"A LAW UNTO HIMSELF"[1]: FREE EXERCISE, (UN)EQUAL VALUE, AND THE FUTURE OF PUBLIC ACCOMMODATIONS

INTRODUCTION

Addressing the nation in 1963, President Kennedy declared that "the right to be served in facilities which are open to the public . . . [is] an elementary right."[2] Over sixty years later, this right appears to be at risk. The last few years have seen high-profile challenges to antidiscrimination laws by entities seeking to deny equal service to queer persons based on the religious affiliations of the entity or its owners.[3] Rather than rejecting such challenges as it had in the past,[4] the Supreme Court appears to be considering a new path.

In the fall of 2022, the Court declined to stay a New York trial court's injunction against Yeshiva University (YU).[5] The injunction ordered the university to recognize YU Pride Alliance — a group of queer and allied undergraduate students — on the same terms as other student groups.[6] The Court's denial of a stay was not particularly remarkable. In a rather dry paragraph, the Court explained that YU had failed to exhaust its avenues in state court for relief from the nonfinal order.[7]

Far spicier was Justice Alito's dissent. Joined by Justices Thomas, Gorsuch, and Barrett, Justice Alito framed the case in dire terms: New York City had "impos[ed] . . . its own mandatory interpretation of scripture"[8] and forced a religious institution "to instruct its students in accordance with" that interpretation.[9] The reality is not so neat. YU Pride Alliance brought its challenge under New York City's public accommodations law, which makes it unlawful for a provider of public

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[1] Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

[2] President John F. Kennedy, Televised Address to the Nation on Civil Rights (June 11, 1963), https://www.jfklibrary.org/learn/about-jfk/historic-speeches/televised-address-to-the-nation-on-civil-rights [https://perma.cc/WZD8-EZ8F].

[3] *See generally, e.g.*, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023); Yeshiva Univ. v. YU Pride All., 143 S. Ct. 1 (2022); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); Klein v. Or. Bureau of Lab. & Indus., 506 P.3d 1108 (Or. Ct. App. 2022), *vacated*, 143 S. Ct. 2686 (2023). Notably, the Supreme Court granted certiorari in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, only regarding petitioner's free speech challenge and not her free exercise challenge. *See* 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (mem.) (granting certiorari); Petition for a Writ of Certiorari at i, 23, *303 Creative*, 143 S. Ct. 2298 (No. 21-476).

[4] *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968); *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

[5] *YU Pride All.*, 143 S. Ct. at 1.

[6] *See id.*

[7] *See id.*

[8] *Id.* at 2 (Alito, J., dissenting).

[9] *Id.*

accommodations to discriminate on the basis of sexual orientation.[10] According to the dissent, however, the injunction struck at the heart of the First Amendment's Free Exercise Clause.[11]

Describing why the university would likely succeed on the merits, Justice Alito relied on the fact that the law did not include benevolent orders in its definition of public accommodations.[12] New York law defines these orders as nonprofit societies "formed, organized and carried on solely for the benefit of [their] members[,] . . . operating on a lodge system and having a representative form of government."[13] By Justice Alito's account, their exclusion rendered the provision neither neutral nor generally applicable.[14] Instead, the law treated "a vast category of secular groups more favorably,"[15] triggering strict scrutiny and earning YU an exemption from the law.[16]

Justice Alito's rationale would transform public accommodations law. His approach abandoned a central component of the Court's new test for religious exemption claims, the so-called "most-favored-nation" theory.[17] Under the doctrine, a law is not neutral or generally applicable, and therefore triggers strict scrutiny, "whenever [it] treat[s] *any* comparable secular activity more favorably than religious exercise."[18]

This approach, at least in the form adopted by the Court,[19] functions through equal-value determinations, in which judges evaluate whether a nonregulated establishment implicates the government interest underlying the regulation of religious exercise. If such an establishment exists, the regulation is subject to strict scrutiny review as a potentially unconstitutional burden on free exercise. This process helps restrain courts from invoking strict scrutiny against all regulations by narrowing the universe of comparable secular entities to those that are relevant to the regulation under review.

