THE PRINCIPLE AND POLITICS OF LIBERTY OF CONSCIENCE

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INTRODUCTION

"[W]hat should replace *Smith*?"[1] That was Justice Barrett's main question in *Fulton v. City of Philadelphia*. She expressed serious misgivings about the governing free exercise rule, set out in *Employment Division v. Smith*,[2] according to which laws that are neutral and generally applicable do not draw a presumption of invalidity simply because they burden religion.[3] But she also hesitated to embrace the leading alternative, according to which a law that substantially burdens free exercise cannot be applied unless the government can show that it is narrowly tailored to the pursuit of a compelling interest. That "strict scrutiny regime" would raise a series of difficult questions for her.[4] Reluctant to face them unnecessarily, she instead joined the majority opinion, which exempted a religious organization from Philadelphia's civil rights requirement for narrower reasons.

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[1] *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring). Justice Kavanaugh joined her opinion and Justice Breyer joined all but the first paragraph, which endorsed "textual and structural arguments against *Smith*." *Id.*

[2] 494 U.S. 872 (1990).

[3] *See id.* at 878–79.

[4] *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring) (raising questions about the differential treatment of entities and individuals, the distinction between direct and indirect burdens, and the proper level of scrutiny).

Altogether, five Justices criticized the core *Smith* rule — joining a sixth, Justice Breyer, who had long voiced reservations.[5] No Justice defended that rule in *Fulton* or any other recent decision.[6] Given the lack of enthusiasm, it is reasonable to think that overruling *Smith* remains a possibility.[7] What may make the prospect even more thinkable for Justice Barrett is her realization that "swapping *Smith*'s categorical antidiscrimination approach" need not mean adopting "an equally categorical strict scrutiny regime."[8] More "nuanced" models are available,[9] and they may prove attractive to a relatively broad coalition of constitutional actors, not only on the Court but more widely as well.

Of course, it is far from inevitable that *Smith* will be formally overruled or explicitly abandoned. The Roberts Court may prefer to cut a series of fine distinctions without reformulating any landmark precedents. A similar doctrine of details seems to be governing in the Establishment Clause area, with major precedents repeatedly criticized and repeatedly bypassed without being overturned outright.[10]

Yet the strain is showing. Chief Justice Roberts's majority opinion in *Fulton* turned on a technicality that was difficult to explain to

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[5] Justice Alito, joined by Justices Thomas and Gorsuch, called for overruling *Smith* and replacing it with a compelling interest test for all substantial burdens on free exercise. *Id.* at 1924 (Alito, J., concurring in the judgment) ("*Smith* was wrongly decided. . . . If S*mith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest. Whether this test should be rephrased or supplemented with specific rules is a question that need not be resolved here because Philadelphia's ouster of [Catholic Social Services] from foster care work simply does not further any interest that can properly be protected in this case."). For Justice Breyer's view, see *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) ("I agree with Justice O'Connor that the Court should direct the parties to brief the question whether [*Smith*] was correctly decided, and set this case for reargument.").

[6] *Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring in the judgment) ("[N]ot a single Justice has lifted a pen to defend [*Smith*].").

[7] Prominent scholars have already started to answer Justice Barrett's question. *See* Thomas Berg & Douglas Laycock, *Protecting Free Exercise Under* Smith *and After* Smith, SCOTUSBLOG (June 19, 2021, 6:37 PM), https://www.scotusblog.com/2021/06/protecting-free-exercise-under-smith-and-after-smith [https://perma.cc/D7HQ-CMJU] ("[W]e want to begin to address Barrett's questions. We think the compelling-interest test should usually govern when a generally applicable law substantially burdens religion."); Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, CATO SUP. CT. REV. (forthcoming 2021) (on file with the Harvard Law School Library).

[8] *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

[9] *Id.* (noting that "this Court's resolution of conflicts between generally applicable laws and other First Amendment rights — like speech and assembly — has been much more nuanced" than under a strict scrutiny regime).

[10] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) ("If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it.").

nonspecialists. He decided that the Free Exercise Clause protected a religious child welfare agency that refused to certify same-sex couples as foster parents.[11] Strict scrutiny applied because Philadelphia had created a "system of individual exemptions" from its antidiscrimination rules, which otherwise shielded LGBTQ+ couples.[12] According to this esoteric exception to *Smith*, Philadelphia's ability to grant exemptions from the antidiscrimination rule was enough to trigger a presumption against its regulation of the religious agency.[13] And *Fulton* was only the most recent free exercise decision with overwrought reasoning.[14] Unless the Court is willing to settle for contrived justifications for its outcomes, it will have to bring greater coherence to religious freedom law before too long.

What is more, the political conditions for a doctrinal overhaul are surprisingly favorable, despite the polarization that otherwise divides judges, lawmakers, and the country. On the Court, the more liberal Justices have not rejected the idea of rethinking the main free exercise rule.[15] And among scholars, opinions do not neatly sort along partisan lines.[16] So although the politics of free exercise exemptions have shifted

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[11] *Fulton*, 141 S. Ct. at 1882.

[12] *Id.* at 1878.

[13] *Id.* Philadelphia then failed to overcome the presumption, according to the Court, when it did not show that it had a compelling interest in applying its antidiscrimination rule to the religious agency. *Id.* at 1881–82.

[14] *See, e.g.*, Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 135 (2018) (suggesting that the Court in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018), failed to fulfill the "'duty of civility,' which requires providing sufficient justifications for legal decisions" (footnote omitted) (quoting JOHN RAWLS, POLITICAL LIBERALISM 217 (1st ed. 1993))).

[15] Justice Breyer has long questioned the wisdom of *Smith*, *see supra* note 5. Liberals could be found on both sides of the rule when it was announced in *Smith* itself, though it was principally seen as a conservative decision. *See* Emp. Div. v. Smith, 494 U.S. 872, 873–90 (majority opinion joined by Justice Stevens); *id.* at 891–903 (O'Connor, J., concurring in the judgment) (joined by Justices Brennan, Marshall, and Blackmun as to Parts I and II, which dissented from the new free exercise rule).

[16] For examples of scholars to the left of the political center who have criticized *Smith*, see STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS 16–17 (2009); Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RSRV. L. REV. 55, 57 (2006); Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 154–55 (2004); and James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 739–42. Of course many conservatives have called for its replacement as well, among whom perhaps the leading example is Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1152–53 (1990) [hereinafter McConnell, *Free Exercise Revisionism*]. To the left of center, *Smith* or something similar has been supported by numerous academics, including Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 572–73 (1998); Leslie C. Griffin & Marci A. Hamilton, *Why We Like* Smith*: We Want Neutral and General Laws to Prevent Harm*, VERDICT (Apr. 20, 2021), https://verdict.justia.com/2021/04/20/why-we-like-smith-we-want-neutral-and-general-laws-to-prevent-harm [https://perma.cc/2MTL-CGPA]; and Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, AM. CONST.

over time, with many liberals and progressives now wary of a measure that they once supported as essential to the protection of religious minorities, that change has not resulted in a consensus among them in favor of the governing rule.

Given that some on the political left are open to rethinking *Smith*, it is surprising that they have not coalesced around an answer to Justice Barrett's question. That said, elements of an alternative have been proposed by legal academics,[17] as well as by those writing in political theory.[18] This Comment builds on their work. At the present moment of reexamination and possible reformation, it is important to articulate a clear alternative, both to the existing free exercise interpretation and to the strict-scrutiny option, which was defended in *Fulton* by Justice Alito.[19]

This Comment sets out a model for free exercise that supports exemptions from general laws while sustaining the essential conditions for a democratic society. *Liberty of conscience* interprets free exercise to require a rebuttable presumption of unconstitutionality against laws and policies that substantially burden people's most profound beliefs and practices.[20] It thereby protects them from government actions that interfere with their basic freedom or with their standing as coequal partners in a society that is engaged in a cooperative enterprise of self-government. Because it shields everyone who is exercising a fundamental right, it counts as a liberty principle. Yet it is also egalitarian, and it implements that commitment by incorporating legal mechanisms that are designed to prevent powerful actors from using exemptions to undermine the predicates of any democracy. These mechanisms combine to make up the overall framework of liberty of conscience, and they include: a moderated standard of scrutiny rather than maximum scru-

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SOC'Y SUP. CT. REV. (forthcoming 2021) (on file with the Harvard Law School Library). Those on the right who support *Smith* include Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815, 1816 (2011); and Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1470 (1999).

17 *See, e.g.*, 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 142–56 (2006); Oleske, *supra* note 16, at 740–41; Brownstein, *supra* note 16, at 57–60.

18 *See, e.g.*, CÉCILE LABORDE, LIBERALISM'S RELIGION 217–21 (2017); Alan Patten, *The Normative Logic of Religious Liberty*, 25 J. POL. PHIL. 129, 143–49 (2017).

19 *See supra* note 5 (describing Justice Alito's opinion).

20 The term liberty of conscience has a long history, though it is being retrofitted here to denote a specific set of constitutional commitments that reconcile the basic liberty with democratic imperatives. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 246 (Ian Shapiro, ed. 2003) ("[L]iberty of conscience is every [person's] natural right, equally belonging to dissenters as to themselves."); *see also* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM — AND WHAT WE SHOULD DO ABOUT IT 27, 32–33 (2005) ("Liberty of conscience provided the principle motivating the American experiment in the nonestablishment of religion. But this was liberty of conscience with a distinctly American twist.").

tiny, a commitment to the judgment that the government has a sufficiently strong interest in protecting civil rights, a reasonable limit on third-party harms, and a fair division of social responsibility. This nuanced approach is grounded in basic commitments, and it is conceivable as a reconstruction of the free exercise tradition.[21]

However, this Comment also warns that the ideal framework is unlikely to be attractively realized under nonideal conditions — in particular, our contemporary circumstances of extreme political polarity. Even if the proposal were to win majority support, it might only give the Roberts Court greater leeway to extend a recent pattern of decisionmaking that favors religious actors.[22] Liberty of conscience has an open texture that may well increase the power of courts to wield judicial review in a manner that implements a problematic politics. Legal rules can matter, even when results are overdetermined by interests in addition to ideas. Those concerned about conditions of equal citizenship, and the prospects for cooperative governance more generally, therefore have good reason to pause before throwing their support behind free exercise exemptions under the social and political conditions that mark this moment in history.

Part I describes the fundamentals of liberty of conscience. Minorities in matters of conscience presumptively should be free from substantial government burdens, not only to preserve the moral independence that allows them to hold their republican representatives to account, and not only to shield against a majoritarian political process that is liable to oppress or overlook them, but also simply to protect against disproportionate burdens that can be relieved at acceptable cost. Basic democratic commitments support the availability of exemptions from general rules for the exercise of conscience, along with limitations on that availability.

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[21] *See* RONALD DWORKIN, LAW'S EMPIRE 65–68 (1986) (setting out interpretation's twofold criteria of fit and justification). In practice, the case law on free exercise has not consistently adhered to the main rule of *Smith*. *See infra* section II.B, pp. 303–07 (describing the ways the Court has departed from *Smith* without convincing justification). Modalities of text, structure, and history are also compatible with free exercise exemptions. *See, e.g.*, Laycock & Berg, *supra* note 7 (manuscript at 5).

[22] The only exception, putting aside the shadow docket, is the travel ban case, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). On the shadow docket, the Court did once deny a death row inmate access to an imam at the time of execution, though more recently it all but confessed error. *Compare* Dunn v. Ray, 139 S. Ct. 661, 661 (2019), *with* Dunn v. Smith, 141 S. Ct. 725, 726 (2021). Early in the pandemic, moreover, the Court twice ruled against churches on the shadow docket. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.). As the crisis stretched on, the Court repeatedly issued orders in favor of churches. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1297–98 (2021) (mem.) (granting one such application and listing other orders). One exception came in a case in which the government's school-closing order was about to expire. *See* Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527 (2020).

Section I.A distinguishes the model from leading theories grounded in equality or neutrality. It also clarifies briefly that free exercise exemptions properly protect not just religion as such but a broader class of beliefs and practices, specified by constitutional values and signified here by the term conscience. In this section and the succeeding three, the Part regularly references a developed literature rather than constructing a freestanding defense. The Comment brings together components of an egalitarian conception of liberty of conscience.

Section I.B envisions that the presumption can be overcome by important government interests, including combatting structural injustice through civil rights protections. Section I.C draws out an important but often implicit constraint on freedom of conscience, namely that it does not protect believers against responsibilities they bear to contribute to a fair framework of social cooperation. Paying taxes is the classic example of a duty that does not normally admit exemptions, however much it might burden conscience. Separately, section I.D explains that exemptions for conscience must be tempered by fairness to others and by avoidance of harm to others.

Sections I.E and I.F argue briefly that any exemption doctrine must be supplemented by a commitment to equality on the basis of religion and conscience. First, section I.E supports a stronger presumption against laws and policies that discriminate on the basis of faith or freethinking, either facially or in their purpose.[23] Widespread agreement exists on this point even today, though that consensus does not yet extend to the antisubordination interpretation that the section favors. Section I.F summarizes a distinct conception of free exercise equality, equal value, which is fully examined in a companion article.[24] Language in *Fulton* reaffirmed the principle,[25] which had been developed in a series of orders concerning restrictions on religious gatherings in the context of the Covid outbreak.[26] Equal value is compatible with liberty of conscience — but both approaches are susceptible to political dynamics.

Part II cautions that liberty of conscience is unlikely to be adopted completely and administered appealingly. Political conservatives on the Roberts Court and elsewhere can be expected to continue to deploy free

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[23] *See infra* section I.E, pp. 291–92.

[24] Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. (forthcoming 2021) (on file with the Harvard Law School Library) [hereinafter Tebbe, *The Principle and Politics of Equal Value*].

[25] *Fulton*, 141 S. Ct. at 1877 ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.").

[26] The most important of these orders was in *Tandon v. Newson*, 141 S. Ct. 1294, where the Court found that "California treats some comparable secular activities more favorably than at-home religious exercise." *Id.* at 1297.

exercise law to protect religious actors and to constitutionalize laissez-faire economics. However much traditional believers are being burdened by aggressive secular programs, as they sincerely believe they are, the Court's decisionmaking on free exercise is patterned in ways that look more like privileging than protecting.[27]

Part II begins with *Fulton* itself. The rule used there, which again applies strict scrutiny to any system of individualized exemptions that fails to accommodate religion,[28] is not completely unfamiliar. Yet it has a checkered past and present. Justice Scalia engineered the legal device solely to allow the *Smith* Court to remake free exercise law without overruling any precedents. Until *Fulton*, the individualized exemption rule had never been relied on exclusively to support a holding in the Supreme Court.[29] And there, the Roberts Court dusted off the rule for a strikingly similar purpose: to whitewash a turnabout, so that it could continue to remake free exercise law to more strongly empower religious interests without formally repudiating any cases. Understood in this political manner — and only this way — *Fulton* made sense and was remarkably successful. It not only achieved unanimity as to the outcome, but it avoided all criticism of its reasoning from the more liberal Justices. Although its justification was overtaxed, its politics were unambiguous.

Extending that analysis, section II.B contends that the Roberts Court has repeatedly ruled in favor of religious actors while tolerating contradictions within existing doctrine on religious freedom. Decisions on matters like the ministerial exception, public accommodations, and the travel ban are difficult to square with preexisting law without relying on artificial distinctions. Relatedly, section II.C explains how the Court is increasingly willing to accept religious exemptions that harm others, in contravention of its own holdings and the requirement of evenhandedness. Section II.D observes that the Court's approach to religious exemptions differs from its treatment of incidental burdens on other fundamental rights, especially freedom of speech, though it acknowledges some justifications and complexity. Section II.E emphasizes that the Court is finding ways to excuse violations of civil rights laws, even though those laws have been held to be supported by the strongest possible government interests. Finally, section II.F reviews recent empirical evidence that is consistent with an explanation of partisan politicking.

The Conclusion returns to Justice Barrett's question and considers how it should be answered in light of this Comment. Someone could

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[27] *Cf.* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1250–51 (1994) (distinguishing between privileging and protecting religion).

[28] *Fulton*, 141 S. Ct. at 1878.

[29] For a full discussion of the relevant precedent, see *infra* note 180.

agree that liberty of conscience presents an ideal approach to free exercise exemptions, and they could also accept that it is unlikely to be attractively applied under nonideal conditions. They would then face a distinct question of how to proceed. At least three options are open to lawyers, judges, and academics who wish to promote democratic commitments.

One possibility would be to continue to press for the ideal framework for free exercise exemptions, and to dissent powerfully and persistently when it is rejected or implemented selectively. That would mean cooperating with a reformulation of *Smith* while insisting on guardrails that ensure the political equality of all members of the democratic community. A difficulty with this choice is that it increases the probability that a presumption against substantial burdens will be adopted, but in a version that will prove more harmful than the status quo. If liberty of conscience is more permissive than the current constitutional framework, and if a more permissive rule would empower a problematic politics, then advocating for it may be counterproductive.

