605 (Alito, J., dissenting from denial of application for injunctive relief) (emphasis added). Justice Alito was joined by Justices Thomas and Kavanaugh.

[44] 141 S. Ct. 63 (2020) (per curiam).

[45] *Id.* at 66.

[46] *Id.* The Court deemed New York's restrictions "far more restrictive" than those considered in *South Bay* and *Calvary Chapel*. *Id.* at 67 & n.2.

[47] *Id.* at 80 (Sotomayor, J., dissenting) (emphasis added). Justice Sotomayor was joined by Justice Kagan. Chief Justice Roberts dissented on mootness grounds, *see id.* at 75 (Roberts, C.J., dissenting), while Justice Breyer dissented in large part due to the "extraordinary" nature of the relief being sought, *id.* at 77 (Breyer, J., dissenting) (quoting Nken v. Holder, 556 U.S. 418, 428 (2009)).

[48] S. Bay United Pentecostal Church v. Newsom (*South Bay II*), 141 S. Ct. 716 (2021) (mem.).

[49] *See id.* at 717 (Barrett, J., concurring in the partial grant of application for injunctive relief) (drawing a line between restrictions that "appl[y] across the board (and thus constitute[] . . . neutral and generally applicable law[s])" and those that "favor[] certain sectors (and thus trigger[] more searching review)" and observing that "if a chorister can sing in a Hollywood studio but not in her church, [such] regulations cannot be viewed as neutral"); *id.* at 720 (statement of Gorsuch, J.) ("[I]f Hollywood may host a studio audience or film a singing competition while not a single soul may enter California's churches, synagogues, and mosques, something has gone seriously awry."). Three dissenting Justices quoted the Chief Justice's *South Bay I* concurrence to support their conclusion that California's restrictions were neutral and therefore valid. *See id.* at 721 (Kagan, J., dissenting) ("California's response to the COVID pandemic satisfies th[e] neutrality rule by regulating worship services the same as other activities 'where large groups of people [come together] in close proximity for extended periods of time.'" (quoting *South Bay I*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief)).

expressed in *South Bay I*, while others aligned with what eventually became the broader view expressed by the *Roman Catholic Diocese* Court. One federal district court in New York held that state and municipal policies singling out religion for harsher restrictions unjustifiably diminished "fundamental rights";[50] a district court in Kansas reached a similar outcome, enjoining a law that "restrict[ed] religious practice while failing to prohibit secular activity that endanger[ed] the same interests to a similar or greater degree."[51] But courts in Illinois,[52] Maryland,[53] and New Mexico[54] disagreed, finding "no analogous secular conduct"[55] at issue and distinguishing or criticizing cases that found such conduct.

Circuit courts also divided sharply on the question of analogous secular conduct.[56] The Seventh Circuit upheld a law limiting religious meetings to ten participants, holding that religious services were uniquely equipped to provide their benefits to patrons without meeting in person and were therefore unlike exempted secular activities.[57] The Sixth Circuit, in contrast, condemned policies that provided a "haven for numerous secular exceptions"[58] and that permitted secular activities "pos[ing] the same public-health risks as the kinds of in-person worship barred by the order."[59] In one Ninth Circuit case, the majority resolutely held that the state "appl[ied] the same restrictions to worship services as [it] d[id] to other indoor congregate events,"[60] while the dissent argued that "potentially similar" secular activities were "regulated entirely separately from, and often more leniently than, religious services."[61]

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[50] Soos v. Cuomo, 470 F. Supp. 3d 268, 279 (N.D.N.Y. 2020).

[51] First Baptist Church v. Kelly, 455 F. Supp. 3d 1078, 1090 (D. Kan. 2020) (internal quotation marks omitted).

[52] *See* Cassell v. Snyders, 458 F. Supp. 3d 981, 995–97 (N.D. Ill. 2020).

[53] *See* Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214, 231–34 (D. Md. 2020).

[54] *See* Legacy Church, Inc. v. Kunkel, 455 F. Supp. 3d 1100, 1153 (D.N.M. 2020).

[55] *Id.*

[56] *See* Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 346 (7th Cir. 2020) (deciding one such case and noting that as to the question whether churches are more like exempted or unexempted secular institutions, "[j]udges of other appellate courts have supported both comparisons").

[57] *Id.* at 347.

[58] Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 616 (6th Cir. 2020) (per curiam).

[59] Roberts v. Neace, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam). Both *Maryville Baptist Church*, 957 F.3d 610, and *Roberts v. Neace*, 958 F.3d 409, were decided after the Supreme Court's decision in *South Bay I*. *But cf.* Commonwealth v. Beshear, 981 F.3d 505, 511 (6th Cir. 2020) (staying preliminary injunction requested by religious school where restrictions applied to other K-12 schools); *see also* Harvest Rock Church, Inc. v. Newsom, No. 20A137, 2021 WL 406257, at *1 (U.S. Feb. 5, 2021) (enjoining a California ban on indoor services, but allowing percentage caps and a prohibition on indoor singing).

[60] Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 730 (9th Cir. 2020), *vacated*, 141 S. Ct. 63 (2020).