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[10] *See* Opposition to Emergency Application for Stay Pending Appellate Review or, In the Alternative, Petition for Writ of Certiorari & Stay Pending Resolution at 5, *YU Pride All.*, 143 S. Ct. 1 (No. 22A184) [hereinafter Opposition to Emergency Application for Stay Pending Appellate Review]; *see also* N.Y.C., N.Y., ADMIN. CODE § 8-101 (2023).

[11] U.S. CONST. amend. I; *see YU Pride All.*, 143 S. Ct. at 2 (Alito, J., dissenting).

[12] *YU Pride All.*, 143 S. Ct. at 2–3 (Alito, J., dissenting).

[13] N.Y. INS. LAW § 4501(a) (McKinney 1985).

[14] *See YU Pride All.*, 143 S. Ct. at 3 (Alito, J., dissenting). The Court has held that religious exemptions are available only when a challenged law lacks either neutrality or general applicability. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 546 (1993).

[15] *YU Pride All.*, 143 S. Ct. at 2 (Alito, J., dissenting).

[16] *Id.* at 2–3.

[17] *See generally* Note, *Pandora's Box of Religious Exemptions*, 136 HARV. L. REV. 1178 (2023). The Court has not used "most-favored-nation" terminology, but the analyses in its recent free exercise cases, *e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020) (per curiam); Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam), employ the doctrine as legal scholars have described it, *compare* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22–23 (2016), *with Tandon*, 141 S. Ct. at 1296 (citing *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67–68).

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

[19] *See id.*

The equal-value comparison is crucial to a workable most-favored-nation approach. By encouraging judicial sensitivity to the broader legal landscape, equal-value determinations help guard against both incidental antireligious discrimination and craftily worded laws burdening free exercise. A focus on equal value also ensures that litigants cannot wield the Free Exercise Clause to circumvent a law that effectively targets government interests in nondiscriminatory ways. A most-favored-nation approach without equal value, on the other hand, could allow clever litigants to gain religious exemptions when a category of entity — one that doesn't implicate the government interest triggering the regulation — remains unregulated.

Should the Court eliminate the test's equal-value component, the effects could prove momentous. Were the Court to apply this pared-down most-favored-nation test, every public accommodations law in the country, including Title II of the Civil Rights Act of 1964,[20] may become subject to religious exemptions. The importance of robust public accommodations laws and the history of sincere religious objections to antidiscrimination policies counsel in favor of a different outcome.

This Note shows the impact such an approach would have on the effectiveness of public accommodations laws across the United States. Part I provides background on public accommodations laws and recent developments in free exercise doctrine. Part II traces the development of the most-favored-nation doctrine and highlights the importance of equal value within that framework. Building on this analysis, Part III explores the implications of Justice Alito's lightened version of the most-favored-nation doctrine. Using the facts of *Yeshiva University v. YU Pride Alliance*[21] as a comparator, the Part exposes how such an approach would undermine longstanding precedents and threaten the broad coverage of laws prohibiting discrimination by businesses and other public establishments.

An analysis of equal value's role within the most-favored-nation approach is particularly warranted now that two Justices have authored minority opinions eliminating equal value from the test.[22] Many scholars have written about the emergence of the most-favored-nation doctrine and its potential impact on free exercise jurisprudence.[23] However, while some have acknowledged the role equal value plays, none have

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[20] 42 U.S.C. §§ 2000a to 2000a-6.

[21] 143 S. Ct. 1.

[22] *See id.* at 2–3 (Alito, J., dissenting); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief).

[23] *See generally, e.g.*, Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237 (2023); Stephen I. Vladeck, *The Most-Favored Right: COVID, The Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 701–03 (2022); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397 (2021).

fully explored the implications of a most-favored-nation doctrine devoid of equal value.

A majority of the Court has yet to embrace this mode of analysis. As recently seen in *303 Creative LLC v. Elenis*,[24] other First Amendment doctrines like compelled speech and expressive association provide avenues for the Justices to avoid such a destructive decision.[25] Enterprising lawyers, including YU's, may nonetheless force the Court to decide a free exercise challenge head on.[26] The rise in free exercise challenges to antidiscrimination laws[27] and the increasing public support for such exemptions[28] warrants a clear-eyed assessment of such a shift.