Another option would be to argue for a second-best solution, such as sticking with the rule of *Smith* for pragmatic reasons. However, the Court has found ample room to implement its preferences under the extant legal regime as well. As Part II suggests, the majority may even prefer to obscure constitutional change by executing it under prevailing rules. Affirmatively promoting those rules, even as a second-best solution, may feel not only unfortunate but also ineffective.

A third alternative would be to simply let Justice Barrett's question go unanswered. Resources could then be devoted to arguing for the best outcomes in particular cases, leaving the framework of free exercise for another day. That tactic might end up looking uncomfortably like the Roberts Court's doctrine of details, though on behalf of different outcomes. Ultimately, the choice among these three is a question of strategy that deserves its own treatment. What is clear is that judges, lawyers, and academics face hard choices and that their decisions will shape a key element of constitutional law at a consequential moment in history.

I. THE PRINCIPLE

Members of a democracy enjoy certain basic liberties, among which is liberty of belief, conscience, or religion.[30] One way to account for this common commitment is to say that persons should be regarded as

[30] *See* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 12 (2017) ("[R]eligious freedom itself is a foundational value. . . . [C]urrent constitutional law actually *underprotects* free exercise by providing too few exemptions from general laws.").

having moral capacities.[31] And the exercise of those capacities is safeguarded by a set of basic liberties — freedoms not only of conscience and religion, but also of thought, opinion, speech, and association.[32]

Drawing on the social contract tradition, we could say that no one engaged in that kind of cooperative project would reasonably want to impose on others the strains of conscience and commitment that would result if government were to burden their deepest beliefs or core aspects of their moral, spiritual, or philosophical identity.[33] Oppression of that sort is something all reasonable people would avoid for themselves — and they would recognize a similar need in others.[34]

We can justify liberty of conscience not only by emphasizing an individual's deliberation and choice among beliefs, but also by recognizing the constitutive importance of the rituals, communities, or practices with which they closely identify. This understanding avoids a Protestant bias that emphasizes individualistic choice and belief, given that many people experience their spiritual foundations as given rather than chosen, or communal rather than individualized, or liturgical rather than theological. Regardless of these differences, people deserve to be able to act with spiritual integrity, to have an opportunity for self-determination.[35]

Additionally, and importantly, freedom of religion and conscience is necessary for the functioning of a democratic republic. No collectivity engaged in a project of cooperative government could fatally compromise its members' independence, which is required if they are to maintain the critical distance from their political representatives that is necessary to hold them to account.[36]

However specified and justified, the commitment to a basic liberty of conscience is essential for protecting against persecution and injustice.

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[31] *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 18–19 (Erin Kelly ed., 2001).

[32] *See id.* at 44–45. For one influential formulation of relevant rights, see G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948) ("Everyone has the right to freedom of thought, conscience and religion . . . ."); *id.* at art. 19 ("Everyone has the right to freedom of opinion and expression . . . ."); and *id.* at art. 20 ("Everyone has the right to freedom of peaceful assembly and association.").

[33] *See* RAWLS, *supra* note 31, at 103–04 (discussing the "strains of commitment"); LABORDE, *supra* note 18, at 200–01 (same).

[34] *See* RAWLS, *supra* note 31, at 6–7 (defining reasonable persons).

[35] *See* LABORDE, *supra* note 18, at 205 (guarding against "bias[] toward individualistic notions of autonomy or Protestant modes of belief"); Patten, *supra* note 18, at 144 ("[S]elf-determination need not imply any exercise of choice or autonomy; it simply means having the opportunity to pursue and fulfill the ends that one in fact has.").

[36] *Cf.* Robert C. Post, Essay, *Subsidized Speech*, 106 YALE L.J. 151, 153 (1996) ("First Amendment jurisprudence conceptualizes public discourse as a site for the forging of an independent public opinion to which democratic legitimacy demands that the state remain perennially responsive."); STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 53–54 (1998) (discussing the role of religion in critique of the government).

Over and over again, governments have interfered with practices and rituals not just by targeting them, but also by regulating generally in ways that imposed unjustified burdens. Muslim inmates have been unable to grow beards because of prison rules,[37] Native Americans have faced destruction of sacred grounds by government construction of roads,[38] Orthodox Jews have been barred from wearing yarmulkes in the military,[39] Amish parents have been directed to send their children to school after the age at which education was consistent with salvation,[40] Native Americans have been exposed to criminal liability for using peyote in sacred rituals,[41] and so forth. Each of these policies was neutral on its face and in its intent, each threatened to seriously burden a religious practice, and each was modified to accommodate adherents, either by courts[42] or by legislatures.[43] Without protection that goes beyond formal equality, constitutional law would leave these observances vulnerable to injustice.[44]

Liberty of conscience applies a presumption of unconstitutionality to government actions that substantially burden religion or conscience.[45] It differs from neutrality and equality conceptions because its threshold concern is with free exercise independent of any comparative analysis.[46] Though it therefore counts as a liberty conception, it also incorporates countervailing democratic values in several ways: by making the presumption rebuttable if the government can show that its policy is needed to protect an important state interest,[47] by ensuring fairness to

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37 Holt v. Hobbs, 574 U.S. 352, 356 (2015).

38 Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988).

39 Goldman v. Weinberger, 475 U.S. 503, 504–05 (1986).

40 Wisconsin v. Yoder, 406 U.S. 205, 207–09 (1972).

41 Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

42 *See Holt*, 574 U.S. at 369–70; *Yoder*, 406 U.S. at 234–36.

43 *See* Smith River National Recreation Area Act, 16 U.S.C. § 460bbb (protecting the area through which the road would have been built in *Lyng*); 10 U.S.C. § 774 (effectively reversing *Goldman v. Weinberger*, 475 U.S. 503); 42 U.S.C. § 1996a (reversing the outcome in *Smith* as to federal law).

44 *See* LABORDE, *supra* note 18, at 199 (giving similar examples and concluding "neutrality of justification is not sufficient"). Professors Christopher Eisgruber and Lawrence Sager try to protect the liberty of spiritual minorities within equality, but sometimes they cannot because there are no available comparators. *Id.* at 56–57 (discussing and critiquing their approach).

45 For more on the term's origins, see *supra* note 20.

46 Substantive neutrality, a leading theory, requires the government to minimize incentives either for or against observance — a requirement of symmetry that is inherent in neutrality and that turns out to be difficult to satisfy in practice. *See* Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 701–02 (2005). Though the framework here will trigger a presumption in many of the same situations, it differs conceptually by asking only whether conscience is unduly burdened. *See infra* pp. 279–80.

47 *See infra* section I.B, pp. 281–85.

others and avoiding harm to others,[48] and by enforcing a responsibility to support a fair framework for cooperative government.[49]

Protection for conscience will also shield members of dominant groups such as traditionally privileged religious denominations. How is that consistent with democratic ideals? Oftentimes, powerful interests will not require rights — they will be able to protect themselves through the exercise of political leverage. Sometimes, however, they will find themselves on the other side of regulation, perhaps in unusual local jurisdictions where they lack social power or perhaps in unusual political moments on the national level. Where and when that happens, it may become appropriate to protect them against government. A constitutive feature of equal liberty, after all, is that it shields everyone against unfair exercise of state power. Where traditionally privileged actors come up against the equality interests of subordinated people, however, the framework relies on other essential features, such as that the presumption in favor of conscience can be overcome by the government's interest in enforcing laws that are tailored to an important interest — with civil rights measures as the paradigmatic example. Tempered by caveats that have withstood scrutiny over time,[50] liberty of conscience must give way to the governmental imperative to dismantle structural injustice that stratifies society in a manner that is inimical to democracy.[51] Subsequent sections in this Part explicate those features or constraints.

Why should a right to conscience, even if conceived correctly here, be protected by exemptions from general laws, rather than through a model that protects only against discrimination? A simple answer is that government can burden minority conscience just as readily through laws that do not discriminate either on their face or purposefully, as in the examples described above.[52] Enforcing liberty through equality rules also presents a problem of constitutional luck — the difficulty that protection for freedom of conscience depends on the happenstance of whether some other interest is regulated more favorably.[53] Critics of liberty rights may object that religious exemptions privilege believers

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[48] *See infra* section I.C, pp. 285–88.

[49] *See infra* section I.D, pp. 288–91.

[50] *See infra* pp. 283–85.

[51] *See* TEBBE, *supra* note 30, at 25–36, 115–98 (describing a coherentist approach to conflicts of rights that seeks a reflective equilibrium and sketching the outlines of resolutions in the areas of public accommodations, employment, public officials, and government funding).

[52] *See* cases cited *supra* notes 37–41 and accompanying text; *see also* Greenawalt, *supra* note 16, at 154–55 (arguing that small religious minorities may be underprotected by the rule of *Smith*).

[53] *See* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 629 (2003); Tebbe, *The Principle and Politics of Equal Value*, *supra* note 24 (manuscript at 49) (discussing this argument more fully).

over others with equally profound and valuable reasons for avoiding regulation, or that they unfairly entail harms to other private citizens. Limits on exemptions properly incorporate those objections — again, as described below.[54]

Why should exemptions be provided through judicial review, rather than legislatively or through executive action? Some of the most prominent and enduring objections to free exercise protections against general laws have concerned the allocation of authority to judges in a system of separated powers. In *Smith* itself, for example, Justice Scalia argued that the nation would be "courting anarchy"[55] if it provided free exercise accommodations from general laws and that it was "horrible to contemplate" judicial balancing of religious interests against public ones.[56] And today, prominent scholars argue that judicially managed religious exemptions cannot be administered without intolerable incursions on the rule of law.[57] Yet the *Smith* doctrine has not itself proven immune to contradiction or complexity.[58] Nor has the administration of strict scrutiny in statutory contexts seemed to be markedly more chaotic.[59]

In any event, free exercise exemptions can be justified by democratic rationales for countermajoritarian constitutional enforcement. To the degree that they protect subordinated groups, they work against degradation of political equality and the accompanying effects on the exercise and efficacy of basic capacities. And to the degree that exemptions promote ethical independence from the state, they draw support from justifications for judicial review that focus on the health of

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[54] *See infra* sections I.B, pp. 281–85, I.C, pp. 285–88, and I.D, pp. 288–91.

[55] Emp. Div. v. Smith, 494 U.S. 872, 888 (1990).

[56] *Id.* at 888, 889 n.5 ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.* at 889 n.5.).

[57] *See* Lupu & Tuttle, *supra* note 16 (manuscript at 22–25); Brief of Professors Ira C. Lupu, Frederick Mark Gedicks, William P. Marshall, and Robert W. Tuttle as Amici Curiae in Support of Respondents at 24–26, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

[58] *See Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring in the judgment) ("As recent cases involving COVID-19 regulations highlight, judges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced. In the last nine months alone, this Court has had to intervene at least half a dozen times to clarify how *Smith* works."); *id.* at 1922 (Alito, J., concurring in the judgment) (reviewing the coronavirus orders, with their debatable comparisons between regulated religious activities and unregulated activities, and concluding: "Much of *Smith*'s initial appeal was likely its apparent simplicity. *Smith* seemed to offer a relatively simple and clear-cut rule that would be easy to apply. Experience has shown otherwise.").

[59] *See* Jamal Greene, *The Supreme Court, 2017 Term — Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 46 (2018) ("[C]ase law under the Religious Freedom Restoration Act (RFRA) has courted no anarchy to date.").

democratic processes for the formation of wills and worldviews.[60] Finally, to the degree that liberty of conscience is burdened independent of these considerations, courts can protect against oppression of a different sort, namely the suppression of fundamental freedoms that should be enjoyed by everyone equally.[61]

With those fundamentals in mind, what would a conscience exemption look like?

A. Liberty of Conscience

A few features distinguish liberty of conscience. First, again, it protects liberty rather than equality, neutrality, or another form of evenhandedness.[62] By contrast, a leading academic theory holds that the government should be required to regulate neutrally, so that it neither incentivizes nor disincentivizes religious observance.[63] Substantive neutrality, as this approach is sometimes called, overlaps with liberty of conscience in many applications and it was designed to promote religious liberty.[64] But its proponents also strongly support many statutory exemptions that create incentives for people to practice.[65] That

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[60] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (defending judicial review where necessary because democratic processes cannot be trusted).

[61] Protection of free exercise seems to be contemplated by footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), independent of process considerations. *Id.* at 152 n.4 ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . .").

[62] *See supra* pp. 276–77.

[63] *See* McConnell, *Free Exercise Revisionism*, *supra* note 16, at 1146–47 ("The purpose of free exercise exemptions is to ensure that incentives to practice a religion are not adversely affected by government action. By the same token, government action should not have the effect of creating incentives to practice religion.").

[64] *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) [hereinafter Laycock, *Formal, Substantive, and Disaggregated Neutrality*] ("I will call my proposal 'substantive neutrality.' My basic formulation of substantive neutrality is this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 562 (1993) (Souter, J., concurring in part and concurring in the judgment) (discussing substantive neutrality approvingly and citing Laycock, *Formal, Substantive, and Disaggregated Neutrality*, *supra*). Professor Douglas Laycock believes that religious liberty will be protected by a substantive neutrality rule. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 320 (1996) ("'The religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.' In this formulation, autonomy and neutrality are mutually reinforcing elements of religious liberty . . . ." (quoting Laycock, *Formal, Substantive, and Disaggregated Neutrality*, *supra*, at 1001)).

[65] *See* Tebbe, *supra* note 46, at 702.

support is hard to square with neutrality, which is symmetrical by definition.[66] Moreover, neutrality simply does not squarely address the underlying question, which is whether people have the ability to exercise a basic capacity in matters of conscience.[67]

Second, liberty of conscience does not regard religion as constitutionally unique but rather as part of a larger class of ethically salient beliefs, practices, and identities. It is not possible here to defend that position, which is debated in an extensive literature.[68] But the argument can be characterized and fit into a broader conception of conscience.

As a matter of constitutional interpretation, the strongest argument for religion's specialness is that the text of the First Amendment itself uses the term.[69] But that turns out to be an accident of history, for the Framers of the provision chose the phrase "rights of conscience," which was substituted at the last minute for "free exercise" of religion without comment and apparently without substantive significance.[70] Terminology aside, it may be the case that the Framers and ratifiers had in mind beliefs centered on the supernatural — religious beliefs in that sense — but nevertheless they may also have thought that they were protecting a wide range of convictions on matters of profound human significance, a range that today would include everything we would want to signify with terms like conscience or belief. Finally, Supreme Court precedent does include the conviction that religion cannot be

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[66] By contrast, liberty of conscience avoids the advantaging of religion and conscience through prohibitions on unfairness and harm to others. *See infra* section I.D, pp. 288–90.

[67] A liberty approach can be difficult to square with a commitment to egalitarianism. *See* LABORDE, *supra* note 18, at 218. But Professor Cécile Laborde emphasizes that profound commitments and projects can only be presumptively limited if background conditions are fair. *See id.* at 220; *see also* Patten, *supra* note 18, at 143. Similarly, the limitations on liberty of conscience, set out in this section and the next three, are designed to address egalitarian concerns.

[68] For some critiques of special constitutional treatment of religion, and citations to others, see, for example, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); BRIAN LEITER, WHY TOLERATE RELIGION? (2012); and Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). For specification of the term ethical salience, see LABORDE, *supra* note 18, at 42. For defenses of constitutional solicitude for religion as such, see, for example, KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE (2015); ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2012); and Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017).

[69] Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 9–10, 12–16 (2000); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 189 (2012) ("[T]he text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations.").

[70] For an account of the drafting, see FELDMAN, *supra* note 20, at 47. Critiques of the textual argument include Eisgruber & Sager, *supra* note 27, at 1270; Stephen G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 147–48 (1990); and Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 577–78.

favored over comparably serious convictions, though not without contradictions.[71]

Although religion should not be regarded as special as a matter of constitutional theory, something is — there is a class of obligations that are treated differently from other preferences. This Comment signifies that class with the term conscience, though it could have chosen another word with fewer connotations of individuality and reasoned choice. Regardless of the terminology, how should the category be bounded? Here we can learn from thinking on a related question, namely how to draw boundaries around the term religion.[72]

Once the class of protected beliefs and practices has been specified, the next issue is how free exercise nevertheless can be limited by government.

B. Overcoming the Presumption

Rather than the compelling interest test, something closer to intermediate scrutiny is appropriate for the administration of the presumption against laws that substantially burden conscience. Of course, there are good reasons to be skeptical about whether the difference between these two standards matters much in actual implementation. After all, the Supreme Court did administer a strict scrutiny regime for free exercise exemptions during the three decades before *Smith* was decided. Under the rule of *Sherbert v. Verner*,[73] the Court purported to require the government to justify substantial burdens on free exercise by showing that its application of the law was narrowly tailored to a compelling interest.[74] Nevertheless, the Court granted exemptions in very few cases.[75] Since that rule was replaced in *Smith*, moreover, the Court

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[71] *Compare* United States v. Seeger, 380 U.S. 163, 187 (1965), *with Hosanna-Tabor*, 565 U.S. at 189 (stating explicitly that religion has a special constitutional status).