[61] *Id.* at 734 (O'Scannlain, J., dissenting) ("[E]ven non-worship activities conducted by or within a place of worship are not subject to the attendance parameters . . . ."). The Supreme Court vacated the Ninth Circuit's judgment after *Roman Catholic Diocese*. *See* Harvest Rock Church v. Newsom, 141 S. Ct. 63, 69 (2020).

II. Problems with the Analogical Approach

As the COVID-19 cases demonstrate, analogical analysis is an indeterminate inquiry. Similar facts can beget different outcomes. For plaintiffs, this means that relief may depend not on the strength of a factual case, but on the specific court that hears it. The legal test for what constitutes "analogous" activity, though critical to determining general applicability under *Smith*, was — and still is — almost entirely defined by the individual judges applying it. This approach invites an unelected judiciary to step beyond its authorized role into the realm of improper value judgments.

The appeal of the analogical approach is obvious: it is a relatively simple way to navigate the constitutional quagmire of free exercise jurisprudence.[62] Are churches more like shopping malls, or like basketball arenas? Is a medical exemption like a religious exemption, or not? An analogizing court has only to ask itself which view it finds more persuasive. Viewed this way, even a complex free exercise challenge dappled with shades of gray can quickly and comfortably collapse into "a simple case."[63] But the simplicity of the analogical approach comes at a cost — or two.

A. Unbounded Discretion

First, judges applying the analogical approach may become likely to "mistake their own predilections for the law."[64] Left to themselves, even the most experienced jurists may stumble into the trap of "circular" reasoning when deciding the side of the analogical divide on which a religious plaintiff falls.[65] Most judges can articulate persuasive reasons that a religious institution is like (or unlike) a shopping mall or an office. But too often they do not fully explain why the reasons supporting the opposite outcome are insufficient.

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[62] *See The Supreme Court, 2019 Term — Leading Cases*, 134 HARV. L. REV. 410, 477 (2020) ("The Court's current Religion Clauses jurisprudence is . . . so fractured that many cases ultimately boil down to raw interest-balancing exercises.").

[63] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); *see also* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting) ("[T]his case is easier than *South Bay* [*I*] and *Calvary Chapel*.").

[64] Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CINCINNATI L. REV. 849, 863 (1989). "[B]alancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing — or if not that, at least with the relative confidence or paranoia of the age in which they are doing it . . . ." John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975).

[65] Josh Blackman, *The Three Dissents in* Calvary Chapel Dayton Valley v. Sisolak, REASON: VOLOKH CONSPIRACY (July 25, 2020, 3:21 AM), https://reason.com/2020/07/25/the-three-dissents-in-calvary-chapel-dayton-valley-v-sisolak [https://perma.cc/8VBA-MRVS] (critiquing Justice Alito's *Calvary Chapel* dissent on these grounds).

The dueling opinions in *South Bay I* and *Roman Catholic Diocese* provide excellent examples of this problem. Each asserts firmly that it has the better of the analogical argument, but neither grounds that assertion in a legal or factual foundation that fully excludes the other result. Given that "[i]t would be foolish to pretend that worship services are *exactly* like any of the possible comparisons,"[66] it is difficult to dispel the worry that the winning arguments might prevail only because a court prefers them, perhaps due to ideological predispositions.[67] Indeed, some (including New York Governor Andrew Cuomo) attributed the Supreme Court's decision in *Roman Catholic Diocese* to this very phenomenon.[68]

This danger is exacerbated by the freedom judges enjoy to define the analogical inquiry itself. In many cases, "multiple secular analogs to the burdened religious exercise create the potential for some secular analogs to be regulated and some to be exempted."[69] Whether the religious plaintiff is more similar to a regulated or an exempted analog may well be determined by how the lines of similarity are drawn.

Consider some of the categories outlined by courts in the COVID-19 litigation. In *Roberts v. Neace*,[70] the Sixth Circuit wondered how the state could fail to "permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of the other services," when it made exceptions for "life-sustaining" institutions so broadly defined as to include "law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes, and landscaping businesses."[71] For the *Roberts* court, "life-sustaining" and "soul-sustaining" institutions were similar; the state could not favor the former while limiting the latter. Thus, remote, technology-based religious "meetings" were insufficient to ensure the "soul-sustaining" function of churches — for "[w]ho is to say that every member of the congregation has access to the necessary technology to

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[66] Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 346 (7th Cir. 2020) (emphasis added).

[67] *See* Zalman Rothschild, Free Exercise Partisanship 3 (Feb. 6, 2021) (unpublished manuscript) (on file with the Harvard Law School Library) ("[I]n deciding free exercise challenges by religious plaintiffs to COVID-19 lockdown orders, 0% of Democrat-appointed judges sided with religious plaintiffs, 66% of Republican-appointed judges sided with religious plaintiffs, and 82% of Trump-appointed judges sided with religious plaintiffs. Such data belies a notion commonly voiced by Supreme Court nominees—that politics have no bearing on their judicial decision-making.").

[68] *See* Josh Marcus, *Cuomo Blames Trump Justice for Supreme Court Covid-19 Decision on NY Churches*, THE INDEPENDENT (Nov. 27, 2020, 9:48 PM), https://www.independent.co.uk/news/world/americas/us-politics/cuomo-blames-trump-justice-for-supreme-court-covid19-decision-on-ny-churches-b1763066.html [https://perma.cc/L7QU-9FEH] ("We know who [Trump] appointed to the court. We know their ideology.").