I. Background History of Public Accommodations Laws and Free Exercise Jurisprudence

A. Access to Public Accommodations in the United States

1. Access to Public Accommodations Before 1964. — Different legal regimes have governed access to public accommodations in the United States. At common law, operators of common carriers had no right to refuse service on the basis of a person's race, religion, or national origin.[29] The first national public accommodations legislation came with Congress's passage of the Civil Rights Act of 1875.[30] The Act enshrined many of the protections that Congress would enact nearly a century later in Title II of the Civil Rights Act of 1964.[31] In relevant part, the 1875 Act required the "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances . . . and other places of public amusement."[32] Unlike its civil rights–era successor, however, the 1875 Act did relatively little to change facts on the ground. Enforcement of the 1875 Act was stymied — despite

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[24] 143 S. Ct. 2298 (2023).

[25] *See id.* at 2308–09, 2312–13.

[26] Unlike in similar cases, such as *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); and *Klein v. Oregon Bureau of Labor & Industries*, 506 P.3d 1108 (Or. Ct. App. 2022), YU's lawyers invoked only the Free Exercise Clause, with no attendant free speech defense. *See* Emergency Application for Stay Pending Appellate Review or, In the Alternative, Petition for Writ of Certiorari and Stay Pending Resolution at i, *YU Pride All.*, 143 S. Ct. 1 (No. 22A184).

[27] *See* Jamie Reinah, Note, *LGBTQIA+ Public Accommodation Cases: The Battle Between Religious Freedom and Civil Rights*, 90 FORDHAM L. REV. 261, 263, 264 n.21, 265 (2021); Petition for a Writ of Certiorari, *supra* note 3, at 31–33.

[28] *See* ROBERT P. JONES ET AL., PUB. RELIGION RSCH. INST., INCREASING SUPPORT FOR RELIGIOUSLY BASED SERVICE REFUSALS 10 (2019).

[29] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 284 (1964) (Douglas, J., concurring); *see also* John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws*,*"* 50 COLUM. L. REV. 131, 150 (1950); S. REP. NO. 88-872, at 22 (1964).

[30] Ch. 114, 18 Stat. 335, *invalidated in part by* The Civil Rights Cases, 109 U.S. 3 (1883).

[31] *See* Robert R. Bebermeyer, *Public Accommodations and the Civil Rights Act of 1964*, 19 U. MIA. L. REV. 456, 467 (1965).

[32] § 1, 18 Stat. at 336.

robust implementation requirements[33] — by absentee leadership in Washington,[34] a lukewarm judiciary,[35] and widespread disapproval among whites.[36] The Supreme Court ultimately struck down the public accommodations provisions in the 1883 Civil Rights Cases.[37]

Exclusion and segregation in public accommodations became the rule in much of the country.[38] With the Court's blessing of "separate but equal" accommodations in 1896,[39] establishments across the United States offered differential service to customers of disfavored racial, ethnic, and religious backgrounds, when they provided such service at all.[40]

2. Title II, Public Accommodations Access, and Their Impact on National Life. — With the passage of the 1964 Civil Rights Act, certain public accommodations were again required to serve the public on a nondiscriminatory basis. Title II of the Act guarantees to all, irrespective of race, color, religion, or national origin, "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation,"[41] which includes places of lodging, places of entertainment, food-service establishments, and gas stations.[42]

Title II played a key role in creating the public landscape people have come to expect.[43] The Kennedy Administration considered passage of the Civil Rights Act and its public accommodations provision as critical to the realization of a more just society that lived up to its stated values.[44] That the Senate debate over the Act lasted longer than any other in history[45] speaks to the effect lawmakers expected it to have.

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[33] *See id.* § 3, 18 Stat. at 336.

[34] *See* John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 PROLOGUE 225, 226, 228–29 (1974) (describing the Justice Department and Attorney General as "remarkably derelict in providing attorneys in the field with copies of the act," *id.* at 228, despite the latter's repeated pleas for the statutory text).

[35] *See id.* at 231–33.

[36] *See, e.g.*, RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO 173–75 (Da Capo Press 1997) (surveying a diverse sample of northern newspapers and finding them strongly aligned against the Act); Franklin, *supra* note 34, at 226–28.

[37] 109 U.S. 3 (1883); *see id.* at 23–25.