[72] *See* Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1130–49 (2011) (exploring the relationship between the definition of religion and religion's specialness). Professor Kent Greenawalt provides the most persuasive and enduring answer to the definitional question, namely that religion should be specified by analogy to familiar instances. *See* GREENAWALT, *supra* note 17, at 139–43. In applying his analogical approach, it is useful to disaggregate the term and to realize that its boundaries may differ by constitutional context. *See* LABORDE, *supra* note 18, at 5; Tebbe, *supra*, at 1142. To the degree that we are protecting people from harmful discrimination, for instance, we must include atheists, who are the targets of unusual social antipathy. To the degree that we are providing exemptions from general laws, however, nonbelief alone may not entail a similar range of beliefs that must be connected to practices as a matter of personal integrity. The key point is that the analogical method should incorporate constitutional values, which in turn shape the scope and strength of particular protections.

[73] 374 U.S. 398 (1963).

[74] *Id.* at 403.

[75] In fact, the Court ruled for religious claimants in only two sets of cases. One was made up of four unemployment compensation cases, including *Sherbert* itself. *See* Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 831–32 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139 (1987); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 720 (1981); *Sherbert*, 374

has found creative ways to provide exemptions.[76] So the choice of a general standard underdetermines outcomes, at least in this area.

Still, it makes sense to select a standard that best comports with judgments about accommodations that are warranted and that fit existing constitutional practices. That will guide courts and help them to convincingly justify their decisions to the parties and to the broader public. And here, a better standard for conscience exemptions is intermediate scrutiny.[77] Among other advantages, that choice reserves the maximum level of scrutiny for discrimination on the basis of religion

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U.S. at 402. The other was a single challenge to truancy laws by the Old Order Amish. *See* Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972); *see also* McConnell, *Free Exercise Revisionism*, *supra* note 16, at 1127–28 ("[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*." (emphasis added)); Oleske, *supra* note 16, at 711–12 (describing a "consensus," *id.* at 712, that the Court did not apply true strict scrutiny before *Smith*, and citing articles to support that sense). *But see* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 222–28 (1994) (rejecting the view that the Court applied a weakened version of the compelling interest test under *Sherbert*, in the context of arguing that RFRA must be applied strongly even if its test is patterned on those cases).

[76] *See infra* section II.B, pp. 303–07 (detailing examples where the Court has not adhered to the main *Smith* rule).

[77] *Cf.* McConnell, *Free Exercise Revisionism*, *supra* note 16, at 1128 (proposing a standard lower than strict scrutiny for religious exemption claims); Brownstein, *supra* note 16, at 57 ("[C]onstitutional doctrine in other areas of law is not limited to the bare choice of either protecting a right rigorously in all cases, or not protecting it at all. When the scope of a right extends broadly so that its protection implicates varying and important state interests, taking the right seriously does not mean we must always protect the right under rigorous review. Rather, it means that courts must develop a nuanced, complex, and sophisticated jurisprudence regarding the right."); Oleske, *supra* note 16, at 739–44 (proposing heightened scrutiny short of the compelling interest test); Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1263 (2008) (proposing rigorous rational basis review of incidental burdens on free exercise). Note that intermediate scrutiny comes in varieties that range from relatively mild interpretations, like the time, place, and manner test for speech regulation, see *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984), to the demanding scrutiny of sex segregation, see *United States v. Virginia*, 518 U.S. 515, 532–33 (1996). *See* Laycock & Berg, *supra* note 7 (manuscript at 14) (distinguishing between "serious intermediate scrutiny" and unserious intermediate scrutiny, as in *United States v. O'Brien*, 391 U.S. 367 (1968)). This Comment gives guidance on the sorts of interests that should be deemed strong enough to satisfy the standard. *See infra* pp. 283–85. Beyond that, courts would be tasked with developing the most appropriate version for liberty of conscience, keeping in mind that the exact formulation matters less than the trend line of actual results. In this regard, the method proposed here shares something with European proportionality review and approaches it has inspired. *See, e.g.*, JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 161–62 (2021) (applying a proportionality method to the tension between religious freedom and civil rights law); *see also* Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. (forthcoming 2022) (manuscript at 1–7) (on file with the Harvard Law School Library) (reviewing GREENE, *supra*). For a perceptive discussion of how intermediate scrutiny applies in the context of compelled speech laws, see Laura Portuondo, *Abortion Regulation as Compelled Speech*, 67 UCLA L. REV. 2, 45–53 (2020).

and conscience,[78] applying a relatively measured form of heightened review to incidental burdens on the right. That difference ought to be real.

Whatever formulation is adopted, moreover, interpreters should adhere to the principle that civil rights laws are driven by government interests that are sufficiently strong to overcome the presumption. Such a judgment has long been part of the jurisprudence, though never without complications.[79] For example, the Court in *Burwell v. Hobby Lobby Stores, Inc.*,[80] assumed that the government had a compelling interest in promoting women's reproductive health,[81] and it affirmed in dicta the sufficiency of the interest in eradicating racial discrimination in the workplace.[82] In another area of First Amendment law, the Court likewise has held that civil rights laws are supported by an interest strong enough to overbalance the freedom of association.[83] According to these strains of authority, the public has interests in enforcing antidiscrimination laws that are sufficient to overcome a presumption of unconstitutionality.

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[78] *See infra* section I.E, pp. 291–92.

[79] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) ("The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . ."). For an influential examination of the difficulties of *Bob Jones*, see Robert M. Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 60–68 (1983).

[80] 573 U.S. 682 (2014).

[81] *Id.* at 691–92, 728. The five-Justice *Hobby Lobby* majority included Justice Kennedy, who all but stated that the government had carried its burden on that point. *Id.* at 737 (Kennedy, J., concurring) (noting the government's argument that the contraception mandate serves a "compelling interest in providing insurance coverage that is necessary to protect the health of female employees" and emphasizing that "[i]t is important to confirm that a premise of the Court's opinion is its assumption that the [contraception mandate] furthers a legitimate and compelling interest in the health of female employees"). *See also* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018) (noting that "if [religious] exception[s] were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations").

[82] *Hobby Lobby*, 573 U.S. at 733 ("The Government has a compelling interest in providing an equal opportunity to participate in the work force without regard to race . . . .").

[83] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."). In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), by contrast, the Court recognized first that "States have a compelling interest in eliminating discrimination against women in public accommodations," *id.* at 657, but then it held that the Boy Scouts' right to disfavor "homosexual conduct" would be burdened by a state requirement that it retain a gay scoutmaster and that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association," *id.* at 659. *See also* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 578–79 (1995) (finding that the interests driving a state public accommodations law were insufficient to overcome the speech interests of parade organizers who excluded an LGBTQ+ rights organization).

Importantly, one purpose driving civil rights law is to combat status degradation of persons vulnerable to structural injustice. Government acts here to preserve the equal standing of all individuals in the democratic community, undifferentiated by caste. Some have denied that this interest in preventing "expressive" or "dignitary" harm is sufficient to overcome a free exercise claim, particularly in the context of public accommodations.[84] But a majority of the Court sometimes has suggested otherwise.[85]

Most recently, the *Fulton* Court indicated that the government's interest in equal treatment of same-sex couples who wished to be foster parents was "weighty," for "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[86] Chief Justice Roberts nevertheless reasoned that Philadelphia had failed to carry its burden under "the facts

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[84] Douglas Laycock, *The Campaign Against Religious Liberty*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 231, 246 (Micah Schwartzman et al. eds., 2016) ("Reciprocal moral disapproval is inherent in a pluralistic society; the desire of same-sex couples never to encounter such disapproval is not a sufficient reason to deprive others of religious liberty."); Thomas C. Berg & Alan Brownstein, *Giving Our Better Angels a Chance: A Dialogue on Religious Liberty and Equality*, 21 J. APP. PRAC. & PROCESS 325, 344 (2021) (statement of Berg) ("[A]t least some of the dignitary harm occurs through the 'communicative impact' of the refusal — the message of moral condemnation it conveys — and in cases of expressive conduct at least, such communicative impact cannot be the basis for overriding a First Amendment interest."). *But see* Berg & Brownstein, *supra*, at 357 (statement of Brownstein) (arguing that government has a compelling interest in combatting the expressive or dignitary effects of discriminatory service refusals); Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 153–60 (2015) (arguing that civil rights laws have long been centrally concerned with avoiding stigma and ensuring equal citizenship and that those interests apply even where a good or service is readily available from other market participants).

[85] *See Masterpiece Cakeshop*, 138 S. Ct. at 1728–29 ("[A]ny decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons."); *see also Jaycees*, 468 U.S. at 625 ("[I]n upholding Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. § 2000a, which forbids race discrimination in public accommodations, we emphasized that its 'fundamental object . . . was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."' Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964). That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.").

[86] *Fulton*, 141 S. Ct. at 1882 (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727). As noted below, the choice of the term "weighty" rather than compelling must have been deliberate. *See infra* pp. 312–13; *see also* Elizabeth Sepper & James D. Nelson, Fulton v. Philadelphia*: A Masterpiece of an Opinion?*, AM. CONST. SOC'Y: EXPERT F. (June 18, 2021), https://www.acslaw.org/expertforum/fulton-v-philadelphia-a-masterpiece-of-an-opinion [https://perma.cc/E54F-46YM] ("Chief Justice Roberts quoted *Masterpiece*'s observation that '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.' But when he described the City's interest, he didn't use strict scrutiny's magic word — 'compelling'; he admitted only that it was 'weighty.'").

of this case," specifically that the City had made exceptions available, undermining its contention that it could not provide a similar exception to the religious child welfare agency without impairing its antidiscrimination interest.[87] Whether or not that application was convincing — some doubt is expressed below[88] — the contention that equality law is supported by a compelling interest, including in its expressive aspects, has been supported by language in the U.S. Reports.

None of this is to say that exemptions from equality laws are never warranted. Where basic rights conflict, resolutions should be found that best fit together with constitutional principles and with other judgments that have withstood examination and testing.[89] And with respect to the conflict between religion and equality law, the resolution has never been absolute in either direction. Antidiscrimination laws, like all others that conflict with liberty of conscience, not only must be supported by an interest that is sufficiently strong, but their enforcement must also be shown to be important in a particular case. Conflicts between religious freedom and equality law can sometimes be amenable to particularized resolutions that preserve both interests.[90]

C. Social Division of Responsibility

Members of a democracy do not only enjoy rights against public power, but they also have responsibilities to support the project of cooperative government. While the government is obliged to create fair background conditions for the exercise of basic liberties, individuals are obligated to adjust their ends to comport with that framework.[91] Liberty of conscience does not free people from the duty to do their part to support a fair framework for the democracy itself, even if the ability to exercise their conscience is substantially burdened.[92]

Taxation is the classic example in constitutional law. Members of a democracy have a responsibility to support the collective enterprise by

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[87] *Fulton*, 141 S. Ct. at 1882.

[88] *See infra* section II.E, pp. 313–17.

[89] *See* TEBBE, *supra* note 30, at 25–36 (articulating this approach).

[90] *Hobby Lobby* is one example of an appropriate compromise, as Professor Jamal Greene argues. *See* GREENE, *supra* note 77, at 161–62. What made that decision troubling was that the Court did not make its ruling contingent on the provision of alternate coverage to women. *See* TEBBE, *supra* note 30, at 51. But the ultimate outcome satisfied both sides.

[91] *See* Patten, *supra* note 18, at 141–42; LABORDE, *supra* note 18, at 219–20. This formulation has implications for the more general problem of exemptions, but here it fits better with the existing doctrine on responsibilities.

[92] On the relatively neglected importance of duties, see Samuel Moyn, *Rights vs. Duties: Reclaiming Civic Balance*, BOS. REV. (May 16, 2016), https://bostonreview.net/books-ideas/samuel-moyn-rights-duties [https://perma.cc/7YX4-PL39] ("[W]e are now very familiar with the claim that all humans everywhere have rights. But we are much less familiar with the notion that rights are protected by the fulfillment of duties.").

paying appropriate taxes, whatever the incidental burden on observance. Professor Alan Patten uses the example of "contemplative pilgrims" who believe both that they must devote fifty hours per week to sacred study and that they are obligated to take an annual pilgrimage to a distant place.[93] Because of the first commitment, they are less able to work and they tend to be impecunious, a situation that is exacerbated by the expense of the second commitment, to regular traveling. They therefore experience a conflict between their religious tenets and their obligation to pay taxes. Yet they do not have a presumptive right to an exemption, even if the burden is substantial and even if they could be accommodated without serious interference with the government's interest in raising revenue. Rather, the contemplative pilgrims must adjust their ends.

Supreme Court precedent is largely consistent with this concept of responsibility — at least in its outcomes, if not always in its reasoning. For example, the Court in *United States v. Lee*[94] rejected a challenge by an Amish employer to the requirement to pay social security taxes on behalf of his employees.[95] Although the Court reasoned partly that the government had a strong interest in maintaining the integrity of the system and that it could not function if it exempted every objector, the *Lee* majority also justified its result in terms of social duty. It recognized an "obligation to pay the social security tax" that was "not fundamentally different from the obligation to pay income taxes."[96] To my knowledge, the Supreme Court has never granted a religious freedom exemption from the obligation to pay taxes.[97]

A possible exception is *Murdock v. Pennsylvania*,[98] where the Court protected Jehovah's Witnesses from a license fee. Witnesses traveled from door to door within a town, proselytizing and selling literature. They were convicted of violating an ordinance that required people to obtain a license and pay a fee for canvassing or soliciting.[99] The Supreme Court held that the Witnesses were protected by the First Amendment. Without differentiating between speech and religion, the Court reasoned that the government could not specifically tax the

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93 Patten, *supra* note 18, at 139–40.

94 455 U.S. 252 (1982).

95 *Id.* at 254.

96 *Id.* at 260; *see also* Kent Greenawalt, Hobby Lobby*: Its Flawed Interpretive Techniques and Standards of Application*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 125, 140 (Micah Schwartzman et al. eds., 2016) ("Whether one sees the reason as the absence of a substantial burden or the existence of a compelling interest with no less restrictive means, the Supreme Court has made clear that neither the First Amendment nor RFRA requires exemptions from tax payments.").

97 The Court's arguable departure from this pattern in *Hobby Lobby* has exposed it to criticism. *See* sources cited *infra* note 104.

98 319 U.S. 105 (1943).

99 *See id.* at 106–07.

exercise of constitutional rights. "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."[100]

There is tension between *Murdock* and the principle that members of a democracy have certain obligations to support a fair framework of cooperative self-government. Justice Frankfurter made just this point in his dissent:

> It is only fair that he also who preaches the word of God should share in the costs of the benefits provided by government to him as well as to the other members of the community. And so, no one would suggest that a clergyman who uses an automobile or the telephone in connection with his work thereby gains a constitutional exemption from taxes levied upon the use of automobiles or upon telephone calls. . . . Plainly, a tax measure is not invalid under the federal Constitution merely because it falls upon persons engaged in activities of a religious nature.[101]

Absent any evidence of discriminatory taxation, and absent any claim that the tax would actually burden the exercise of any constitutional right, Justice Frankfurter concluded, the responsibility of the Witnesses to do their fair share to support the democratic system that enabled their freedoms in the first place should not have been excused.

In response, the majority admitted that practitioners and speakers could be required to pay taxes on the income derived from their activities and on property devoted to those activities.[102] What the government could not do was condition the exercise of constitutional rights on the payment of a flat tax. While a natural political barrier prohibited the government from extracting general taxes so onerous that they burdened protected activities, no such shield guarded against specific levies on basic liberties.[103] There, the power to tax really could amount to the power to destroy, according to the Court.[104] One way to understand the Court's holding is as an application of the requirement that background conditions be fair, not disproportionately burdensome.

Whatever the right answer in *Murdock* itself, the majority and the dissent shared the view that practitioners and speakers ordinarily are

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[100] *Id.* at 111.

[101] Jones v. Opelika, 319 U.S. 103, 135 (1943) (Frankfurter, J., dissenting). *Jones* and *Murdock* were decided together on the same day. For a perspective sympathetic to Justice Frankfurter's, see Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 2001 (2016) (criticizing the line of cases including *Murdock* for engaging in an early form of First Amendment Lochnerism).

[102] *Murdock*, 319 U.S. at 112.

[103] This argument is classically associated with Justice Jackson. *See* Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.").