[69] Laycock & Collis, *supra* note 20, at 26.

[70] 958 F.3d 409 (6th Cir. 2020) (per curiam).

[71] *Id.* at 414.

make that work? Or to say that every member of the congregation must see it as an adequate substitute . . . [?]"[72]

The Seventh Circuit, however, saw things very differently. In *Elim Romanian Pentecostal Church v. Pritzker*,[73] it held firmly that the dividing line was practical, not theoretical: churches were not among groups whose "activities *must* be carried on in person," such as warehouses, nursing homes, or food distribution plants.[74] "Feeding the body requires teams of people to work together in physical spaces," the court held, "but churches can feed the spirit in other ways."[75] The existence of those other ways, and not whether they constituted an "adequate substitute" (as the Sixth Circuit had asked), was what properly defined the inquiry.

Which of the two circuits was correct? Under the analogical approach, it is impossible to say. Both courts drew comparisons, but they did so along different lines. Such unbounded reliance on judicial discretion is a recipe for inconsistency. The next two circuits to confront similar problems could find that the dispositive factor for an "analogous" institution during a pandemic is building size or distance between people in seating arrangements, or they might instead draw lines based on economic impact or perceived importance to the community. Because "there is no limit to the level of generality at which principles may be described"[76] — and indeed, because there are different generalities that can be drawn from the same set of comparisons — it is impossible to know before adjudication not only which side will win, but also what the rules of the game will be.

B. Judicial Overreach

Second, the analogical approach functions as an invitation for judges to make decisions that are beyond their proper authority. In the context of meeting restrictions, a decision to provide exemptions to restaurants and shopping establishments but not religious institutions reflects a very real "value judgment" that the favored establishments are more important.[77] Similarly, when states decide to grant exemptions for worship services, they value increased freedom for religious worship over any

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[72] *Id.* at 415; *see also* Josh Blackman, *What Rights Are "Essential"? The 1st, 2nd, and 14th Amendments in the Time of Pandemic*, 44 HARV. J.L. & PUB. POL'Y (forthcoming 2021) (manuscript at 64), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707739 [https://perma.cc/KEY6-YQNC] ("Not everyone can make it to a limited number of ten-person services.").

[73] 962 F.3d 341 (7th Cir. 2020).

[74] *Id.* at 347.

[75] *Id.*

[76] Adrian Vermeule, *Living It Up*, NEW REPUBLIC (Aug. 2, 2010), https://newrepublic.com/article/76600/living-it [https://perma.cc/4N75-4RC2].

[77] The United States' Statement of Interest in Support of Plaintiff's Motion for a Temporary Restraining Order at 12 n.4, Harborview Fellowship v. Inslee, No. 20-cv-05518 (W.D. Wash. June 11, 2020); *see also* Blackman, *supra* note 72 (manuscript at 64) ("Governors . . . made 'value judgments' about the importance of religious worship. They have deemed it unimportant.").

expected gains in public health from shutting them down. When the executive and legislative branches make such determinations, they do so in the necessary course of making and enforcing the law and are subject to institutional checks and balances. Judges making similar choices, however, transcend the bounds of their judicial role. Courts are not empowered to decide, by their own lights, whether the risks of keeping open religious institutions during a pandemic outweigh the benefits or whether medical exemptions are more important than religious ones. But an unfettered analogical approach, with its endless possible points of determination, is so malleable that it essentially amounts to the same thing.

The COVID-19 pandemic provides a vivid example of how the government engages in constitutional value judgments. States battling COVID-19 often found themselves "loath to enforce public health orders" at protests and rallies, "even as they enforce[d] them against businesses and other citizens."[78] For instance, many political leaders and public health experts expressed solidarity with the aims of protestors demonstrating against racial injustice and encouraged protest activity despite the health risks.[79] But some of these same leaders viewed the First Amendment right to worship as comparatively less important. New York City Mayor Bill de Blasio, for example, threatened to "permanently" close places of worship that defied gathering restrictions,[80] but encouraged New Yorkers to participate in racial justice protests. In Mayor de Blasio's view, the protests vindicated vital societal interests that religion did not: "When you see a nation, an entire nation, simultaneously grappling with an extraordinary crisis seeded in 400 years of American racism, I'm sorry, that is not the same question as the understandably aggrieved . . . devout religious person who wants to go back to services."[81]

Other states made exceptions for political rallies, again on the rationale that the First Amendment rights at issue were too important to curtail. In the months before the presidential election, President Donald Trump and others conducted large-scale campaign rallies that attracted

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[78] Chris Rickert, *Protests and Rallies in the Time of COVID-19: What Does the Law Allow?*, WIS. ST. J. (Oct. 23, 2020), https://madison.com/wsj/news/local/crime-and-courts/protests-and-rallies-in-the-time-of-covid-19-what-does-the-law-allow/article_7c717cf9-9818-5222-8778-6422d6c97401.html [https://perma.cc/BZ65-8E86].