[38] *See, e.g.*, Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528, 545 (1899).

[39] Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

[40] *See* Elizabeth Sepper, *Free Speech and the "Unique Evils" of Public Accommodations Discrimination*, 2020 U. CHI. LEGAL F. 273, 277; Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1278, 1281 (2017).

[41] 42 U.S.C. § 2000a(a).

[42] *See id.* § 2000a(b).

[43] *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1287–88, 1293–94 (1996).

[44] *See, e.g.*, *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1372–73 (1963) [hereinafter *Hearings on Miscellaneous Proposals*] (statement of Robert F. Kennedy, Att'y Gen. of the United States).

[45] *Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm [https://perma.cc/LKB4-PZSG].

Although quantifying Title II's effects has proven difficult,[46] its importance and impact are clear. At the time of its passage, neither the economic harm from sit-ins, boycotts, and other protests nor the growing recognition that "desegregation actually proved to be a good business move"[47] had pushed recalcitrant establishments to end their discriminatory policies.[48] To compel compliance, the Justice Department brought ninety-three cases for the provision's violation in its first three years alone, and numerous private suits were brought as well.[49]

Today, some scholars contend that social and economic changes have rendered Title II unnecessary.[50] What data exist from newer online entities — which are not yet subject to public accommodations laws in many jurisdictions[51] — paint a different picture. These online platforms facilitate services, like transient lodging, that are otherwise covered by public accommodations laws.[52] Yet user reports[53] and empirical analyses[54] reveal that people regularly face discrimination and even outright exclusion when using the services that these platforms provide.[55]

Preventing this type of discrimination also serves a central role in the maintenance of a just society. Unlike in areas such as housing and employment, where rejection is routine, people do not expect "choosiness" from public accommodations.[56] As Professor Richard Epstein notes, "most serious commentators had little doubt about the moral imperative behind passage of Title II"[57] at a time when "it was difficult, if not impossible, for [Black] citizens to secure food, transportation, and

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46 *See* Anna Harvey & Emily A. West, *Discrimination in Public Accommodations*, 8 POL. SCI. RSCH. & METHODS 597, 597 (2020).

47 Gavin Wright, *The Regional Economic Impact of the Civil Rights Act of 1964*, 95 B.U. L. REV. 759, 762 (2015); *see also* Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 CASE W. RSRV. L. REV. 660, 664–65 (1965).

48 *See* Memorandum from Louis F. Oberdorfer, Assistant Att'y Gen., U.S. Dep't of Just., to Robert F. Kennedy, Att'y Gen. of the United States (Nov. 13, 1963), https://www.jfklibrary.org/asset-viewer/archives/BMPP/030/BMPP-030-006 [https://perma.cc/7R5X-3EJW].

49 *See* Wright, *supra* note 47, at 763.

50 *See, e.g.*, Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1254–59, 1261 (2014).

51 *See* DAVID BRODY & SEAN BICKFORD, LAWS.' COMM. FOR C.R. UNDER L., DISCRIMINATORY DENIAL OF SERVICE 4 (2020); *see also* Leong & Belzer, *supra* note 40, at 1276 (explaining that many online services "provide access to facilities that fulfill needs squarely within the concern of public accommodation laws").

52 *See* Lisa Gabrielle Lerman & Annette K. Sanderson, Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 247 (1978); *see also* Singer, *supra* note 43, at 1291–93, 1303–21 (detailing the venerable common law history of innkeepers' duty to serve the public without discrimination).

53 *See* Leong & Belzer, *supra* note 40, at 1295.

54 *See* Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* 7–11, 13 (Harvard Bus. Sch., Working Paper No. 14-054, 2014).

55 *See, e.g.*, Leong & Belzer, *supra* note 40, at 1292–95.