[104] *Murdock*, 319 U.S. at 112 ("The power to tax the exercise of a privilege is the power to control or suppress its enjoyment.").

not entitled to an exemption from the obligation to contribute to a fair scheme of taxation. That remains true even if a particular tax does substantially burden their constitutionally protected activities. And the principle of social responsibility is not limited to taxation as such, but it also extends to a larger set of obligations to support, and adjust one's ends to conform to, a democratic framework that makes possible the exercise of rights in the first place.[105]

D. Fairness and Harm to Others

Any protection for liberty of conscience must be accompanied by measured prohibitions on unfairness and harm to others. First, exemptions cannot be granted that privilege religious interests over other comparable private interests. For example, the Court invalidated a Texas sales tax exemption for religious periodicals, reasoning in part (if not with perfect clarity) that the law impermissibly favored religious publications over secular periodicals.[106] And during the period of military conscription for the Vietnam War, the Court confronted a statutory exemption that was written to protect only conscientious objectors whose pacifism was grounded in "religious training and belief"; it interpreted the exemption to also include those whose objection was not obviously grounded in religion.[107] Although those rulings were framed as statutory interpretation, the Court's reading of the text was so aggressive that they are conventionally thought to have been based on constitutional grounds.[108]

It is true that the Court has also held that religious exemptions "need not 'come packaged with benefits to secular entities'" in order to pass muster.[109] Drawing a line between permissible and impermissible exemptions is necessary and can be difficult.[110] But, however that is done, there doubtless is a limit to the degree to which the government

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[105] *See, e.g.*, Patten, *supra* note 18, at 151–52 (criticizing *Hobby Lobby* by analogizing the regulatory burden on the company to taxation); Greenawalt, *supra* note 95, at 140–41 (same); Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 984–85 (2020) [hereinafter Tebbe, *A Democratic Political Economy for the First Amendment*] (applying a similar critique to Janus v. AFSCME, 138 S. Ct. 2448, 2460–66 (2018)).

[106] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (plurality opinion).

[107] *See* United States v. Seeger, 380 U.S. 163, 164–66 (1965); *see also* Welsh v. United States, 398 U.S. 333, 343–44 (1970).

[108] The conventional view today was articulated at the time by Justice Harlan. *See Welsh*, 398 U.S. at 354–58 (Harlan, J., concurring in the result) (arguing that *Seeger*, 380 U.S. 163, and *Welsh*, 398 U.S. 333, can only be understood as constitutionally grounded).

[109] Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) ("Religious accommodations . . . need not 'come packaged with benefits to secular entities.'" (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987))).

[110] The principle of equal value can provide one metric. *See* Tebbe, *The Principle and Politics of Equal Value*, *supra* note 24 (manuscript at 52–56) (proposing, in section IV.A, an application of the principle to nonestablishment).

can privilege religious actors through exemptions that others have strong reasons to value.[111]

Second, exemptions for certain private citizens are impermissible if they impose undue hardships on other private citizens. This is sometimes called the rule against third-party harms, and it captures an intuition that private persons should not be forced to bear undue hardship because the government is accommodating another person's exercise of conscience.[112] During the period before *Smith*, when the Court did in fact apply the compelling interest test to substantial burdens on free exercise, it protected those who would have been adversely affected if a religious accommodation had been granted to another.[113] This is not merely an instance of the truism that rights have costs because third-party harms involve rights on both sides.

When someone is burdened because of another's conscience, that impacts their freedom of conscience in both its equality and liberty dimensions. Equality is threatened because the government has favored one commitment of conscience over another. And liberty is endangered insofar as the individual is forced to support, or sacrifice for, the deepest beliefs of another.[114]

Consider again *United States v. Lee*, where the Court turned away the Amish challenge to the Social Security tax.[115] It focused on the consequences for the employees, who would have lost social security benefits because of their employer's beliefs. "Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees," the Court reasoned.[116] When Congress reacted to *Lee*, it protected religious employers who objected to the Social Security tax — but only insofar as their employees shared

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[111] *Cf.* Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 303–06 (1985) (turning away free exercise and nonestablishment challenges to minimum wage and reporting requirements, albeit not explicitly because an exemption would unfairly favor religious employers over others).

[112] This paragraph condenses arguments made elsewhere, including TEBBE, *supra* note 30, at 50–70, and Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 784–85 (2018).

[113] *See* Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 709–10 (1985).

[114] As Madison put it in the context of his argument against compelled taxation to support clergy, not only does the compulsion to contribute even "three pence" to another's faith violate liberty of conscience, but it also "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* JAMES MADISON: WRITINGS 29, 31, 33 (Jack N. Rakove ed., 1999).

[115] 455 U.S. 252, 261 (1982).

[116] *Id.* "When followers of a particular sect enter into commercial activity as a matter of choice," the Court also explained, "the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.*

their faith.[117] Congress acted on a constitutional impulse when it limited the religious accommodation to avoid harm to nonadherents. These arguments, and many of the others surrounding third-party harm, are debated in a lively literature.[118]

Various limits also apply to the rule against third-party harm. Burdens borne by the government do not implicate the concern in the same way, for instance. Taxpayers normally cannot complain that the government has disfavored or burdened them when it socializes the costs of accommodating the consciences of citizens.[119] Nor does the rule apply where an accommodation safeguards freedom of association. By definition, exempting an association from an antidiscrimination rule harms those who are excluded; that is an unavoidable consequence of protecting the right to selectively gather together with others.[120]

Finally, and significantly, religious interests can outweigh harms to third parties in some cases. A workable standard provides that religious accommodations cannot impose an "undue hardship" on third parties.[121] This phrase is borrowed from Title VII, where Congress wrestled with the similar question of how much harm should be tolerated in order to accommodate religious employees. Interpreting the standard in light of constitutional protection of third parties, courts formulated a rule that protects others' interests.[122] They have used it to arrive at reasonable results that sensibly balance the fundamental interests of religious actors

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[117] *See* 26 U.S.C. § 3127. Even the exemption Congress did create might be problematic, to the degree that it raises the cost of exiting the faith for workers who have gone without Social Security payments.

[118] For recent contributions, see *Developments in the Law — Intersections in Healthcare and Legal Rights*, 134 HARV. L. REV. 2163, 2187 (2021) (charting the doctrinal status of the third-party harm principle over time, culminating in a narrower version after the retirement of Justice Kennedy); Stephanie H. Barclay, *First Amendment "Harms,"* 95 IND. L.J. 331, 345–66 (2020); *The Supreme Court, 2018 Term — Leading Cases*, 134 HARV. L. REV. 490, 565 (2020) ("If the Court is no longer required to consider the harm done to third parties by religious exemptions, then numerous civil rights protections may be under threat."); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 883–901 (2019).

[119] *See* Schwartzman et al., *supra* note 111, at 786 ("There is a meaningful difference between taxing the public to support a religious exemption and burdening a group of citizens in order to accommodate the religious beliefs of another group."); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2524 (2015) (drawing a similar distinction).

[120] *See* Schwartzman et al., *supra* note 112, at 793; TEBBE, *supra* note 30, at 56–58.

[121] *See* Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215, 217 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017) [hereinafter Tebbe et al., *How Much May Religious Accommodations Burden Others?*] (drawing on 42 U.S.C. § 2000e(j)).

[122] *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (interpreting the undue hardship standard to mean that accommodating employees need not impose more than a "de minimis" cost on others).

with the principle of avoiding harm to others.[123] The resulting precedents are capable of guiding constitutional actors in accommodating divergent interests across a wider range of applications.

Much of the current debate about third-party harms concerns the legal status of the principle under existing precedents. Now that the Court has opened up those precedents for reexamination, it has an opportunity to reaffirm and reimagine the principle of avoiding harm to others.

E. Antidiscrimination

This Comment focuses on exemptions from general laws for commitments of conscience. However, a complete understanding of free exercise would include equality protections as well. Equality values are compatible with the protection of individual liberty and not reducible to it. This section briefly outlines a strong presumption against explicit and purposeful discrimination on the basis of religion and conscience. Section I.F summarizes a distinct guarantee of equal value.

Commitments of conscience historically have formed an axis of structural injustice, like other attributes such as race, sex or gender, sexual orientation, ethnicity, and the like.[124] No member of a democratic community ought to be devalued or demoted in their membership status, for that kind of stratification is incompatible with the parity of persons that is an essential condition for cooperative government. Certainly, the state itself cannot be permitted to relegate people to a distinct caste on account of their adherence to a religious or spiritual system.[125]

A familiar legal mechanism for policing discrimination of this sort is to apply a presumption of invalidity to government actions that differentiate on the basis of conscience or religion.[126] Burden shifting is

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[123] *See* Tebbe et al., *How Much May Religious Accommodations Burden Others?*, *supra* note 121, at 223–28 (reviewing lower court cases).

[124] *See, e.g.*, EISGRUBER & SAGER, *supra* note 68, at 52, 59, 62 ("The vulnerability of non-mainstream religious views — including views that repudiate religion in any of its recognizable forms — to discrimination is what justifies the special constitutional treatment of religion on some occasions . . . ." *Id.* at 62.).

[125] *See, e.g.*, *id.* at 52; *see also* Town of Greece v. Galloway, 572 U.S. 565, 631 (2014) (Kagan, J., dissenting). Justice Kagan, imagining a Muslim citizen coming before a town legislature that asks the citizen to join in a Christian prayer, argued:

> Everything about that situation, I think, infringes the First Amendment. . . . That the practice thus divides the citizenry, creating one class that shares the Board's own evident religious beliefs and another (far smaller) class that does not. And that the practice also alters a dissenting citizen's relationship with her government, making her religious difference salient when she seeks only to engage her elected representatives as would any other citizen.

Town of Greece, 572 U.S. at 631.

[126] *See, e.g.*, McDaniel v. Paty, 435 U.S. 618, 627–28 (1978) (applying a form of strict scrutiny to a state law that explicitly excluded clergy from holding public office).

a prophylactic instrument that is designed to address the fact that judicial institutions have limited ability to uncover illicit discrimination. Because of their evidentiary constraints, and because bias is stigmatized, courts will struggle to uncover wrongful targeting. A prophylactic device recognizes that the overall costs of error can be lowered by shifting the evidentiary burden to the government once the plaintiff has made an initial showing of discrimination.[127]

Whether it makes sense to apply the presumption even to discrimination that burdens a structurally advantaged group is a controversial issue. Think here not only of affirmative action programs for racial minorities that have been challenged as discriminatory but also of situations where members of a dominant or mainstream religious group are burdened by a government program, such as closing laws during the Covid pandemic.[128] This Comment's view is that legal prophylaxis is less warranted in such situations and ought to draw a gentler form of review.[129] An antisubordination understanding, though not dominant today, occupies a more stable strain of constitutional history than many appreciate.[130] Alternatively, the presumption could be more easily overcome in situations where a member of a dominant group has brought the claim. Either of these antisubordination rules, however, would face the difficulty of determining which individuals are subject to structural injustice in particular circumstances — an inquiry that could be highly contextual and perhaps more appropriate for legislative or executive action.

A full defense of the antisubordination approach to free exercise is not possible here. What is important is just to recognize that a complete conception of free exercise would include a guarantee against unjust government discrimination, both facial and purposive.

F. Equal Value

Finally, free exercise has been applied to guarantee equal value, according to which government presumptively may not regulate a

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[127] For a detailed explanation of burden shifting as prophylaxis for judicial enforcement of religious antidiscrimination, see Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 18–25 (2009), which cites the literature on prophylactic devices in constitutional law.

[128] *Cf.* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam) (considering a challenge by a Roman Catholic congregation, among others, to Covid restrictions on gatherings).

[129] *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (arguing that "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives'" rather than having to satisfy strict scrutiny (quoting Califano v. Webster, 430 U.S. 313, 317 (1977))).

[130] *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 10–11 (2003).

conscientious practice while exempting other activity to which the government's interests apply in the same way.[131] Such differential treatment usually, though not invariably, violates free exercise by treating the exercise of conscience with less than equal regard.[132] And it does so even in the absence of a classification, even in the absence of disparate impact, and even in the absence of a substantial burden on conscience. Equal value has a longer history and better theoretical support than most people realize, though it also carries real risks.[133]

The Roberts Court developed equal value during the Covid pandemic, though it deployed the rule in a manner that is difficult to justify, as explained below.[134] In a series of emergency orders, the Justices considered free exercise challenges to restrictions on gatherings as applied to worship services and other religious assemblies. Although the Court let stand a few regulations,[135] it invalidated several more, particularly as the lockdowns persisted into late 2020 and early 2021.[136] *Tandon v. Newsom*[137] contained the clearest statement of equal value.[138] There, the per curiam opinion 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."[139] Comparability was measured "against the asserted government interest that justifies the regulation at issue."[140] If the religious claimant could make that initial case, then the burden would shift to the government to show that applying the regulation to the religious actor was necessary for the pursuit of a compelling interest.[141] Four dissented, including Chief Justice Roberts.[142]

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131 *See* Tebbe, *The Principle and Politics of Equal Value*, *supra* note 24 (manuscript at 53).

132 Eisgruber and Sager argue that equality can be violated when a government actor *would have* accommodated a mainstream group, if it had considered the question, and yet it continued to regulate a powerless faith. *See* EISGRUBER & SAGER, *supra* note 68, at 92; *see also* LABORDE, *supra* note 18, at 52–53 (describing this argument).

133 *See* Tebbe, *The Principle and Politics of Equal Value*, *supra* note 24 (manuscript at 10–26) (tracing the diverse origins of equal value and exploring potentially problematic applications of the model).

134 *See infra* pp. 295–96.

135 *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.); Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527, 528 (2020); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (mem.).

136 *See* Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65 (2020) (per curiam).

137 141 S. Ct. 1294 (2021).

138 *See id.* at 1296–97.

139 *Id.* at 1296.

140 *Id.*

141 *Id.*

142 *See id.* at 1298 (Kagan, J., dissenting).

In *Fulton*, however, Chief Justice Roberts reaffirmed the rule of equal value, if only in passing. "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," he reiterated for the majority.[143] That said, he did not cite *Tandon* or any of the other Covid cases, and he did not apply the rule of equal value to the facts. Only Justice Gorsuch discussed *Tandon* approvingly, saying: "[T]his Court began to resolve at least some of the confusion surrounding *Smith*'s application in *Tandon*."[144] However, Justice Gorsuch evidently was not satisfied to let equal value stand alone, for "*Tandon* treated the symptoms, not the underlying ailment."[145] A genuine cure would require the government to justify all substantial burdens by showing they were narrowly tailored to a compelling interest. Justice Alito also discussed the Covid orders, using them as evidence that the existing free exercise framework has not turned out to be easy to administer.[146]

Under the facts of *Tandon* itself, California had limited all gatherings in private homes to members of no more than three households.[147] Citizens and clergy brought suit, arguing that their faiths required them to gather in groups composed of greater numbers of households. The Court concluded that California's regulation violated free exercise,[148] even though the regulation did not target religious gatherings in its text or in its purpose.[149] Overriding the state's own determination that its public health interests applied differently to at-home gatherings, the majority found that certain exempt organizations were comparable, including "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants."[150] Dissenting, Justice Kagan protested that the "obvious comparator" for a religious gathering at home was a nonreligious gathering at home, which was regulated identically.[151] The district court had made a factual finding, based on uncontested evidence from the state's public health experts, that the exempted businesses posed lesser health risks.[152] In its unsigned order, the majority simply disagreed with those physicians and scientists.

Equal value captures an intuition that many people share, namely that there is something unjust about a government regulating protected

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143 *Fulton*, 141 S. Ct. at 1877.
144 *Id.* at 1930–31 (Gorsuch, J., concurring in the judgment).
145 *Id.* at 1931.
146 *Id.* at 1921–22 (Alito, J., concurring in the judgment).
147 *See Tandon*, 141 S. Ct. at 1297.
148 *Id.*
149 *See id.* at 1298 (Kagan, J., dissenting).
150 *Id.* at 1297 (majority opinion).
151 *Id.* at 1298 (Kagan, J., dissenting).
152 *Id.* at 1298–99.

activity while it exempts other activity to which its interests apply just as strongly. Were the government's health concerns to apply equally to liquor stores and houses of worship, for instance, opening the former while closing the latter would strike many as involving an implicit determination that retail shopping is more important than ritual. Such a government would have to provide a strong reason why it could not open both, subject to similar safety restrictions. While equal value could benefit powerful groups, it is properly applied in situations where the government fails to regulate with equal concern, a concept that is sensitive to social valence. Furthermore, it contains an egalitarian safeguard at the back end of the analysis, insofar as it can be overcome by strong state interests such as the imperative of enforcing civil rights laws.

Although many people assume that equal value functions as an ersatz liberty rule, protecting free exercise only until *Smith* is replaced, it actually is compatible with liberty of conscience. It is true that many of those who promote equal value also wish to see *Smith* overruled.[153] Conceptually, however, the two guarantees are independent. In particular, equal value is a comparative principle that works even in situations where observance is not substantially burdened. So even if liberty of conscience were adopted wholesale, equal value might retain some usefulness and appeal.