[79] *See* Rachel Weiner, *Political and Health Leaders' Embrace of Floyd Protests Fuels Debate over Coronavirus Restrictions*, WASH. POST (June 11, 2020, 2:00 PM), https://wapo.st/3dTDGmv [https://perma.cc/7KKE-XT2K].

[80] Celia Jean, *NYC Mayor to Synagogues: Close for Coronavirus or Be Shut Down Permanently*, JERUSALEM POST (Mar. 30, 2020, 9:51 PM), https://www.jpost.com/diaspora/nyc-mayor-to-synagogues-close-for-coronavirus-or-be-shut-down-permanently-622767 [https://perma.cc/7UGD-N8EA].

[81] Gil Student, *Torah Is the Air We Breathe*, FIRST THINGS (June 26, 2020), https://www.firstthings.com/web-exclusives/2020/06/torah-is-the-air-we-breathe [https://perma.cc/F2PD-QP3T].

thousands of supporters despite state restrictions limiting gatherings.[82] While some state governments condemned these rallies,[83] others embraced them. Ohio's Department of Health, for instance, announced that "political rallies [we]re protected by the First Amendment and [we]re exempt" from the state's ten-person limits on group gatherings.[84]

Executive decisionmakers and legislators often make value judgments like those described above. The power to do so, however, is subject to two significant checks absent in judicial decisionmaking. First, executive and legislative officials are directly accountable to the people. Leaders who encouraged protests but proscribed religious activity[85] or who allowed large rallies[86] faced substantial criticism from those disagreeing with those policies. Constituents who reject their leaders' value choices can replace those leaders at the ballot box. Second, executive and legislative decisions are subject to judicial review. Even popular laws are constitutionally invalid if they "result in the curtailment of fundamental rights without compelling justification,"[87] and one of the judiciary's roles is to measure laws against the boundaries set by the Constitution.

If courts are to impartially determine the extent of those constitutional protections, they must avoid engaging in value judgments themselves to the extent doing so is possible. When courts begin openly weighing the value of religious free exercise against competing interests, they lose sight of the question they are constitutionally tasked with adjudicating: whether the state has violated the Constitution and "devalue[d] religious reasons for [conduct] by judging them to be of lesser import than nonreligious reasons."[88] The analogical approach, by its open-ended nature, can lead courts away from this narrower, constitutionally guided inquiry and toward unrestrained first-order value judgments.

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[82] *See* Deb Erdley & Natasha Lindstrom, *Frustration Grows as Covid Restrictions Remain, Political Rallies Go On*, TRIBLIVE (Sept. 6, 2020, 8:18 AM), https://triblive.com/news/politics-election/frustration-grows-as-covid-restrictions-remain-political-rallies-go-on [https://perma.cc/2LYC-EDF7].

[83] *See, e.g.*, *id.* (Pennsylvania); Matt Westerhold, *COVID-19 Restrictions Won't Apply to Political Rallies in Ohio*, TIMES LEADER (Sept. 16, 2020), https://www.timesleaderonline.com/news/local-news/2020/09/covid-19-restrictions-wont-apply-to-political-rallies-in-ohio [https://perma.cc/K7TN-MTFJ] (Nevada).

[84] Westerhold, *supra* note 83.

[85] *See* Isabella Redjai, Opinion, *Coronavirus: Churches Are Essential. If Protesters Can Assemble, So Should People of Faith.*, USA TODAY (Aug. 8, 2020, 6:00 AM), https://www.usatoday.com/story/opinion/voices/2020/08/08/coronavirus-pandemic-churches-essential-businesses-open-religious-freedom-column/3323082001 [https://perma.cc/8CUM-TABN].

[86] *See* Erdley & Lindstrom, *supra* note 82.

[87] Soos v. Cuomo, 470 F. Supp. 3d 268, 279 (N.D.N.Y. 2020).

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

III. A CONSTITUTIONAL FRAMEWORK FOR FREE EXERCISE ANALOGIES

The COVID-19 cases have drawn attention to the shortcomings of free exercise analogizing. Some commentators have come to realize that "[c]omparing churches to nail salons is a red herring" because "[t]he Free Exercise Clause should not turn on [that] sort of ad hoc balancing test."[89] Indeed, this mode of thinking may even have begun to reach the Supreme Court: Justice Kavanaugh showed signs of a break with the analogical approach in his *Calvary Chapel* dissent, arguing that the proper frame of inquiry "does not require judges to decide whether a church is more akin to a factory or more like a museum."[90]

But if the analogical approach is deficient, what should replace it? One suggestion comes from Professor Douglas Laycock, who argues that the Supreme Court's First Amendment jurisprudence has granted religion "something analogous to most-favored nation status."[91] In international law, a most-favored nation must be given all the benefits that its trade partner agrees to give any other nation.[92] Similarly, Laycock argues that in free exercise cases, the relevant question is not how many analogous secular activities are regulated, but rather "whether a single secular analog is *not* regulated."[93] For adherents of this view, just one analogous exemption is enough to violate the *Smith* standard of general applicability.