56 Sepper, *supra* note 40, at 276.

57 Epstein, *supra* note 50, at 1246.

lodging when traveling from place to place."[58] These denials of service deprived people of their personal dignity,[59] inflicted harm far beyond any momentary deprivation,[60] and caused serious economic damage both individually and societally.[61]

B. Recent Developments in Free Exercise Jurisprudence

The past three decades have seen repeated shifts in the Supreme Court's approach to free exercise challenges. In the decades before 1990, laws imposing more than an incidental burden on free exercise had to be justified by a "compelling state interest"[62] under the rule announced in *Sherbert v. Verner*.[63] The reality, however, never aligned with that stringent standard.[64] In the 1990 case *Employment Division v. Smith*,[65] the Court announced a formal return to the pre-*Sherbert* rule that a "neutral law of general applicability"[66] was not subject to free exercise challenges.[67] Justice Scalia, writing for the Court, interpreted *Sherbert* as applying to cases "where the State has in place a system of individual exemptions"[68] but not to "generally applicable prohibitions of socially

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58 *Id.* at 1242.

59 *See* Leslie Kendrick & Micah Schwartzman, *The Supreme Court, 2017 Term — Comment: The Etiquette of Animus*, 132 HARV. L. REV. 133, 159–60 (2018); Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL'Y 705, 714–15 (2014); *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872, at 16 (1964)); *id.* at 291–92 (Goldberg, J., concurring) ("The primary purpose of the Civil Rights Act of 1964 . . . as the Court recognizes, and as I would underscore, is the vindication of human dignity . . . .").

60 Nelson Tebbe & Larry Sager, *The Supreme Court's Upside-Down Decision in* Masterpiece, TAKE CARE (June 7, 2018), https://takecareblog.com/blog/the-supreme-court-s-upside-down-decision-in-Masterpiece [https://perma.cc/B3N7-JU8R]; Sepper, *supra* note 40, at 280–81.

61 *See* Quick, *supra* note 47, at 664–65; *Hearings on Miscellaneous Proposals*, *supra* note 44, at 1373–75 (statement of Robert F. Kennedy, Att'y Gen. of the United States).

62 Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415 (1963)).

63 374 U.S. 398; *see id.* at 403.

64 *See* Emp. Div. v. Smith, 494 U.S. 872, 888–89, 889 n.5 (1990) (collecting cases, mostly decided after *Sherbert*, upholding laws burdening religious exercise); *see also id.* at 878–79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law . . . ."); United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment); Ian Millhiser, *Religious Conservatives Have Won a Revolutionary Victory in the Supreme Court*, VOX (Dec. 2, 2020, 8:00 AM), https://www.vox.com/2020/12/2/21726876/supreme-court-religious-liberty-revolutionary-roman-catholic-diocese-cuomo-amy-coney-barrett [https://perma.cc/D23R-MFCB] (contrasting success rates of religious objectors after *Sherbert* with those of other litigants whose claims warranted strict scrutiny).

65 494 U.S. 872.

66 *Id.* at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in the judgment)).

67 *See id.* at 879, 882; Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940); Reynolds v. United States, 98 U.S. 145, 166–67 (1879).

68 *Smith*, 494 U.S. at 884.

harmful conduct."[69] The *Smith* rule continues to govern but has become increasingly embattled.[70]

In the midst of battles over restrictions on businesses and private gatherings during the COVID-19 pandemic, the Court adopted a new approach to religious exemption claims.[71] This approach, which scholars have dubbed the "most-favored-nation" theory of free exercise, centers on the idea that "[t]he constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct."[72] The name comes from international law, where a "most-favored-nation" provision in a treaty binds one state to treat the other state, "its nationals or goods, no less favorably than any other state, its nationals or goods."[73] Of course, the "other state" isn't necessarily apparent in religious exemption cases; judges must decide to what they're comparing the challenged law.[74]

Many courts and scholars using the most-favored-nation approach have relied on the principle of "equal value" to make these determinations.[75] In the free exercise context, equal value means that "secular exemptions are comparable if and only if they implicate the government's interest in the same way as the claimed religious exemptions."[76] When courts find such comparability, they deem the law to lack general applicability and apply heightened scrutiny. The test doesn't do away with *Smith*;[77] strict scrutiny continues to apply only when a law lacks neutrality or general applicability. Instead, the most-favored-nation approach raises the bar for general applicability: "[E]ven with statutes that

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[69] *Id.* at 885.

[70] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring); *id.* at 1931 (Gorsuch, J., concurring in the judgment). *See generally id.* at 1883–926 (Alito, J., concurring in the judgment).