The real difficulty is that equal value is being applied in a selective manner that manifests a particular politics. In practice, for instance, retail shopping does not in fact implicate the government's interests in public health comparably to worship, which involves congregating for extended periods in a way that visiting a store does not. That determination by public health officials was overridden even when it was uncontroverted.[154] Moreover, equal value is not being selected evenly across religious freedom cases.[155] Nor is it being applied consistently across constitutional provisions to which it is conceivably pertinent.[156] In operation, the new equality is promoting a mix of religious preferentialism and a laissez-faire political economy.[157]

In fact, equal value is subject to power dynamics that are similar (though not identical) to those that affect liberty of conscience. The next Part diagnoses how free exercise exemptions are likely to work on the ground.

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[153] Again, Justices Alito and Gorsuch argued that equal value was suboptimal. *See supra* p. 294. This was notable for Justice Alito, who was one of the original architects of equal value. *See* Tebbe, *The Principle and Politics of Equal Value*, *supra* note 24 (manuscript at 14–16).

[154] *See, e.g.*, *Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting) (noting "the uncontested testimony of California's public-health experts" that gatherings in homes were not comparable to retail activities).

[155] *See* Tebbe, *The Principle and Politics of Equal Value*, *supra* note 24 (manuscript at 62–74).

[156] *See id.* (manuscript at 64–76).

[157] On the latter, see *infra* note 159.

II. POLITICS

Paradigms are shifting across religious freedom law. Periodization may be tricky in this area, but the fundamental fact that a change is underway is obvious to everyone. If the Rehnquist Court drew back on judicial review, shrinking the domain of both the Free Exercise Clause and the Establishment Clause and increasing the space for government discretion, then the Roberts Court is increasing its own power relative to lawmakers and executive officials. Yet it is doing that not by strengthening both provisions symmetrically, but instead by vigorously interpreting free exercise and associated statutory guarantees while weakening nonestablishment. The result is a jurisprudence that unmistakably benefits religious actors across all areas of the doctrine, compared to precedent.[158] It also constitutionalizes a deregulatory political economy, this time through the First Amendment.[159]

Because the transformation is being accomplished through common law decisionmaking over a period of time, it is generating multiple contradictions. Those gaps and inconsistencies are instructive, because they can reveal the turnabout's particular politics, if only partially and provisionally.

A. Fulton*'s Success*

The *Fulton* majority opinion will satisfy few. Those worried about religious exemptions from equality laws will not be reassured by an

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[158] *See, e.g.*, Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1381–82 (2020) ("The general doctrinal pattern has been a narrowing of the Establishment Clause and a broadening of free exercise."); Linda Greenhouse, *Grievance Conservatives Are Here to Stay*, N.Y. REV. BOOKS (July 1, 2021), https://www.nybooks.com/articles/2021/07/01/grievance-conservatives-are-here-to-stay [https://perma.cc/7ZYD-6W5B] ("Renegotiating the boundaries between church and state is the Court's current project. . . . In the rulings of the current Court, the dimensions of the [F]ree-[E]xercise [C]lause have ballooned, leaving the [E]stablishment [C]lause all but effaced."); Michael W. McConnell, Opinion, *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/8E62-PVQW] ("Taking the long view, this Supreme Court has been consistently supportive of religious liberty. In 13 cases involving religion since 2012, the religious side prevailed in 12 of them, sometimes by lopsided majorities."). Today, including *Fulton* and *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), it would be fourteen of fifteen decisions, putting aside the shadow docket. The outlier is the travel ban decision, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). *But see* McConnell, *supra* ("[I]f we are criticizing the court for being political, we should at least describe its politics accurately. . . . The court may be political, but its politics is of the middle, and of a particular kind of middle, one that is committed to pluralism and difference rather than to the advancement of particular moral stances.").

[159] *See* Tebbe, *A Democratic Political Economy for the First Amendment*, *supra* note 105, at 1011–18 (diagnosing the political economy of contemporary free exercise decisions); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455–57 (2015) (comparing Lochnerism and free exercise jurisprudence today).

opinion relying on an obscure rule and applying it in three sentences.[160] And those concerned about religious freedom will fault the Court for shying away from a more durable doctrine. Both sides will continue to press for a stable resolution.

Yet the decision did achieve something. It protected the religious child welfare agency, Catholic Social Services, without announcing a major legal shift, and it supported its opinion in a manner that nonexperts would find abstruse.[161] Moreover, it achieved unanimity as to the outcome, allowing a credible claim that its support for religious freedom transcended partisanship.[162] One possibility is that the majority treaded lightly to avoid unnecessary offense to civil rights supporters. Another is that it obfuscated its rationale so that its ongoing campaign to constitutionalize religious interests would draw little criticism. These two are related, and they may have been blended.

Whatever his motivations might have been, Chief Justice Roberts wrote a problematic majority opinion. First, it relied on a legal mechanism — the individualized-exemption dicta in *Smith* — that had a dubious origin and had never been solely relied on for a holding by the Supreme Court.[163]

Justice Scalia revolutionized free exercise law in *Smith* without overruling any cases. Beforehand, the rule had been that all laws that substantially burdened free exercise had to be narrowly tailored to a compelling government interest. That rule had been in place since *Sherbert v. Verner*[164] was decided in 1963. Nevertheless, Justice Scalia

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[160] Those three sentences read:

> Like the good cause provision in *Sherbert*, [the City's contract] incorporates a system of individual exemptions, made available in this case at the 'sole discretion' of the Commissioner. The City has made clear that the Commissioner has no intention of granting an exception to [Catholic Social Services]. But the City may not refuse to extend that exemption system to cases of religious hardship without compelling reason.

Fulton, 141 S. Ct. at 1878 (internal quotation marks, alterations, and citations omitted).

[161] In this way, the Court cloaked the significance of its ruling to the general public, thereby avoiding criticism, while communicating more clearly to lawyers and lower courts — speaking to two audiences at once in the manner of stealth overruling. *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 4–5 (2010).

[162] *See, e.g.*, Andrea Picciotti-Bayer, *Supreme Court's Unanimous "*Fulton*" Ruling Vindicates Religious Freedom. The Decision Is Also Powerful Evidence that the Supreme Court, As It Is Currently Constituted, Doesn't Play Politics*, NAT'L CATH. REG. (June 18, 2021), https://www.ncregister.com/commentaries/supreme-court-s-unanimous-fulton-ruling-vindicates-religious-freedom [https://perma.cc/87PU-S9AT]; *see also* Richard W. Garnett, Fulton *and the Art of Cooperation: Religious Freedom as a Public Good*, BERKLEY F. (July 26, 2021), https://berkley-center.georgetown.edu/responses/fulton-and-the-art-of-cooperation-religious-freedom-as-a-public-good [https://perma.cc/32ZJ-E3Y7] ("[*Fulton*'s] welcome unanimity sends a clear message to activists, citizens, and officials alike that reasonable balancing is possible, and must be pursued, between the aims of anti-discrimination laws and the religious freedom of crucial social service providers.").

[163] For full support of this claim, see *infra* note 180.

[164] 374 U.S. 398, 403 (1963)

tried to create the impression that *Smith*'s main rule — namely, that free exercise exemptions are not available from laws that are neutral and generally applicable as to religion — had been governing law all along. He did that partly by engineering several distinctions to wall off troublesome precedents that had seemed to apply strict scrutiny to laws that substantially burdened religion regardless of neutrality or general applicability. One of these distinctions provided that strict scrutiny would still be applied to systems of "individualized governmental assessment" or "individualized exemptions" when they denied relief to religious claimants, a move that dispatched a series of four unemployment compensation cases.[165] Normally, unemployment compensation is offered only to those who are available for work.[166] And in each of the four cases, workers had refused available jobs for religious reasons, making them ineligible for benefits. However, the Court found each time that the government did not have a compelling reason for denying unemployment compensation.[167]

Justice Scalia's individualized assessments dicta had some appeal. In situations where the government gives itself the power to make case-by-case determinations and then grants exceptions to secular actors but not religious ones, it is reasonable to wonder whether it has acted fairly.[168] Justice Brennan raised concerns about government discrimination in *Sherbert* itself.[169] Adele Sherbert was a Seventh Day Adventist who lost unemployment benefits when she refused a job that would have required her to work on Saturdays in violation of her beliefs.[170] She won after the Supreme Court applied strict scrutiny simply because her faith had been burdened.[171] But Justice Brennan, writing for the majority, highlighted an additional fact: apparently there had

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165 *See* Emp. Div. v. Smith, 494 U.S. 872, 884 (1990) (internal quotation marks omitted); *see also supra* note 75 (listing the handful of cases in which religious claimants prevailed before *Smith*).

166 *See, e.g.*, *Sherbert*, 374 U.S. at 400 n.3 ("An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that: . . . (3) He is able to work and is available for work . . . .") (quoting S.C. CODE ANN., tit. 68, § 68-113 (1962)).

167 *See* Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 835 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141–42 (1987); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 719 (1981); *Sherbert*, 374 U.S. at 406–07.

168 There is some debate about whether the state could or did grant exemptions for comparable nonreligious reasons. Justice Harlan, in dissent, held that the state was not authorized to exempt anyone who was unavailable for work because of personal reasons. *See Sherbert*, 374 U.S. at 419–20 (Harlan, J., dissenting). The majority challenged that interpretation of state law. *See id.* at 401 n.4 (majority opinion).

169 *Id.* at 406.

170 *Id.* at 399–400.

171 "We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does." *Id.* at 403; *see also id.* at 406 ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right.").

been times in the past when the state had required businesses to operate on Sundays, and in those situations it had exempted workers who wished to worship on the day when most Christians observed the Sabbath.[172] Justice Brennan pointed out the obvious inference of government bias as an additional reason to protect Sherbert.[173] So when *Smith* was decided years later, there was a sense that *Sherbert* was compatible with its holding that free exercise did not protect against laws that were neutral and generally applicable as to religion.

Yet other evidence suggested that Justice Scalia dug up the individualized-exemptions language solely to distinguish the four unemployment compensation cases, without any deeper coherence. Nowhere in the original decisions had the Court emphasized the fact that unemployment compensation decisions were being made case by case.[174] Instead, it had simply found that the government had substantially burdened the claimants without a compelling interest.[175] Writing at the time, Professor Michael McConnell concluded that the individualized-exemption distinction "appears to have one function only: to enable the Court to reach the conclusion it desired in *Smith* without openly overruling any prior decisions."[176]

Tellingly, Scalia's distinction could not even explain the result in *Smith* itself, which involved a system of individualized assessments. Though its procedural posture was convoluted, *Smith* concerned either unemployment compensation or criminal prosecution, both of which turned on case-by-case determinations by the government.[177]

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[172] He wrote:

> Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty. When in times of "national emergency" the textile plants are authorized by the State Commissioner of Labor to operate on Sunday, "no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner." . . . The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

Id. at 406 (original alterations and citations omitted).

[173] *See id.*

[174] *See Fulton*, 141 S. Ct. at 1914 (Alito, J., concurring in the judgment) ("[I]n order to place *Sherbert*, *Hobbie*, [*Frazee*,] and *Thomas* in a special category reserved for cases involving unemployment compensation, an inventive transformation was required. None of those opinions contained a hint that they were limited in that way."). Justice Scalia found the individualized-exemptions language in an earlier opinion by Chief Justice Burger, joined by two others, that had turned away a religious claim and therefore had not relied on the idea. Emp. Div. v. Smith, 494 U.S. 872, 884 (1990) (citing Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion)).

[175] *See, e.g.*, *Sherbert*, 374 U.S. at 404, 406.

[176] McConnell, *Free Exercise Revisionism*, *supra* note 16, at 1124.

[177] *Id.* *Smith* had an unusual procedural posture that made it difficult to tell whether it concerned unemployment compensation or criminal liability. *See Smith*, 494 U.S. at 874.

Furthermore, the state seemed to actually exercise that discretion when it declined to charge the religious claimants with any crime.[178] Yet strict scrutiny was not applied — that, of course, was the whole point of *Smith*. Previously, moreover, the Court had decided other cases without mentioning that they too involved systems of individualized governmental determinations.[179] All in all, the individualized-exemptions rule appears to have been used to retrofit precedents in order to give political cover to a constitutional overhaul.

In *Fulton*, the Supreme Court seemed to dust off the individualized-exemption rule for a political purpose that was strikingly similar if inverted: to obscure an effective return to constitutional protection for those seeking religious exemptions from general laws. Between the time it was invented and today, the individualized-exemptions rule had never provided the sole foundation for a holding by the Court.[180] If it is correct that the rule was not even applied in the

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[178] *See Fulton*, 141 S. Ct. at 1914 (Alito, J., concurring in the judgment) (making the point that the state had exercised its prosecutorial discretion and observing "[w]hy this was not sufficient to bring the case within *Smith*'s rule about individualized exemptions is unclear").

[179] *See* McConnell, *Free Exercise Revisionism*, *supra* note 16, at 1123 (discussing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); and O'Lone v. Est. of Shabazz, 482 U.S. 342 (1987)). Formally, the Court did not apply strict scrutiny because there was no substantial burden in *Lyng*, 485 U.S. at 447, and because of the prison context in *O'Lone*, 482 U.S. at 349.

[180] It is true that the individualized-exemptions language was invoked in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), but only in passing and at best as additional support for a finding that the ordinances there contained so many categorical exceptions that they were gerrymandered to target religion. In the middle of a paragraph making that argument with respect to one of the three ordinances at issue, the Court remarked: "Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of 'individualized governmental assessment of the reasons for the relevant conduct.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884). Next, the Court invoked the distinct rule of equal value, saying that the City's "application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." *Id.* at 537–38. It would be hard to argue that the individualized-exemptions language was necessary to the outcome.

Others agree that the rule has not provided the only basis for a holding in the Supreme Court. Justice Alito noted that Justice Barrett claimed that the individualized-exemptions rule was "longstanding" but that she failed to cite any cases to support it. *Fulton*, 141 S. Ct. at 1892 n.25 (Alito, J., concurring in the judgment). Her only support came from a footnote in *Sherbert* and part of *Cantwell v. Connecticut*, 310 U.S. 296 (1940), but those authorities were convincingly distinguished by Justice Alito. *See Fulton*, 141 S. Ct. at 1892 n.25 (Alito, J., concurring in the judgment). Both of them predate *Smith*, moreover.

In another early case, a plurality of three Justices mentioned the idea approvingly, but only as a mechanism for uncovering "discriminatory intent," and only in the course of rejecting all arguments of the religious claimant. *See* Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion); *see also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 142 n.7 (1987) (arguing arguendo that "even if the Court had accepted the reasoning of the Chief Justice's opinion in *Roy* — which it did not — we would apply strict scrutiny in this case" under the individualized-exemptions rationale).

In lower courts, the individualized-exemptions doctrine has made occasional appearances. Justice Alito mentioned it in a decision he wrote while serving on the Third Circuit, but he then made it fairly clear that he was relying on equal value instead. *See* Fraternal Ord. of Police Newark

unemployment compensation cases themselves, then it justified a holding of the Supreme Court for the very first time in *Fulton*. That is exactly what you would expect of a mechanism designed to justify an overdetermined result without drawing criticism for upending precedent. It is not what you would expect from a genuine rule of law.[181]

If Philadelphia had used the discretion it was said to have given itself to engage in a pattern or practice of exempting nonreligious child welfare agencies from its nondiscrimination requirement while refusing an exception to Catholic Social Services, then it would have raised a suspicion that it was acting out of antireligious hostility. That would have looked like discriminatory administration in equal protection law.[182] Or if Philadelphia had granted a comparable exception, that could have raised a presumption of unfairness under the equal value approach used in the coronavirus orders.[183] But under the actual facts of *Fulton*, there was no evidence that Philadelphia had used its ostensible ability to grant an exception even once.[184]

It is true that there are freedom of speech precedents in which the Court has invalidated licensing regimes that give too much discretion to local officials.[185] On an analogy to them, the mere availability of an exemption would be enough to arouse a suspicion of impermissible burdening. That seems to have been the justification in *Fulton*, and it makes some sense on its face. But to make that rule the basis for a free exercise holding for the first time — in three sentences of reasoning supported only by questionable dicta that went unused for three decades, even if it was mentioned from time to time — was unsettling and unpersuasive.

Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999). However, Justice Alito did rely on the individualized-exemptions idea, along with equal value, in a later opinion. *See* Blackhawk v. Pennsylvania, 381 F.3d 202, 209–12 (3d Cir. 2004). Judge Sutton invoked the doctrine in *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012), though he ran it together with equal value. *See also* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1081–82 (9th Cir. 2015) (reading the exception narrowly and finding it inapplicable); Axson-Flynn v. Johnson, 356 F.3d 1277, 1297–99 (10th Cir. 2004) (applying the "individualized-exemption exception" alongside the hybrid-rights exception to *Smith*); Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (applying the individualized-exemption rule); Rader v. Johnston, 924 F. Supp. 1540, 1553 (D. Neb. 1996) (same).