The most-favored nation approach seemingly gives priority to the protections of the Free Exercise Clause, and Justice Kavanaugh enthusiastically adopted the framework in *Calvary Chapel*.[94] But despite its advantages, the approach does not purport to solve the central problem of how to decide whether secular conduct is analogous. Rather, it claims only that "[t]he constitutional right to free exercise of religion is a right to be treated like the most favored *analogous* secular conduct."[95]

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[89] Josh Blackman, *Another Way to Think About* South Bay*: Why Allow Protest, but Not Prayer?*, REASON: VOLOKH CONSPIRACY (June 3, 2020, 1:09 PM), https://reason.com/2020/06/03/another-way-to-think-about-south-bay-why-allow-protest-but-not-prayer [https://perma.cc/8CBJ-NSAJ].

[90] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief). Justice Kavanaugh did reaffirm his commitment to the analogical analysis favoring the plaintiffs in his *South Bay I* dissent, however. *See id.* at 2615.

[91] Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49; *see also id.* at 50 ("If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons.").

[92] *See Most Favored Nation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[93] Laycock & Collis, *supra* note 20, at 22.

[94] *See Calvary Chapel*, 140 S. Ct. at 2612–13 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

[95] Laycock & Collis, *supra* note 20, at 22–23 (emphasis added).

Because "the meaning of 'similarly situated' is in the eye of the beholder,"[96] even courts willing to apply a most-favored nation framework are left without guidance in the threshold inquiry of what constitutes "analogous secular conduct."

How may a court avoid this conundrum? One solution is to let go of the analogy mindset altogether and replace it with a new approach: a regime that requires the government to justify disparate treatment of religious conduct regardless of how "analogous" it may be to favored secular activity, or else face strict scrutiny. Framing the inquiry this way places the burden squarely on the shoulders of the government when the vital right to free exercise of religion is at stake, giving greater meaning to the promises of the First Amendment.

A. Beyond Analogy: A New Free Exercise Framework

Constitutional mandates require "machinery . . . that can transform rights proclaimed on paper into practical protections."[97] This Note proposes one such mechanism for cases involving secular exemptions to laws burdening religious activity: a presumption in favor of religious plaintiffs in the form of an evidentiary burden on the government. Under this framework, the government cannot simply rely on a subjective claim that any favored secular activity is not analogous. Instead, it must show by clear and convincing evidence that its unfavorable treatment of religious activity is justified. The court must apply strict scrutiny in evaluating the plaintiff's claims when this burden cannot be met. Applied consistently, this test would replace untethered judicial analogizing with a more "inflexible and uniform adherence to the rights of the Constitution."[98]

This framework requires a three-step process. First, the plaintiff must point to a secular institution or activity that has been granted an exemption from the law at issue. Once the plaintiff does so, the burden of proof shifts to the government regardless of whether the secular exemption is "analogous." This approach ensures that the judicial inquiry *begins*, not ends, with a claim of disparate treatment. In giving plaintiffs a low bar to clear, this first step is much like the initial showing required by a defendant in a *Batson*[99] challenge: "Once the [plaintiff] makes a prima facie showing, the burden shifts to the State . . . ."[100]

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96 Rothschild, *supra* note 17, at 290.

97 Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 282 (1988) (quoting Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1413 (1983)).

98 THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

99 Batson v. Kentucky, 476 U.S. 79 (1986).

100 *Id.* at 97; *see also* Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam).

Second, the court must grant the government an opportunity to justify its disparate treatment of religious and secular activity. As Justice Kavanaugh wrote in *Calvary Chapel*, when a religious plaintiff is excluded from a favored group, "the . . . question is whether the government has provided a *sufficient justification* for the differential treatment and disfavoring of religion."[101] In most cases, the government may overcome this burden with a showing of clear and convincing evidence. One central purpose of requiring a standard of proof is to "indicate the relative importance attached to the ultimate decision."[102] Because the Supreme Court has long emphasized the unique importance of First Amendment rights,[103] a showing of clear and convincing evidence — a standard used "to preserve fundamental fairness"[104] — is likely appropriate.[105] Clear and convincing evidence must be presented "when the individual interests at stake . . . are both 'particularly important' and 'more substantial than mere loss of money.'"[106] Religious plaintiffs' interests in their right to free exercise of religion surely fit this description.

What might it look like for the government to justify disparate treatment by clear and convincing evidence? As with all evidentiary showings, the answer may differ depending on the case. In the COVID-19 cases, it is easy to imagine the sort of evidence that would have sufficed. Studies showing that coronavirus transmission is more likely in a worship setting than in an exempted shopping mall or casino taking similar preventative measures, coupled with empirical evidence showing that proposed attendance restrictions are likely to be effective, would have been sufficient. Because the coronavirus pandemic constituted a rapidly unfolding emergency, expert testimony may have been more feasible than empirical studies. Such testimony, however, would need to fulfill the same role as the data would have done and comply with evidentiary requirements.[107] For instance, in seeking to uphold restrictions on religious activity but not protests, the state could not rely on testimony stating

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[101] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (emphasis added); *see also* 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 . . . [it] must justify why houses of worship are excluded from that favored class.").

[102] Addington v. Texas, 441 U.S. 418, 423 (1979).

[103] *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[104] Santosky v. Kramer, 455 U.S. 745, 756 (1982); *accord id.* at 756–57 (collecting cases).