[71] *See* Vladeck, *supra* note 23, at 701–03; Tebbe, *supra* note 23, at 2399–401 (describing the Court's "new approach," *id.* at 2401, in *Tandon*); Luray Buckner, Note, *How Favored, Exactly? An Analysis of the Most Favored Nation Theory of Religious Exemptions from* Calvary Chapel *to* Tandon, 97 NOTRE DAME L. REV. 1643, 1643 (2022).

[72] Laycock & Collis, *supra* note 17, at 22–23.

[73] RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 801 (AM. L. INST. 1987).

[74] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting) (noting the Court's responsibility to determine the appropriate secular analogue to regulated religious activity); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49 (1991).

[75] *See* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365–66 (3d Cir. 1999); Laycock & Collis, *supra* note 17, at 11, 16–23; Tebbe, *supra* note 23, at 2398–99, 2399 n.8, 2409–14, 2416–21 (collecting cases and articles embracing equal value); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 868–69, 880–82 (2001).

[76] Tebbe, *supra* note 23, at 2412.

[77] *See* ELIZABETH REINER PLATT ET AL., LAW, RTS. & RELIGION PROJECT, COLUMBIA L. SCH., WE THE PEOPLE (OF FAITH) 10 (2021) ("In lieu of overturning *Smith* . . . the Court has reinterpreted [it] in a way that would be unrecognizable to Justice Scalia."); Millhiser, *supra* note 64.

make no mention of religion," judges must determine "whether the decision-maker paid too little attention to religious liberty."[78]

II. THE MOST-FAVORED-NATION APPROACH AND THE ROLE OF EQUAL-VALUE DETERMINATIONS

A. The Promise of the Most-Favored-Nation Doctrine

Professor Douglas Laycock first applied the concept of the "most-favored nation" to free exercise in an article penned in the wake of *Smith*.[79] The basic concept, as outlined above, is that religious conduct should be treated at least as well as analogous[80] secular conduct. First, a judge must identify the government's interest in the regulation burdening religious exercise.[81] Next, they must survey the universe of *unregulated* entities or activities to determine whether any implicate that same interest — that is, they must rely on equal value.[82] This comparison stage forms the crux of the test in its prototypical format.[83] From Laycock's initial articulation of the approach to the present, most judges and scholars looking for appropriate comparators have employed some form of equal-value analysis.[84]

A reliance on equal value best positions the most-favored-nation test to fulfill its promise: preventing discrimination and especially inadvertent or well-disguised discrimination against religious exercise.[85] Even detractors of the most-favored-nation theory correctly identify what may be its greatest attribute.[86] The test, through a focus on equal value, "reach[es] beyond malice to include selective sympathy and indifference."[87] It therefore addresses some of the most compelling critiques of the *Smith* framework from both the left and the right.[88] The test extends greater protections to disfavored or overlooked religious minorities

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[78] Koppelman, *supra* note 23, at 2246.

[79] *See* Laycock, *supra* note 74, at 49.

[80] This explanation centers on the most common version of the doctrine, which includes equal value. In more extreme versions, secular analogues play no role. *See* Koppelman, *supra* note 23, at 2253; Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 696 (2021).

[81] *See* Duncan, *supra* note 75, at 869.

[82] *See* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 31 (2000).

[83] *See* Koppelman, *supra* note 23, at 2245–47, 2250–53 (outlining newer iterations of the test that either warp equal value in ways that render it almost meaningless or do away with it entirely).

[84] *See, e.g.*, Ward v. Polite, 667 F.3d 727, 738–39 (6th Cir. 2012); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1233–35 (11th Cir. 2004); Blackhawk v. Pennsylvania, 381 F.3d 202, 211 (3d Cir. 2004); Mitchell County v. Zimmerman, 810 N.W.2d 1, 15–16 (Iowa 2012); James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 338 (2013); Duncan, *supra* note 75, at 869; Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siècle *Sketches*, 75 IND. L.J. 295, 303 (2000).

[85] *See* Tebbe, *supra* note 23, at 2424–25.

[86] *See, e.g.*, Koppelman, *supra* note 23, at 2238–39, 2246.

[87] *Id.* at 2239.