[181] This account differs from the view that "the conservative justices appear to have blinked" in *Fulton*. *Cf.* David Cole, *Surprising Consensus at the Supreme Court*, N.Y. REV. BOOKS (Aug. 19, 2021), https://www.nybooks.com/articles/2021/08/19/surprising-consensus-at-the-supreme-court [https://perma.cc/S83V-8Z9Z].

[182] *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

[183] *See* Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021).

[184] Brief for City Respondents at 35, *Fulton*, 141 S. Ct. 1868 (No. 19-123) ("DHS has no authority to grant exemptions to the contract's non-discrimination requirement.").

[185] Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 & n.10 (1992); *Cantwell*, 310 U.S. at 305–06; Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939); Schneider v. New Jersey, 308 U.S. 147, 160 (1939).

Chief Justice Roberts's constitutional reasoning was compounded by strange interpretations of the City's contract and the state's public accommodations law. Those readings were thoroughly critiqued by Justice Gorsuch.[186] Both of them were implausible, but both were necessary for the majority's conclusion that no generally applicable law prohibited Catholic Social Services from excluding same-sex married couples. Without reviewing all the majority's difficulties in detail, it is possible to note here simply that the Court could not have been correct that the agency's "customized and selective" examination of foster parents for certification alone meant that the religious agency was not a public accommodation.[187] If that were right, Justice Gorsuch powerfully argued, then selective colleges and universities could not qualify as public accommodations — despite the fact that they were listed as paradigmatic examples by the statute itself.[188] Even though Chief Justice Roberts's interpretation of public accommodations law was wrongheaded, and even though it cannot bind state courts, it may well influence them.

All told, the *Fulton* majority opinion makes sense only as a political maneuver, and an effective one at that.[189] Chief Justice Roberts disposed of a controversial case with technical reasoning that was difficult for the public to understand and therefore difficult to disparage.[190] He achieved unanimity as to the result, and he entirely avoided criticism from the more liberal Justices. *Smith* went undefended. Viewed from a distance, *Fulton* looks like yet another in a series of finely reasoned decisions that consistently come down in favor of religious actors, with only a few exceptions that are revealing insofar as they are anomalous.[191]

B. Contradicting the Current Rule

Consider the cases where deference to the government seemed to be required by the main rule of *Smith* but was not applied, resulting in a

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[186] *Fulton*, 141 S. Ct. at 1926–28 (Gorsuch, J., concurring in the judgment) (criticizing the majority's interpretation of the relevant public accommodations statute); *id.* at 1928–29 (criticizing the majority's reading of Philadelphia's contract with Catholic Social Services).

[187] *Id.* at 1880 (majority opinion).

[188] *See id.* at 1927 (Gorsuch, J., concurring in the judgment) (citing 43 PA. STAT. AND CONS. STAT. ANN. § 954(l) (West 2021)).

[189] *See id.* at 1926–27 ("[I]f the goal is to turn a big dispute of constitutional law into a small one, the majority's choice to focus its attack on the district court's minor premise — that the [Fair Practices Ordinance] applies to [Catholic Social Services] as a matter of municipal law — begins to make some sense.").

[190] *See* Noah Feldman, Opinion, *Supreme Court's 9–0 Ruling on Gay Foster Parents Divides Justices*, BLOOMBERG (June 17, 2021, 1:30 PM), https://www.bloomberg.com/opinion/articles/2021-06-17/supreme-court-s-fulton-ruling-on-gay-foster-parents-shows-divisions [https://perma.cc/THQ2-L2JF] (calling the decision "highly technical," "convoluted," and "bizarre").

[191] *See supra* note 22 (describing the exceptions).

win for the religious claimant. There are at least three categories of these cases, all decided within the last few Supreme Court terms. Together, they suggest that the Roberts Court is accomplishing its goals even under current law. Perhaps they also indicate that the results are overdetermined and relatively insensitive to changes in black letter law. But they may instead depict a Court that would be even freer to accomplish its aims under a framework like the one described in Part I.

Consider first *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[192] which established the ministerial exception at the Supreme Court level.[193] Employment discrimination law prevents the exclusion of workers from adverse treatment on the basis of a protected status.[194] Although the main federal statute exempts religious organizations that limit their hiring to people of the same faith, it does not permit them to discriminate on other protected grounds.[195] Virtually everyone agrees that the Roman Catholic Church ought to be able to hire only men as priests, even though that practice infringes the rule against sex discrimination in employment. Implementing that intuition, the ministerial exception is a constitutional doctrine that protects the ability of congregations to employ religious leaders in ways that otherwise would violate civil rights law. Long recognized by lower courts, the exception was adopted by the Supreme Court for the first time in *Hosanna-Tabor*.[196]

What is more controversial — in fact, sharply so — is the application of the ministerial exception to situations where discriminatory hiring is not required by a congregation's theology.[197] It has even been applied in situations where church doctrine prohibits the alleged discrimination.[198] The Supreme Court seemed to extend the rule to all those situations as well.[199] One rationale for that expansive rule is something like the conviction that a necessary intimacy between clergy and

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[192] 565 U.S. 171 (2012).

[193] *Id.* at 188.

[194] 42 U.S.C. § 2000e-2. The claim of Cheryl Perich, the discharged teacher, was for retaliation under the Americans with Disabilities Act, 42 U.S.C. § 12203(a). *Hosanna-Tabor*, 565 U.S. at 180.

[195] 42 U.S.C. § 2000e-1.

[196] *Hosanna-Tabor*, 565 U.S. at 188 ("We agree that there is such a ministerial exception."). The ministerial exception would be justified by liberty of conscience, even as against civil rights laws. *See supra* p. 285.

[197] *See* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1966 (2007) (noting in an early article that the ministerial exception applies "regardless of whether or not religious belief motivated the discrimination").

[198] *See* B. Jessie Hill, *Change, Dissent, and the Problem of Consent in Religious Organizations*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 419, 432–33 (Micah Schwartzman et al. eds., 2016) (discussing such cases and arguing that they undermine the consent rationale for church autonomy protections).

[199] *See Hosanna-Tabor*, 565 U.S. at 188–89.

congregation would be harmed by government regulation. Another is that adjudicating such cases would inevitably require courts to make impermissible determinations of religious significance, such as whether a pastor was performing well.[200]

If there had been any doubt that the Court had adopted the strong form of the ministerial exception, it was removed in *Our Lady of Guadalupe School v. Morrissey-Berru*.[201] There, the ministerial exception was applied to teachers in Catholic schools without any inquiry into whether the alleged discrimination — on the basis of disability and age — was required by the church's theology. That question was irrelevant. The only issue was whether the teachers qualified as "ministers" within the meaning of the exception. Once it was determined that they did, their civil rights claims were extinguished.[202]

Here, the pertinent point is that the Court itself has not sufficiently distinguished the ministerial exception from the main rule of *Smith*. Employment discrimination laws like Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act are neutral and generally applicable. No Justice contested that. Yet the ministerial exception is grounded in free exercise as well as nonestablishment.

This is a contradiction for the Court.[203] All the majority offered in *Hosanna-Tabor* itself was a distinction between the regulation of "outward physical acts," which is still subject to the *Smith* rule, and interference with internal church decisions that affect the mission of the institution itself, which is not.[204] But that distinction was unconvincing.[205] None of the values driving free exercise requires differentiation between regulation of outward physical acts and employment decisions,

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[200] *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 54–55 (2011); Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 20 LEWIS & CLARK L. REV. 1265, 1267 (2017) ("*Hosanna-Tabor* stands in a long line of decisions, grounded primarily in the Establishment Clause, that prohibit state adjudication of 'strictly and purely ecclesiastical' questions." (footnote omitted)); *id.* at 1282–84 (arguing that the ministerial exception works as a prophylactic rule in employment discrimination cases involving ministers, keeping courts from reaching ecclesiastical questions).

[201] 140 S. Ct. 2049 (2020).

[202] *Id.* at 2066.

[203] Again, there are other ways of reconciling the ministerial exception with *Smith* — *see, e.g.*, Lupu & Tuttle, *supra* note 200, at 1293–95 — but the ministerial exception cases have not explicitly articulated them.

[204] *Hosanna-Tabor*, 565 U.S. at 190 ("*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.").

[205] *See, e.g.*, Lupu & Tuttle, *supra* note 200, at 1276 ("As many others have noted, . . . it is utterly unpersuasive to assert that the peyote use involved in *Smith* is an outward act, while the treatment of Ms. Perich in *Hosanna-Tabor* is an 'internal church decision,' thereby distinguishing the cases."). Lupu and Tuttle argue that the ministerial exception is justified by the prohibition on government resolution of ecclesiastical questions, a rule that stands outside *Smith*. *See id.* at 1267.

which are almost always manifested tangibly anyway. Accordingly, the distinction has not been defended in subsequent decisions or in the literature, to my knowledge.[206]

Think second of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[207] There too, governing free exercise law would seem to have precluded the result. A baker sought protection from public accommodations law, which prohibited him from excluding customers on the basis of sexual orientation. Colorado determined as a matter of state law that he had run afoul of its public accommodations law when he refused to create a wedding cake for Charlie Craig and David Mullins.[208] State civil rights law was neutral and generally applicable with respect to religion, so it did not appear to be vulnerable to a free exercise claim, as Justice Kennedy acknowledged in his opinion for the Court.[209]

Yet the baker won. Justice Kennedy purported to rationalize that result in terms of existing doctrine, but his attempt to do so was novel and strained. He picked out of the record places where members of the Colorado Civil Rights Commission had made statements that Justice Kennedy considered to be disrespectful toward religion.[210] Whether they were has been contested.[211] Even if they did express antipathy, however, they represented the views of just two out of seven commissioners. Under familiar antidiscrimination doctrine, that is not enough to invalidate a government action; even bias by a majority of members would be insufficient if the commission would have taken the same action absent the impermissible motive.[212] Justice Kennedy recognized this but insisted on special sensitivity where government officials were acting in an adjudicative capacity. Again, that reasoning was plausible on its face but strangely unprecedented. Overall, the reasoning of *Masterpiece Cakeshop* was so thin that it has been compared to an abdication of the duty of civility — the obligation to give reasons for rulings that exert power over people's lives and the democracy more generally.[213]

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[206] One author reconceptualizes the distinction as one between disputes among church insiders and disputes with outsiders. *See* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183, 1193–95 (2014).

[207] 138 S. Ct. 1719 (2018).

[208] *See id.* at 1725–27.

[209] *See id.* at 1727 ("[W]hile those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.").

[210] *Id.* at 1729.

[211] *See* Kendrick & Schwartzman, *supra* note 14, at 138–43.

[212] *See id.* at 153 (discussing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977)).

[213] *See id.* at 164–66.

Third and finally, compare the coronavirus orders to *Trump v. Hawaii*,[214] the travel ban case. In the first situation, executive officials were found to have subjected religious actors to "disparate treatment" although in some cases there was no evidence or claim of discriminatory classification or purpose.[215] In the second, the President was found not to have violated religious freedom, despite overwhelming evidence of discriminatory purpose.[216] How can these results be reconciled? It is true that the doctrinal foundations of the challenges were different — free exercise and nonestablishment, respectively — but both centered on claims of religious discrimination. And although the coronavirus challenges were closer to demands for religious exemptions, the travel ban briefing did include an argument for protection for Muslim travelers, though it was oblique.[217]

It is also true that the Court resolved the travel ban case not by denying the reality of a discriminatory purpose but instead by deferring to the Executive's plenary power over immigration and national security, and by finding that the Trump Administration ultimately had offered legitimate reasons for the final version of the travel ban, in addition to the illegitimate reasons expressed by President Trump.[218] Yet the coronavirus cases also concerned executive branch administration of an emergency situation on the basis of legitimate motives. They therefore seemed to be similarly strong candidates for judicial deference.[219]

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[214] 138 S. Ct. 2392 (2018).

[215] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020); *see, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting) (noting the absence of any indication that the government had discriminated against religious actors).

[216] Trump v. Hawaii, 138 S. Ct. at 2417–18 (reviewing the President's statements); *id.* at 2423 (ruling for the President). For a more extensive comparison of the travel ban decision to the coronavirus orders, see Tebbe, *The Principle and Politics of Equal Value*, *supra* note 24 (manuscript at 64–74).

[217] *See* Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Neither Party at 26–27, Trump v. Hawaii, 138 S. Ct. 2392 (No. 17-965), 2017 WL 3588206, at *22–23.

[218] *See* Trump v. Hawaii, 138 S. Ct. at 2420–21.

[219] There was also significant tension between the travel ban decision and *Masterpiece Cakeshop*. Both cases ended up turning on a claim of antireligious animus on the part of the government. Yet the results were the inverse of what might have been expected. In the travel ban situation, the evidence of discriminatory intent toward Muslims was strong, and it pertained to the sole decisionmaker, President Trump. *See* Trump v. Hawaii, 138 S. Ct. at 2417–18. The Court did not contest that evidence. *Id.* In *Masterpiece Cakeshop*, by contrast, the evidence of discriminatory intent consisted of stray remarks by two members of a multimember decisionmaking body. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018). The Court tried to reconcile the holdings by emphasizing deference to the Executive on matters of immigration and national security, on the one hand, Trump v. Hawaii, 138 S. Ct. at 2418–20, and special sensitivity to evidence of bias among officials serving an adjudicative function, on the other, *Masterpiece Cakeshop*, 138 S. Ct. at 1730. Yet that effort struck some observers as insufficient to justify the outcomes, which were just the opposite of what might be expected from a Court committed to guarding against antireligious animus. *See* Kendrick & Schwartzman, *supra* note 14, at 168–69.

Even considered alone, several of the coronavirus cases seemingly should have been governed by *Smith*'s prohibition on discriminatory object or purpose. In *Tandon* and the schools cases, for instance, there were no allegations of religious discrimination in the government's purpose.[220] Nor did officials classify religious actors explicitly — they simply closed all schools and regulated all at-home gatherings.[221] Nor were the exempted activities comparable. Here too, then, outcomes were difficult to square with governing law.

Overall, serious contradictions have troubled the judicial administration of free exercise doctrine. Similar difficulties extend into other areas of religious freedom law.

C. Accepting Harm to Others

An important limit on conscience exemptions is the imperative of avoiding harm to others.[222] During the period when free exercise exemptions were explicitly provided, they were generally constrained to situations in which exempting one private citizen would not entail undue hardship to any other identifiable private citizen. This practice was grounded both in the Free Exercise Clause itself and in the Establishment Clause.[223] Yet today there are signs that such precedent is unlikely to be observed.[224]

In *Hobby Lobby*, third-party harms were not formally involved because the Court assumed that the government would provide contraception coverage through alternate means, as it eventually did.[225] However, the Court went further and sidelined the rule against third-party harms by noting that the case only concerned the Religious Freedom Restoration Act of 1993 (RFRA), a statute, and by ruling that it was not bound by precedent concerning free exercise.[226] Untethering RFRA from free exercise precedent was remarkable, given that Congress had explicitly stated that its objective had been to "restore" free exercise law

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[220] *Tandon*, 141 S. Ct. at 1298–99 (Kagan, J., dissenting) (noting the absence of any religious discrimination).

[221] *Id.*

[222] *See supra* section I.D, pp. 288–91.

[223] *See* Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 709–10 (1985) (Establishment Clause); United States v. Lee, 455 U.S. 252, 260–61 (1982) (Free Exercise Clause).

[224] *See The Supreme Court, 2018 Term — Leading Cases*, *supra* note 118, at 560 (noting that the *Little Sisters* Court "signaled that harm to third parties will no longer serve as a check on those accommodations at all").

[225] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014) (noting that the impact on women would be "precisely zero"); TEBBE, *supra* note 30, at 51 (noting that it took about a year from the time of the Supreme Court opinion for the Obama Administration to arrange for substitute coverage for women).

[226] *Hobby Lobby*, 573 U.S. at 734–35.

in the Religious Freedom Restoration Act.[227] Whatever the merits of that move, moreover, it ought to be irrelevant to free exercise itself. Were liberty of conscience to be adopted, it should continue to be constrained by the principle against harm to third parties. Holdings like those of *United States v. Lee*[228] and *Estate of Thornton v. Caldor, Inc.*[229] would seem to pertain with full force.

Yet conservative Justices have not only distinguished those decisions, they have also criticized them. In a lengthy footnote, the *Hobby Lobby* Court argued that a burden on third parties could always be identified by manipulating baselines so that the loss of a government benefit was styled as an affirmative harm.[230] Moreover, the Court objected that trivial costs to others could defeat religious exemptions that lifted serious burdens, and it spun out hypotheticals to illustrate the point. These arguments were weak, as has been argued elsewhere.[231] Here, the practical import of the footnote is independent of its merits — it undermines confidence that the third-party harm rule would be observed if exemptions became explicitly available under the Free Exercise Clause.