[105] In contrast, a preponderance of the evidence standard is likely too low a standard when such important rights are at stake. *See Santosky*, 455 U.S. at 755 (explaining that the preponderance of the evidence standard "indicates . . . society's 'minimal concern with the outcome'" of cases in which it applies (quoting *Addington*, 441 U.S. at 423)).

[106] *Id.* at 756 (quoting *Addington*, 441 U.S. at 424).

[107] *See generally* FED. R. EVID. 702 (stating the evidentiary rule for expert testimony); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) (determining the relevant standard).

only that "[d]ifferent events present different levels of threat about the spread of COVID-19; for example, the risk is higher for an event involving people standing in one place than for one in which people are moving."[108] It must produce evidence that worship services constitute a unique, distinguishable threat to public health that exempted activities do not.

While the evidentiary burden required by this step is meant to hold the government to account, it should not be insurmountable. For one thing, context matters: the government could readily meet its burden in a wartime challenge to restrictions exempting only military installations and hospitals, for instance. Public health crises such as pandemics may also shift some inferences in the government's favor. As the Supreme Court noted in *Jacobson v. Massachusetts*,[109] even members of a free society may, "at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."[110] Unknown variables and high risks that might ordinarily prove fatal to the government's case should be considered more leniently in emergencies, when reliable data is unavailable; "In such circumstances, judicial scrutiny may recede to its lowest ebb, leaving room for an energetic response by the political branches . . . ."[111] Nevertheless, *Jacobson* itself noted that even emergencies cannot justify "a plain, palpable invasion of rights secured by the fundamental law"[112] — rights such as those guaranteed by the First Amendment. "While the law may take periodic naps during a pandemic, [courts should] not let it sleep through one."[113] The government's burden might lessen in exigent circumstances, but it should never dissolve.

Third, if the government cannot meet the required evidentiary showing, the court must apply strict scrutiny to the challenged restriction. Once again, this step does not constitute an immediate ruling in favor of the plaintiff. While first-year constitutional law classes may teach

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[108] Capitol Hill Baptist Church v. Bowser, No. 20-cv-02710, 2020 WL 5995126, at *9 (D.D.C. Oct. 9, 2020); *see also id.* ("If this assertion is making a scientific claim, it falls well short of the evidentiary standard in [*Daubert*].").

[109] 197 U.S. 11 (1905).

[110] *Id.* at 29. Courts adjudicating COVID-19 cases sometimes relied on *Jacobson* in putting a thumb on the scale in favor of the government. *See, e.g.*, *In re* Abbott, 954 F.3d 772, 786 (5th Cir. 2020) ("*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.").

[111] *Capitol Hill Baptist Church*, 2020 WL 5995126, at *7.

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

[113] Roberts v. Neace, 958 F.3d 409, 414–15 (6th Cir. 2020) (per curiam).

that strict scrutiny is "'strict' in theory and fatal in fact,"[114] constitutional scholars[115] and the Supreme Court itself[116] have rejected that myth. Indeed, the COVID-19 cases that applied strict scrutiny demonstrate that the inquiry can be a meaningful one. In each of those cases, "no one contest[ed]" that the government had "a compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus."[117] The first prong of the strict scrutiny test, requiring a compelling state interest, was therefore uniformly satisfied. Injunctions in such cases were granted only because the government failed to show that its restrictions were narrowly tailored to achieve its compelling interest — but this was no surprise when some restrictions on worship services required arbitrarily low numbers of participants, such as no more than ten people.[118] More reasonable restrictions may be capable of passing muster even under the stringent requirements of strict scrutiny.[119]

B. The Burden-Shifting Framework Applied

The constitutionally grounded approach proposed in this Part has many potential applications. Applied systematically, for instance, it would have yielded far more consistent reasoning in the COVID-19 litigation sketched in Part I. In each of those cases, plaintiffs pointed to secular institutions or activities that were given preferential treatment under state coronavirus restrictions. Had the burden been placed on the government to justify this treatment, states imposing burdens on religious activities would have been obliged to present evidence tending to support their restrictions. Courts would then have been able to make more informed and substantiated decisions, and in cases where the government's rationale fell short, they would have applied strict scrutiny as described above.

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114 Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

115 *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1305 (2007) ("For better or worse, . . . the Court has not consistently interpreted the strict scrutiny test as establishing that preferred rights must yield only to cataclysmic threats."); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006).

116 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment))); *see also* Missouri v. Jenkins, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring).

117 *Roberts*, 958 F.3d at 415.

118 *See, e.g.*, First Baptist Church v. Kelly, 455 F. Supp. 3d 1078, 1090 (D. Kan. 2020).

119 *See, e.g.*, Legacy Church, Inc. v. Kunkel, 455 F. Supp. 3d 1100, 1154 & n.12 (D.N.M. 2020) (declining to apply strict scrutiny but labeling challenged restrictions constitutional under strict scrutiny nonetheless); *cf.* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 188 (2020) (arguing that "most" coronavirus restrictions "are likely to be upheld" under "the normal scrutiny applied to comparable government incursions into civil liberties").