[88] *See* Laycock, *supra* note 82, at 25–29, 31–33.

while still ensuring that religious exercise enjoys heightened solicitude under our laws,[89] reflecting long-standing cultural and legal norms.[90]

On a practical level, equal-value determinations help judges identify under- and overinclusive laws. Then-Judge Alito demonstrated this in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[91] the first federal appeals court decision to rely on the most-favored-nation theory.[92] In that case, the Newark Police Department maintained a policy that its officers could not grow beards absent a qualifying medical condition.[93] The prohibition applied to Sunni Muslim officers who asserted a religious obligation to grow beards.[94] The interest behind the policy concerned uniformity of appearance among officers to ensure they were "readily identifiable" to members of the public, didn't "undermine public confidence," and could maintain "morale and esprit de corps."[95] Judge Alito correctly pointed out that bearded officers with medical exemptions also implicated these interests.[96] The law, in other words, was either underinclusive, and the same interests should have prevented medical exemptions, or overinclusive, and those interests should have permitted exemptions for the Muslim men.

But equal-value analysis also restrains the most-favored-nation doctrine by preventing overzealous invalidation of general laws. Without equal value, judges applying the most-favored-nation framework could "look[] at whether a law has any exceptions at all, and, if religious reasons are not among those exceptions, automatically appl[y] strict scrutiny."[97] Courts could even invoke strict scrutiny when a government merely could have created exemptions but didn't do so.[98]

Identifying the government's interest in regulating a particular religious activity or entity is likely the most crucial step when relying on equal value. To the extent that a consensus exists around how to identify the pertinent interest, it begins with the government's own assertions.[99] The litigation context in which these claims arise forces

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[89] *See* Duncan, *supra* note 75, at 881.

[90] *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 313–14 (1952); Church of the Holy Trinity v. United States, 143 U.S. 457, 465–71 (1892).

[91] 170 F.3d 359 (3d Cir. 1999).

[92] Note, *supra* note 17, at 1180; *see Fraternal Ord. of Police*, 170 F.3d at 365–66 (applying heightened scrutiny to policy because of secular exemption that affected same interest used to justify denial of religious exemption).

[93] *Fraternal Ord. of Police*, 170 F.3d at 360.

[94] *Id.*

[95] *Id.* at 366–67.

[96] *Id.*

[97] Koppelman, *supra* note 23, at 2253.

[98] *See id.*

[99] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (directing judges to rely on "the asserted government interest that justifies the regulation" when seeking comparators); Laycock & Collis, *supra* note 17, at 11 ("We must look to the reasons the state offers for regulating religious conduct and then ask whether it permits secular conduct that causes the same or similar harms.").

government litigants to "elaborat[e] the important interests that the challenged law allegedly serves" in ways they think will "motivate courts."[100] This process certainly opens the door to personal biases and political preferences seeping into the analysis, with judges retrofitting a government interest to fit a preferred analogue.[101] But ignoring equal value removes even these semiobjective boundaries.[102]

A most-favored-nation approach with no equal-value analysis would result in heightened scrutiny for nearly every pertinent challenge. One need not speculate to see this. To date, Justices Alito and Kavanaugh have each authored a dissent whose analysis rested on a most-favored-nation approach without equal value.[103] Unsurprisingly, both opinions were able to identify *some* unregulated set of establishments. Justice Alito pointed to the fact that the law under review didn't cover benevolent orders;[104] however, he neither addressed the interests embodied in the law nor analyzed the ways in which such orders did or did not implicate those interests.[105] Justice Kavanaugh boasted that analogousness was irrelevant; the fact that *any* entity was subject to a more lenient standard should trigger strict scrutiny.[106] Equal value, on the other hand, helps ensure that thoughtfully tailored laws, ones that address particular interests without purposefully or inadvertently targeting religious exercise, can remain whole and serve their intended function.

More than thirty years ago, the *Smith* Court explained why automatic strict scrutiny for free exercise claims would court political and legal dysfunction.[107] Even *Smith*'s detractors have acknowledged the challenges that would attend across-the-board heightened scrutiny in the religious exemption context.[108] The problem with automatic strict scrutiny is its very rigidity; that is, absent judicial disingenuousness,[109]

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[100] Laycock & Collis, *supra* note 17, at 11.