Further evidence comes from the Court's decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*[232] to uphold the Trump Administration's regulations exempting religious employers from the contraception mandate.[233] In her very last opinion — a dissent — Justice Ginsburg pointed out that the Administration had exempted religious employers from the mandate without providing any alternative coverage for women.[234] Consequently, "[b]etween 70,500 and 126,400 women of childbearing age, the Government estimates, will experience the disappearance of the contraceptive coverage formerly available to them; indeed the numbers may be even higher."[235]

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[227] *See Hobby Lobby*, 573 U.S. at 749–50 (Ginsburg, J., dissenting); Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 428–33 (2016); Micah J. Schwartzman, *What Did RFRA Restore?*, RELIGIOUS FREEDOM INST. (June 30, 2016), https://www.religiousfreedominstitute.org/cornerstone/2016/6/30/what-did-rfra-restore [https://perma.cc/DC2G-JE5F].

[228] 455 U.S. at 262.

[229] 472 U.S. 703, 710–11 (1985).

[230] *Hobby Lobby*, 573 U.S. at 729 n.37.

[231] *See* Schwartzman et al., *supra* note 112, at 796–98; Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 328, 340–45 (Susanna Mancini & Michel Rosenfeld eds., 2018). *See generally* Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines:* Hobby Lobby*'s Puzzling Footnote 37*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 323 (Micah Schwartzman et al. eds., 2016).

[232] 140 S. Ct. 2367 (2020).

[233] *See id.* at 2386.

[234] *See id.* at 2403 (Ginsburg, J., dissenting) ("Of cardinal significance, the exemption contains no alternative mechanism to ensure affected women's continued access to contraceptive coverage.").

[235] *Id.* at 2408 (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,578–80 (Nov. 15, 2018));

That the Administration's "expansive religious exemption . . . imposes significant burdens on women employees" was a problem because it contravened "the basic principle" that "[w]hile the Government may accommodate religion . . . it may not benefit religious adherents at the expense of the rights of third parties."[236] Justice Ginsburg made it clear that her dissent was "rel[ying]" on that principle.[237] "Holding otherwise," she emphasized, "would endorse 'the regulatory equivalent of taxing non-adherents to support the faithful.'"[238] Here, Justice Ginsburg was invoking James Madison, who had famously resisted a Virginia tax to support the training of clergy.[239] Her specific concern, however, was discriminatory harm to women. Specifically, she expressed alarm that the Trump Administration's religious exemption had frustrated "Congress' endeavor . . . to redress discrimination against women in the provision of healthcare,"[240] and that the exemption "reintroduce[s] the very health inequities and barriers to care that Congress intended to eliminate when it enacted the women's preventive services provision of the [Affordable Care Act]."[241]

By contrast, the majority did not even acknowledge the constitutional issues raised by shifting harm to women in this way.[242] Instead,

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see also id. at 2408 n.18 (describing the government's estimation method and noting that "[i]f more plans, or plans covering more people, use the new exemption, more women than the Government estimates will be affected"). *But see id.* at 2381 (majority opinion) (noting that "[t]he Departments dispute that women will be adversely impacted by the 2018 exemptions," citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,805 (Oct. 13, 2017), but taking no position on the disagreement).

[236] *Id.* at 2408 (Ginsburg, J., dissenting) (first citing Cutter v. Wilkinson, 544 U.S. 709, 713, 722 (2005); and then citing Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985)); *see also id.* at 2410 (noting "a critical distinction in the Court's religious exercise jurisprudence: A religious adherent may be entitled to religious accommodation with regard to her own conduct, but she is not entitled to 'insist that . . . *others* must conform *their* conduct to [her] own religious necessities'" (quoting *Caldor*, 472 U.S. at 710)).

[237] *Id.* at 2408; *see also id.* at 2407 ("[Y]our right to swing your arms ends just where the other man's nose begins." (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 746 (2014) (Ginsburg, J., dissenting))).

[238] *Id.* at 2408 (quoting Brief for Church-State Scholars as Amici Curiae in Support of Respondents at 3, *Little Sisters*, 140 S. Ct. 2367 (Nos. 19-431, 19-454), 2020 WL 1865414, at *3). The author was a signatory to the brief that Justice Ginsburg quoted here.

[239] *See* Madison, *supra* note 114, at 30–33.

[240] *Little Sisters*, 140 S. Ct. at 2404 (Ginsburg, J., dissenting).

[241] *Id.* at 2409 (citing Brief for Amici Curiae the National Women's Law Center et al. in Support of Respondents at 5, *Little Sisters*, 140 S. Ct. 2367 (Nos. 19-431, 19-454), 2020 WL 1875628, at *5).

[242] *Cf. id.* at 2396 n.13 (Alito, J., concurring) (arguing that Justice Ginsburg's concern with harm to others was grounded in the Establishment Clause, that the states had not raised that argument, and that, in any event, "there [wa]s no basis for [such] an argument"). However, Justice Ginsburg argued that the requirement of *Cutter* was grounded in an interpretation of the statute itself. *See id.* at 2407 (Ginsburg, J., dissenting) (characterizing *Cutter* as "construing [the Religious Land Use and Institutionalized Persons Act]" to require that "adequate account" be taken of harm to nonbeneficiaries).

it simply attributed any failure to Congress itself, which had not explicitly required contraception coverage.[243] This is a kind of baseline argument — denying that women have been harmed by the loss of contraception coverage by arguing that they were not entitled to that coverage in the first place.

Whether through baseline adjustment, precedent reinterpretation, or some other mechanism, the Court seems sure to continue to distance itself from its own principle against allowing religious exemptions that entail significant harm to others. That is regrettable, but here my point is narrower — it is that the Court has to do serious work to overcome the principle's support in history, precedent, and normative theory. Considered together with the other evidence offered in this Part, the Court's exertion contributes to the impression that it is striving to implement a particular vision of protection for traditional religious interests facing social contestation and status degradation.

Not only does this transformation favor religious actors, but it also increases the power of the Court itself. Removing limitations like the rule against third-party harm increases judicial maneuverability, which could conceivably be further enabled by a relatively open balancing test.

D. Invalidating Incidental Burdens on First Amendment Rights

Were the Court to overrule *Smith*, it probably would require the government to show that all substantial burdens on observance are narrowly tailored to a compelling interest. What is more, the Court would adopt that standard not only in name, but also in practice. In *Tandon*, it recently emphasized that the compelling interest test under free exercise "'is not watered down'; it 'really means what it says.'"[244]

Regardless of the standard it formally adopts for any new rule, moreover, the Court can be expected to require exceptions from many laws that incidentally burden free exercise. It is already doing that in the ministerial exception cases, as explained above,[245] and in the Covid orders.[246] A new rule would almost certainly be interpreted and applied rigorously. In the RFRA context, for example, the Supreme Court has ordered religious exemptions from every single law it has scrutinized.[247]

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[243] *See id.* at 2381–82 (majority opinion).

[244] Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (alteration in original)).

[245] *See supra* section II.B, pp. 303–07.

[246] *See* Tebbe, *The Principle and Politics of Equal Value*, *supra* note 24 (manuscript at 19–25).

[247] That said, there have not been many cases at the Supreme Court level. *See* Holt v. Hobbs, 574 U.S. 352, 356 (2015); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91 (2014); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 423 (2006). Apparently, the only decision in which a religious claimant lost a RFRA case in the Supreme Court was the one in which it found that applying the statute to the states was outside Congress's enforcement power. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

On the one hand, that pattern might be expected and justified under a compelling interest regime, and it could be affected by case selection. On the other hand, however, the Court has used at least one of those cases as an occasion to explicitly eschew limitations that were in place during the era preceding *Smith*.[248] And regardless of whether its RFRA jurisprudence is instructive, the Roberts Court seems sure to exercise its power of judicial review to provide robust free exercise protection against laws that are neutral and generally applicable toward religion.

If the prediction is correct that any religious exemption regime would be assertively implemented, then it would create tension with the Court's approach to incidental burdens on other First Amendment rights, especially freedom of expression.[249] There, the Court purports to apply a presumption of invalidity under intermediate scrutiny for content neutral regulation of expressive conduct.[250] And sometimes it invalidates regulations under one or another version of that standard.[251] But in the long run of cases, it more often upholds government actions as legitimately motivated and sufficiently tailored.[252] And it does so under a black-letter rubric that is different from strict scrutiny. So both in theory and in practice, any new free exercise rule is likely to contrast with the Court's approach to incidental burdens on speech.[253]

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[248] *See Hobby Lobby*, 573 U.S. at 734 (dispatching United States v. Lee, 455 U.S. 252 (1982)).

[249] *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1215–19 (1996) (comparing law on incidental burdens on speech and religion). Of course, the current rule for free exercise exemptions also sits uncomfortably with speech law. *See* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 84 (2000).

[250] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295–96 (1984).

[251] *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 486–87, 490 (2014) (holding that a law creating buffer zones around abortion clinics was not "narrowly tailored to serve a significant governmental interest," *id.* at 486).

[252] *See* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 785 ("[I]n applying intermediate scrutiny to reconcile governmental interests with free speech claims, the appellate courts have tended to systematically favor the government. . . . [T]his article shows that the aggregate consequence of this governmental preference is the suppression of substantial amounts of important, socially valuable speech."); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 50–51 (1987) (finding that in practice the *O'Brien* test, United States v. O'Brien, 391 U.S. 367, 376–77 (1968), and the test for content-neutral time, place, and manner regulations are deferential to the government); Dorf, *supra* note 249, at 1180 ("At least formally, the Supreme Court requires intermediate scrutiny of laws that impose an incidental burden on free speech, although in practice, the standard applied often appears to be quite deferential.").

[253] Strict scrutiny for incidental burdens on religion would also set up tension with the rule for incidental burdens on interstate commerce, which is more relaxed. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (citation omitted)).

Perhaps that tension could be resolved with careful doctrinal analysis.[254] Or perhaps the difference is untroubling.[255] Neither of those possibilities can be definitively dismissed within the limits of this Comment. Yet the willingness to strongly protect incidental burdens on free exercise — even as compared to another right, freedom of speech, that generally is strongly protected by the Roberts Court — contributes some support to the sense that any availability of conscience exemptions, however the standard is precisely articulated, will be difficult to cabin as a matter of actual implementation. This Court will use available tools to construct a series of outcomes that robustly protect the actual ability of people of faith to observe their beliefs and engage in their practices. Any resulting dissonance with other areas of law is unlikely to stand in the way, though it can help to spot the strategy.

E. Enervating Civil Rights

It is sometimes thought to be uncontroversial that the government's interest in enforcing civil rights laws is compelling. And for decades that proposition was repeatedly reaffirmed, as noted above, albeit with increasing complexity.[256] As things stand, it is uncertain whether the government's interests in rectifying structural injustice are strong enough to withstand claims for free exercise exemptions.

In *Fulton*, the majority held that Philadelphia did not have a compelling interest in requiring Catholic Social Services to serve all prospective foster parents without regard to whether they were married or partnered with someone of the same sex or gender.[257] Philadelphia's interest in "ensuring equal treatment of prospective foster parents and foster children"[258] was called "weighty,"[259] a term that communicated respect but must have been deliberately chosen to differ from

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[254] For example, Professors Thomas Berg and Douglas Laycock argue that incidental burdens on speech leave open other avenues of expression. In freedom of association cases, where there are no alternatives, strict scrutiny is applied. *See* Laycock & Berg, *supra* note 7 (manuscript at 11–12) (discussing Boy Scouts of America v. Dale, 530 U.S. 640 (2000)). But this argument may not take seriously enough the speaker's interest in expressing a perspective in the most effective manner. *Cf.* Dorf, *supra* note 249, at 1181 ("[W]hether a law forbidding sleeping in a park places a substantial burden on the right to express a view about homelessness ultimately depends on the extent to which the right to free speech guarantees the ability to make one's point in the particular way that one deems most effective — and that is ultimately a question about the scope of the free speech right." (citation omitted)).

[255] *See* Brownstein, *supra* note 16, at 61 n.19 ("I am less confident that as a formal matter analogies between the free exercise of religion and freedom of speech, or analogies between any rights, necessarily justify similar doctrinal rules.").

[256] *See supra* notes 79–84 and accompanying text.

[257] *Fulton*, 141 S. Ct. at 1881–82.

[258] *Id.* at 1881.

[259] *Id.* at 1882.

"compelling."[260] Regardless, the majority reasoned that Philadelphia could not have a compelling interest in applying the nondiscrimination law to Catholic Social Services if it were willing to contemplate individualized exemptions.[261] If other exemptions could be granted consistent with its interests, in other words, a religious exemption could be as well.[262]

But that conclusion does not necessarily follow. It is possible to imagine an exemption from the antidiscrimination requirement that does not undermine the purposes of the City's antidiscrimination rule, such as one that allows an agency to favor parents from a subordinated group. More generally, the Court does not explain how requiring Catholic Social Services to serve same-sex couples is not necessary to advance the government's "weighty" interest in equality. Chief Justice Roberts's argument that the mere possibility that the City could exempt some hypothetical agency somehow undermines its need to apply the rule to this real agency was not convincing. Or perhaps he was thinking of the agency's willingness to refer same-sex couples to other agencies.[263] But if that were the rationale, then it would have been necessary to ask whether referrals were compatible with civil rights goals.[264] As the

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[260] *Id.*

[261] *See id.*

[262] That conclusion has been noted. Berg and Laycock, for example, wrote that "*Fulton* also makes clear that civil rights laws do not automatically and in every context serve a compelling government interest. Importantly, the liberals joined this holding." Berg & Laycock, *supra* note 7. And Professor Richard Garnett wrote that "[t]his step in the [*Fulton*] Court's reasoning should be seen as a rejection of the commonly made argument that practices like [Catholic Social Service]'s impose 'dignitary harms' that governments have a compelling interest in preventing in every case." Garnett, *supra* note 162.

[263] *See Fulton*, 141 S. Ct. at 1886 (Alito, J., concurring in the judgment) ("As far as the record reflects, no same-sex couple has ever approached [Catholic Social Services], but if that were to occur, [Catholic Social Services] would simply refer the couple to another agency that is happy to provide that service — and there are at least 27 such agencies in Philadelphia.").

[264] There are reasons to doubt whether the agency's referral policy removes any civil rights concerns. One is that foster children may well be LGBTQ+ but not openly identify as such. *See* BIANCA D.M. WILSON ET AL., WILLIAMS INST., SEXUAL AND GENDER MINORITY YOUTH IN FOSTER CARE: ASSESSING DISPROPORTIONALITY AND DISPARITIES IN LOS ANGELES 39–40 (2014) (finding that LGBTQ+ youth are overrepresented among foster children in Los Angeles County, *id.* at 39, but "relatively invisible" within the system, *id.* at 40). Excluding same-sex couples deprives those children of possibly important support.

Another is that allowing an agency to openly exclude same-sex couples itself may have an expressive impact. Even a Supreme Court decision alone can encourage uninvolved organizations to exclude same-sex couples. Professor Netta Barak-Corren conducted an empirical survey in which she found that the decision in *Masterpiece Cakeshop* significantly increased the likelihood that other wedding vendors would exclude same-sex couples, even though the Court's fact-specific ruling could not possibly have affected their legal rights. Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from* Masterpiece Cakeshop, 50 J. LEGAL STUD. 75, 77 (2021) ("[T]he decision significantly reduced the willingness to serve same-sex couples, from 63.6 percent before *Masterpiece* to only 49.2 percent after the decision was rendered . . . ."); *see also* Netta Barak-Corren, *A License to Discriminate? The Market*

Court left matters after *Fulton*, the agency could openly exclude same-sex couples, and it could do that with City funding.[265]

Earlier cases had already undermined the status of civil rights interests as compelling. *Hobby Lobby* concerned the government's effort to guarantee women's equality in reproductive healthcare coverage.[266] Although the Court did not hold that the government lacked a compelling interest in protecting women in this way, it also did not commit to the position that it had such an interest — instead, it assumed that point arguendo and went on to find that the contraception mandate was not the least restrictive means of pursuing any such interest because the government could have exempted religious businesses while providing cost-free contraception coverage through another mechanism.[267] The Court also suggested that existing exceptions to the mandate undermined the government's claim that it was pursuing a compelling interest.[268] If its interest in women's health and equality was so strong, the argument seemed to be, why grandfather certain insurance plans? Elsewhere in the opinion, the Court acknowledged that the government had a compelling interest in combatting racial discrimination in employment, but it did not explicitly generalize that principle beyond race or beyond employment.[269]

One point of particular controversy is whether the government has a compelling interest in combatting harm to the equal status or standing of members of protected groups, even absent material or tangible harm. Traditionally, civil rights laws have been thought to be driven by three interests, namely ensuring equal economic opportunity, supporting equal social standing, and educating the public about appropriate treatment of people vulnerable to structural injustice.[270] Yet prominent

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Response to Masterpiece Cakeshop, 56 HARV. C.R.-C.L. L. REV. (forthcoming 2021) (on file with the Harvard Law School Library).