While the pandemic cases provide an especially relevant and vivid example, however, they are far from the only important context in which this framework would prove useful. Consider, for instance, suits brought by prisoners prevented from engaging in religiously mandated activity that is nonetheless allowed for secular reasons. A Muslim prisoner forbidden from growing a short beard for religious reasons despite the availability of medical short-beard allowances would benefit under this approach.[120] Given the state's willingness to allow beards in other circumstances, it is unlikely that the state could overcome the burden of proof necessary to justify treating religious requests differently. Similar logic would apply in cases brought by soldiers[121] and police officers[122] discouraged or denied permission to grow facial hair for religious reasons where medical and other exemptions exist.

Another context in which religious plaintiffs have struggled to gain equal footing with secular comparators is in government treatment of Native American sacred sites. In *Slockish v. U.S. Federal Highway Administration*,[123] the government "bulldozed a Native American sacred burial ground, destroyed an ancient stone altar used in religious ceremonies, cut down old growth trees that offered privacy for sacred rituals, and removed safe access to the site" in order to widen a highway.[124] Yet rather than demolishing wetlands lining the same highway, the government instead built a protective retaining wall to preserve them.[125] When Native American plaintiffs brought suit, a district court found that they could not "establish a substantial burden" on the free exercise of their religion because the government had not "coerced" them with sanctions or benefits.[126] But the plaintiffs could easily have pointed to secular interests receiving preferential treatment. If the burden had been placed on the government to justify its protection of wetlands but not Native American sacred sites, *Slockish* could very well have come out differently.

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120 *Cf.* Holt v. Hobbs, 135 S. Ct. 853, 865 (2015) (noting that "prisoners [we]re allowed to grow mustaches, head hair, or ¼–inch beards for medical reasons" despite the prison's refusal to allow a beard for religious reasons).

121 *See* Singh v. Carter, 168 F. Supp. 3d 216, 219 (D.D.C. 2016) ("Thousands of other soldiers are permitted to wear long hair and beards for medical or other reasons . . . .").

122 *See, e.g.*, Fraternal Ord. of Police Newark Lodge No. 12 v. Newark, 170 F.3d 359, 365 (3d Cir. 1999) ("[T]he Department provides medical — but not religious — exemptions from its 'no-beard' policy . . . .").

123 No. 08-CV-01169, 2018 WL 2875896 (D. Or. June 11, 2018).

124 Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1348 (2021); *see also id.* at 1348–50.

125 *See id.* at 1350.

126 *Slockish*, 2018 WL 2875896, at *1; *cf.* Barclay & Steele, *supra* note 124, at 1349 ("If the government bulldozed a cathedral, nothing would prohibit parishioners from still visiting that site and saying prayers while standing atop a pile of rubble. But no one would seriously say that the government had not interfered with religious exercise in that case.").

This burden-shifting framework could be useful even in difficult cases like *Fulton v. City of Philadelphia*.[127] In *Fulton*, heard by the Supreme Court last November, the City of Philadelphia stopped referring foster children to a Catholic foster-care service that would not certify same-sex couples as foster parents.[128] Both a federal district court and the Third Circuit declined to enjoin the City's actions.[129] On appeal to the Supreme Court, petitioners argued that the law at issue was not generally applicable under *Smith* because "[r]ace, age, religion, disability and other characteristics are considered — and can be dispositive" when providing foster care[130] and the City had granted its lawyers "carte blanche to give exemptions" from the relevant nondiscrimination law.[131] In other words, since the City had allowed discrimination based on other protected characteristics, it could not disallow such discrimination in this case.[132] The City argued in response that any exemption it had previously granted was not analogous to that sought by plaintiffs, and it approvingly cited Chief Justice Roberts's analogical reasoning in *South Bay I*.[133]

Under the framework considered here, the City would have borne the burden of proving that its refusal to provide an exemption for the petitioners was justified once the plaintiffs pointed to any secular exemption. The case becomes more complicated, however, in light of the fact that while the City "recognize[d] a slew of exceptions, . . . none of them [we]re for the same-sex anti-discrimination requirement."[134] During oral argument, Justice Barrett recognized this wrinkle and questioned whether the petitioner's exemption-based argument presented an "apples-to-apples comparison" — that is, whether the other exemptions

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[127] 140 S. Ct. 1104 (2020) (mem.) (granting certiorari).

[128] *See* Fulton v. City of Philadelphia, 922 F.3d 140, 147–50 (3d Cir. 2019), *cert. granted* 140 S. Ct. 1104 (2020).

[129] *Id.* at 165.

[130] Reply Brief for Petitioners at 7, Fulton v. City of Philadelphia, No. 19-123 (U.S. Sept. 14, 2020).

[131] Brief for Petitioners at 17, *Fulton*, No. 19-123 (U.S. May 27, 2020); *cf.* Emp. Div. v. Smith, 494 U.S. 872, 884 (1990) ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion))).

[132] *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (internal quotation marks omitted) (omission in original) (quoting Fla. Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment))).

[133] *See* Brief for City Respondents at 28–29, *Fulton*, No. 19-123 (U.S. Aug. 13, 2020).