[265] *See* Amanda Shanor, "*LGBTQ+ Need Not Apply*," REGUL. REV. (June 21, 2021), https://www.theregreview.org/2021/06/21/shanor-lgbtq-need-not-apply [https://perma.cc/ZZM2-SR62] ("'Straight Couples Only' signs can now be posted with full constitutional protection — at least in some contexts.").

[266] *Cf.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2404 (2020) (Ginsburg, J., dissenting) ("Congress' endeavor, in the Women's Health Amendment to the ACA, [was] to redress discrimination against women in the provision of healthcare . . . ."). Note that the women at issue were not only workers themselves, but also the female dependents of employees.

[267] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691–92 (2014) (articulating the assumption).

[268] *Id.* at 727.

[269] *See id.* at 733. Justice Kennedy, who provided a fifth vote for the majority opinion, wrote separately and emphasized "[i]t is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees." *Id.* at 737 (Kennedy, J., concurring).

[270] *See* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Anti-discrimination Law*, 88 S. CAL. L. REV. 619, 627–28 (2015).

commentators have questioned whether the second interest, in combatting status degradation, is strong enough to overcome a religious freedom claim for an exemption.[271] For instance, Charlie Craig and David Mullins were denied service by Masterpiece Cakeshop because their same-sex marriage did not conform to Christian tenets. Assume for a moment that they were able to obtain another wedding cake with no search costs or other economic burdens. Did the state nevertheless have a compelling interest in protecting them from exclusion on the basis of their sexual orientation?[272] The Supreme Court seemed to address that question in its *Masterpiece* opinion, albeit in dicta. Justice Kennedy wrote for the Court that "any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons."[273] While similar language was reaffirmed in *Fulton*,[274] today it is possible that there are no longer five votes for the proposition that the government's interest in avoiding noneconomic damage to citizenship standing is sufficiently strong to overcome a claim for a religious exemption.

Moreover, the Court has used other mechanisms to carve out religious exemptions from civil rights laws. The ministerial exception, discussed above, is one such device. It requires the exemption of religious employers of "ministers" from employment discrimination laws, without any application of the compelling interest test or even rational basis review.[275] Once an employee of a religious organization is determined to be a minister, the employer is exempt without further analysis. The ministerial exception has worked in this way not only in cases concerning discrimination on the basis of gender and disability, but also occasionally in those concerning race.[276]

In *Masterpiece Cakeshop* itself, moreover, the Court protected the baker from a public accommodations law without applying the

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[271] *See* sources cited *supra* note 84.

[272] Colorado determined that exclusion of people who marry someone of the same sex or gender constitutes discrimination on the basis of sexual orientation in violation of the state's public accommodations law. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 280–81 (Colo. App. 2015), *cert. denied,* No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016).

[273] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1728–29 (2018).

[274] *See Fulton*, 141 S. Ct. at 1882 ("We do not doubt that this interest is a weighty one, for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.'" (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727)).

[275] *See supra* pp. 303–05.

[276] *See* Leslie C. Griffin, *The Ministerial Exception Allows Racial Discrimination by Religions*, VERDICT (July 16, 2020), https://verdict.justia.com/2020/07/16/the-ministerial-exception-allows-racial-discrimination-by-religions [https://perma.cc/5KK3-S3WR].

compelling interest test.[277] Normally, a showing of religious discrimination triggers a presumption of invalidity, rather than per se invalidation.[278] Though the Court's failure may have been a mistake or an oversight, it nevertheless contributed to protection for a religious business that otherwise would have faced liability under a civil rights law.

Now it is possible that each of these results, taken alone, could be justified on the basis of law and principle — and of course the Court has defended each in those terms. I have raised certain questions about these defenses, and others have raised further questions.[279] Regardless, there is an evident trend in favor of religious exemptions from civil rights laws, at least at the Supreme Court level. Introducing a flexible balancing test might allow even greater doctrinal leeway for those inclined to shield religious actors from laws designed to protect against social differentiation and political demotion.

F. Empirical Evidence of Political Decisionmaking

Recent studies have provided empirical evidence that is consistent with the impression that the Roberts Court favors religious interests with detectable systematicity. Moreover, the current Court's support for religious actors tracks both partisan affiliation and conservative ideology. Some, if not all, evidence also dovetails with a supposition of religious preferentialism among lower court judges.

Professors Lee Epstein and Eric Posner find that while the Supreme Court ruled in favor of religion 58% of the time from 1953 through 2019, the rate for the Roberts Court is 81%.[280] This "represents a sharp break from earlier Supreme Court religion jurisprudence," as they summarize the data.[281] Although religion cases make up a small percentage of the Court's docket, they are important — for example, more than half of the Court's religion decisions were covered on the front page of *The New*

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[277] *See* Stephanie Barclay, Opinion, *Supreme Court's Cakeshop Ruling Is Not Narrow — And that's a Good Thing*, THE HILL (June 6, 2018, 2:00 PM), https://thehill.com/opinion/judiciary/391004-supreme-courts-cakeshop-ruling-is-not-narrow-and-thats-a-good-thing [https://perma.cc/XG2U-9WM9].

[278] *See* Kendrick & Schwartzman, *supra* note 14, at 152 ("When courts find potential violations of the Free Exercise Clause, they apply strict scrutiny to determine whether the state adopted the least restrictive means of achieving a compelling state interest. But in *Masterpiece Cakeshop*, the Court did not perform this analysis." (citation omitted)).

[279] *See, e.g.*, *id.* at 135–36.

[280] *See* Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. (forthcoming 2022) (manuscript at 7) (on file with the Harvard Law School Library); *see also* Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html [https://perma.cc/2FY2-DLGP] (reporting on the Epstein and Posner study).

[281] Epstein & Posner, *supra* note 280 (manuscript at 4).

York Times, as compared with decisions overall, which made the front page only 15% of the time.[282] Hampered by small sample sizes, Epstein and Posner nevertheless provide a striking descriptive analysis.

Moreover, the religious actors that are prevailing today are mainstream Christians, by and large, as opposed to the religious minorities who appeared before the Justices in earlier eras. During the Warren Court, not a single plaintiff in a free exercise case was a member of a mainstream Christian religion.[283] But in today's Court, most of the religious actors are mainstream Christians.[284] To be sure, minority faiths also win their cases, and at similar rates — with one exception noted above, the travel ban decision, where Muslims went unprotected.[285] Epstein and Posner examine that apparent anomaly, and they explain it by positing that although the outcome in *Trump v. Hawaii* did not favor the religious actors who were most directly affected, it was consistent with "a pro-Christian agenda."[286] Of course, other explanations are possible as well. But regardless, the phenomenon of mainstream Christian victories in the Supreme Court is notable.

Finally, political party and ideology are significantly correlated with voting patterns in religion cases. Epstein and Posner find that partisan affiliation moves together with voting for religion.[287] In fact, they contend that the most plausible explanation for the recent shift in religion jurisprudence centers on personnel changes.[288] Justices Thomas, Alito, Gorsuch, and Kavanaugh, along with Chief Justice Roberts for the most part, are driving the transformation, likely aided now by Justice Barrett. "[T]hey are clearly the most pro-religion [J]ustices on the Supreme Court going back at least until World War II," according to the study.[289]

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[282] *See id.* (manuscript at 6–7).

[283] *Id.* (manuscript at 8).

[284] *See id.*

[285] It is true that Muslims have sometimes prevailed in cases brought under religious freedom statutes. *See* Holt v. Hobbs, 574 U.S. 352, 355–56 (2015) (ruling for a Muslim inmate who wanted to grow a beard despite prison rules); Tanzin v. Tanvir, 141 S. Ct. 486, 489 (2020) (holding that a Muslim challenging inclusion on the "No Fly List" could seek money damages against officials in their individual capacities). Such rulings are undoubtedly based on sincere interpretations of religious freedom laws, but they also help to build coalitions that bolster the legitimacy of religious freedom arguments of traditional religious actors. *Cf.* Tebbe, *The Principle and Politics of Equal Value*, *supra* note 24 (manuscript at 73) (raising a similar possibility with respect to the rule of equal value).

[286] Epstein & Posner, *supra* note 280 (manuscript at 8).

[287] *Id.* (manuscript at 11). This is true regardless of whether the party is that of the appointing President or that of the Justice. *Id.* While political party is only significantly correlated with religion votes for the Roberts Court, political ideology is correlated for all eras, excepting the Warren Court. *See id.* (manuscript at 11–12 & n.38).

[288] *See id.* (manuscript at 19) ("[T]he proximate cause of the change in the Court's jurisprudence is clear.").

[289] *Id.*

Dissenting Justices on these questions, by contrast, are less conservative, less devout, and less Christian in their own religious affiliation.[290]

Epstein and Posner consider another explanation, namely that the national political climate has grown more secular and harsher toward religion. That cultural change is driving new legislation and regulation, against which mainstream Christians are seeking protection.[291] On this "selection-effects story," the cause for the shift is not a rightward change in judicial ideology but instead a leftward trend in electoral politics and resulting regulation.[292] Though they call this story doubtful and implausible,[293] they also conclude by acknowledging its possibility.[294]

Actually, none of this empirical work is designed to prove that conservatives on the Supreme Court are promoting a policy agenda, either in their subjective experience or in some objective sense. Almost certainly, members of the Roberts Court majority do believe they are faithfully applying constitutional law, interpreted in what they view as its best light, and they cannot be proven wrong by the work surveyed in this section. At best, empirical study can provide evidence that correlates with an interpretation that the majority is engineering a worldview that is implicit but identifiable. Combined with the analysis in the rest of this Part, the research just strengthens the impression that there is a pattern to decisions on religion, and that the pattern may become even clearer under a doctrine of conscience exemptions that reinforces preexisting tendencies. To say that this pattern is political is only to say that it matches a substantive vision, which can be revealed and assessed.

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[290] *See id.* They note that Justices "Kagan and Breyer, both liberal [J]ustices, are relatively high on the list under the pro-religion variable (75% and 62%) but drop significantly for the pro-mainstream Christian variable (56% and 44%) as one would expect." *Id.* (manuscript at 10); *see also id.* (manuscript at 13) (distinguishing between the voting patterns of Justices Breyer and Kagan); *id.* (manuscript at 21) ("[O]ne senses that [Justices Breyer and Kagan] felt less hostility toward religious individuals and organizations who believed that they faced discrimination from secular authorities."). Epstein and Posner seem to attribute the voting patterns of Justices Breyer and Kagan to their principled positions. Another possibility is that Justices Breyer and Kagan have engaged in strategic decisionmaking, at least in part. *See* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 291–95 (2020) (noticing the tendency of Justices Breyer and Kagan to vote with the majority in recent religion decisions, exploring the possibility that they are engaged in strategic behavior, seeking to identify the precise strategy they may be deploying, and assessing the likely success of any such strategy).

[291] *See* Epstein & Posner, *supra* note 280 (manuscript at 18, 20–21).

[292] *Id.* (manuscript at 18).

[293] *See id.* ("[T]here are several reasons for doubting a selection-effects story . . . ."); *id.* (considering the possibility that "the public and legislators have become more hostile to religion in recent years" but concluding that "this set of explanations is not plausible").

[294] *See id.* (manuscript at 21–23) (noting that "[t]here is some evidence for . . . a trend," *id.* (manuscript at 21) toward laws that require mainstream religious actors to violate their beliefs, and noting demographic evidence of decreased influence of religion on public life).

Prior empirical work tells a consonant story about the relationship between politics and religion jurisprudence. In an important study published in 2012, Professors Michael Heise and Gregory Sisk found that political ideology was a powerful predictor of votes in Establishment Clause cases.[295] Notably, their study examined lower federal courts, allowing for more numerous data points but perhaps capturing a different dynamic. Their results were striking. Judges appointed by Democratic presidents were predicted to find an Establishment Clause violation 57.3% of the time, controlling for other factors, while those appointed by Republicans were likely to do so only 25.4% of the time.[296] No variable other than politics was consistently salient in predicting outcomes.[297] In a study of free exercise decisions over the same ten-year period (1996 through 2005), they found that judicial ideology did not significantly explain free exercise outcomes.[298] Even so, they did observe that Muslims were expected to lose their cases at greater rates — and that religious actors challenging antidiscrimination laws were significantly more likely to prevail.[299]

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That politics are influencing judicial behavior on these matters is neither particularly surprising, nor entirely avoidable, nor even regrettable. The question we should ask is not whether politics matter but instead what kind are at work. Are the commitments of constitutional actors consistent with the values of a democracy? Viewing the evidence of this Part from that perspective, the sharp shift toward religious solicitude during the Roberts Court gives us at least reason to carefully consider how a liberty of conscience framework would be deployed in the long run of actual adjudications.

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[295] *See* Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1204 (2012).

[296] *Id.* at 1204–05.

[297] *Id.* at 1205 ("No other variable — not the judges' prior legal positions, religion, race, or gender — proved consistently salient in predicting the outcome of claims alleging that governmental conduct crossed the supposed line 'separating Church and State' under the Establishment Clause.").

[298] *See* Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1374 (2013). Their finding of no political effect for free exercise cases is not altogether surprising, given the shifting ideological valence of religious exemptions during that period, when the rise of the LGBTQ+ rights movement accompanied a reassessment of religious exemptions by civil rights groups.

[299] *Id.* at 1374–75. Scholar Zalman Rothschild analyzed more than one hundred federal court adjudications of religious challenges to lockdowns during the Covid pandemic. He found that while not a single judge appointed by a Democratic president ruled in favor of religious plaintiffs, 66% of those appointed by Republicans did — and fully 82% of judges nominated by President Trump. *See* Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 3, 16) (on file with the Harvard Law School Library); *see also* Liptak, *supra* note 280 (reporting on the Rothschild study).

CONCLUSION

How should Justice Barrett's question be answered? The way that judges, lawyers, and academics respond could be consequential. Conditions for an overhaul of free exercise doctrine are surprisingly favorable, despite the polarized state of constitutional politics. A notable number of Justices are open to replacing the rule of *Smith* with a rule that requires at least some exemptions from general laws that substantially burden observance. This Comment has offered one possibility, the framework of liberty of conscience, that maintains overall consistency with the commitment to egalitarian democracy.

Yet it has also warned that any such rule would likely be applied in a manner that reflected the particular politics of religious freedom already being implemented by the Roberts Court. Rather than protecting free and equal democratic membership in matters of conscience, this Court is more likely to use any additional leeway to extend its power of judicial review in the direction of religious preferentialism and a laissez-faire political economy. To whatever degree constitutional doctrine drives results, implementing a new rule today might adversely affect the liberty of those who need protection most.

Lawyers, judges, and academics who are persuaded by this Comment face a distinct and difficult choice among at least three possible courses of action. They could continue to press for conscience exemptions, prepared to dissent powerfully and persistently if the approach were rejected or implemented selectively. In *Fulton*, that would have meant applying a presumption of protection but then finding it overcome by the imperatives of civil rights law, which cannot be undermined in a manner that would risk harm to LGBTQ+ couples and children. However, lawyers tempted by this model might be concerned that their efforts would increase the already realistic chance that a presumption against substantial burdens is adopted, but in a version that is closer to Justice Alito's, either in express terms or in actual implementation. And that result could give the Roberts Court even greater license to implement its program.

Alternatively, advocates could endorse the current doctrine as a second-best solution that they determined to be least harmful — all things considered and under nonideal conditions. In *Fulton*, that would have meant pressing for *Smith* and then insisting that it be applied faithfully. A difficulty with that choice is that the Court does not seem to have been seriously constrained by the *Smith* doctrine, taken as a whole, with its malleability and multiple exceptions. Part II of this Comment teaches that lesson, and further, that existing law might actually be helpful to the Court's majority because it allows the remaking of religious freedom law to proceed without overruling precedents in an overt manner that could draw public criticism. So although the *Smith*

apparatus may well be more constraining than a new guarantee of liberty of conscience, it might also be difficult to affirmatively endorse.

A third possibility would be to let Justice Barrett's question go unanswered. Concerned constitutional actors could instead argue for the outcomes that were most just, using whatever legal tools were most proximate and powerful in the individual case. For example, those seeking to influence *Fulton* could have simply warned against imposing third-party harms or weakening civil rights law. But that strategy might cause discomfort because, if pursued consistently, it would start to resemble Chief Justice Roberts's doctrine of details, if in the service of very different outcomes. If it were successful, the approach could even hasten the overruling of *Smith* by stealth.

Ultimately, the choice among these three — or some other pathway — is a difficult issue that deserves its own analysis. What should be clear to legal actors, perhaps the only obvious truth, is that the country has reached a moment of change on an important question of constitutional justice. Their choices will shape the future of liberty of conscience, especially where it runs up against a countervailing commitment to equal democratic membership for all.