[134] Transcript of Oral Argument at 53, *Fulton*, No. 19-123 (U.S. Nov. 4, 2020), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-123_0758.pdf [https://perma.cc/LVR7-BQCY].

were truly analogous to that sought by the plaintiffs.[135] This issue divided not only counsel during oral argument,[136] but also commentators who had listened to it.[137] *Fulton* thus demonstrates that the Court cannot fully avoid considering "relevant factor[s] . . . in deciding whether a law is generally applicable."[138] Still, this Note's approach would anchor the Court's inquiry not around whether the purported exceptions were *analogous*, but instead whether they were *justified*. Analysis would focus on the City's factual claims that it had "never made an exception to its non-discrimination requirement for anyone"[139] and that it did not exercise the sort of case-by-case discretion prohibited by *Smith*.[140] If the City *had* made exemptions, the focus would shift to the evidence justifying those exceptions and not whether they were, so to speak, apples or oranges.

While the purpose of this framework is to honor the protections of the First Amendment in free exercise cases involving analogy, it bears repeating that it is not a smokescreen for universal plaintiff victories. Restrictions are more likely to be upheld when they seek to mitigate serious public health issues in the face of uncertain facts. Beyond emergencies, states may sometimes have legitimate reasons to treat religious activity differently (and less favorably) than some secular activity, especially in highly regulated environs such as correctional facilities and the military. The constitutional constraints suggested here should not be taken to suggest that religious liberty has no limits. "[W]ith few exceptions, constitutional rights are not absolute; a balance must be struck,"[141] and even the cherished right of free exercise of religion is a part of that balance. Nevertheless, this standard's placement of the burden of proof on the government would give tangible effect to the protections of the

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135 *Id.*

136 *Compare id.* at 54 (arguing that the City could not separate other "exemptions" from the one sought by plaintiffs), *with id.* at 75 (arguing that no "exceptions" existed other than rare, unique "application[s] of the best interests of the child").

137 *Compare* Marty Lederman, *Thoughts on the* Fulton *Oral Argument*, BALKINIZATION (Nov. 5, 2020, 9:10 PM) https://balkin.blogspot.com/2020/11/thoughts-on-fulton-oral-argument.html [https://perma.cc/3VGF-3W4U] ("[T]he alleged exemptions don't offer an 'apples-to-apples' comparison . . . . It's more like apples-to-elephants."), *with* Eugene Volokh, *Prof. Michael McConnell (Stanford) on* Fulton v. City of Philadelphia, REASON: VOLOKH CONSPIRACY (Nov. 6, 2020, 8:02 AM), https://reason.com/volokh/2020/11/06/prof-michael-mcconnell-stanford-on-fulton-v-city-of-philadelphia [https://perma.cc/U759-JCWS] ("[T]he City carves out other exceptions from its non-discrimination policy, for other foster-care organizations; moreover, there is a catch-all exceptions policy big enough to drive a truck through.").

138 Transcript of Oral Argument, *supra* note 134, at 53.

139 Brief for City Respondents, *supra* note 133, at 3; *see also* Transcript of Oral Argument, *supra* note 134, at 76.

140 *See* Volokh, *supra* note 137; Emp. Div. v. Smith, 494 U.S. 872, 884 (1990).

141 David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 956 (2002).

Free Exercise Clause, which "bars even 'subtle departures from neutrality' on matters of religion."[142]

CONCLUSION

Religious liberty is among the most precious rights the American government guarantees to its citizens — the right to believe, and live, in accordance with one's own conscience and faith. The recent COVID-19 pandemic challenged the nation's commitment to this guarantee. But while unanticipated, this threat to religious freedom was not truly "unprecedented."[143] War, unrest, and panic have frequently tested the resilience of vital constitutional protections.[144] And even in peacetime, our First Amendment rights erode when "[s]ecular society sees religion — and public worship in particular — as little more than a cultural expression or a lifestyle choice."[145]

In light of these dangers, judges should take seriously their duty to uphold the constitutional command that the state not abridge the free exercise of religion. The framework outlined in this Note pays careful attention to this constraint, replacing ad hoc judicial analogizing with a burden-shifting approach favoring religious claims of unequal treatment. Government officials seeking to disfavor religious activity must demonstrate that they are justified in doing so. When they cannot, their actions should be subject to strict scrutiny so as to guard against "well-intentioned, but often dangerous breach[es] of the boundaries that protect the free exercise of religion."[146] Courts must be vigilant in protecting religious liberty against even majoritarian threats. If they are not, Americans may one day discover that they have traded their constitutional birthright for a mess of populist pottage.

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[142] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993)).

[143] *Cf.* Jay Van Bevel (@jayvanbavel), TWITTER (May 2, 2020, 12:59 PM), https://twitter.com/jayvanbavel/status/1256629479394480128 [https://perma.cc/P3FE-YYV8] ("We are living through an unprecedented use of the term 'unprecedented.'").

[144] *See generally, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Sedition Act of 1798, ch. 74, 1 Stat. 596.

[145] Student, *supra* note 81; *see also* Jeffrey A. Pojanowski, *Teaching Jurisprudence in a Catholic Law School*, 58 J. CATH. LEGAL STUD. 75, 82 (2019) ("With nonjudgmentalism, casual emotivism, and 'you do you' ensconced as leading doctrines of our day, invoking a universal moral order or objective truth . . . is decidedly countercultural, and not in the way that generates a frisson of bad-boy affirmation in an iconoclastic age.").

[146] David A. Bednar, *And When He Came to Himself*, CLARK MEMORANDUM, Fall 2020, at 12, 21.