[101] *See* Kathleen A. Brady, *Covid-19 and Restrictions on Religious Worship: From Nondiscrimination to Church Autonomy*, FIDES ET LIBERTAS, 2021, at 23, 26–29; Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, 37 J.L. & RELIGION 72, 73–75 (2022); Koppelman, *supra* note 23, at 2241–42; Tebbe, *supra* note 23, at 2477; *see also id.* at 2464–74 (providing examples).

[102] *Cf.* Blackman, *supra* note 80, at 696–97 (discussing Justice Kavanaugh's approach to the most-favored-nation doctrine in Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020), which, by eschewing equal value, weighted the scales heavily in favor of the exemption seeker).

[103] *See* Yeshiva Univ. v. YU Pride All., 143 S. Ct. 1, 2–3 (2022) (Alito, J., dissenting); *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting from denial of application for injunctive relief) (asserting that, if a religious organization is less regulated than any other entity, regardless of the latter's identity, then strict scrutiny applies).

[104] *See YU Pride All.*, 143 S. Ct. at 2–3 (Alito, J., dissenting).

[105] *See infra* pp. 1461–62. *See generally YU Pride All.*, 143 S. Ct. at 1–4 (Alito, J., dissenting).

[106] *See Calvary Chapel Dayton Valley*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

[107] *See* Emp. Div. v. Smith, 494 U.S. 872, 885 (1990).

[108] *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring).

[109] Arguably, such disingenuousness was prevalent in the decades following *Sherbert v. Verner*. *See* cases cited *supra* note 64 and accompanying text.

it would guarantee a system of religious exemptions unlike anything else in our constitutional system.[110]

B. The Most-Favored-Nation Doctrine Goes Viral at the Supreme Court

In the midst of the COVID-19 pandemic, the most-favored-nation approach made its Supreme Court debut.[111] Justice Kavanaugh's lone dissent in an early COVID-related order outlined the premise, his opinion replete with citations to Laycock and *Fraternal Order of Police*.[112] A mere four months later, the Court decided *Roman Catholic Diocese of Brooklyn v. Cuomo*[113] using what appeared to be the most-favored-nation theory.[114] The case concerned a challenge by a Catholic diocese and a synagogue to New York's emergency COVID measures.[115] The per curiam opinion began its discussion by comparing the restrictions on houses of worship to those on other establishments.[116] The analysis focused on the existence of less regulated "nonessential" entities that implicated the government's interest in maintaining public health at least as much as the religious institutions did.[117] These included campgrounds, chemical-manufacturing facilities, and a Target store,[118] all of which were "treated less harshly than" nearby houses of worship.[119] While the Court didn't explicitly lay out the most-favored-nation test, the decision embraced it in its "actual operation."[120]

Soon thereafter, the Court decided another COVID-restrictions case, *Tandon v. Newsom*,[121] using the methodology of the most-favored-nation

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[110] *See Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring) ("I am skeptical about . . . [a] categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights — like speech and assembly — has been much more nuanced."); *Smith*, 494 U.S. at 886 & n.3 (outlining the congruence between *Smith*'s approach to free exercise and the Court's approach to analogous race and speech cases).

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

[112] *Id.* Justice Kavanaugh strayed somewhat from the more common form of the test, in which equal value is used to determine whether to apply strict scrutiny. In his more demanding formulation, any time a religious organization finds itself outside a "favored or exempt class," courts must apply strict scrutiny. *Id.* at 2613.

[113] 141 S. Ct. 63 (2020) (per curiam). The case was the first full decision to address free exercise in the COVID-19 context. *See* THE NETWORK FOR PUB. HEALTH L., COVID-19 RELATED OPINIONS & ORDERS FROM THE U.S. SUPREME COURT 2–3 (2020).

[114] *See Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66–67; Tebbe, *supra* note 23, at 2418–20.

[115] *See Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65–66.

[116] *See id.* at 66–67.

[117] *See id.*

[118] *See* Transcript of Civil Cause for Preliminary Injunction Hearing at 83, Roman Cath. Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118 (E.D.N.Y. 2020) (No. 20-CV-4844).

[119] *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67 (quoting Transcript of Civil Cause for Preliminary Injunction Hearing, *supra* note 118, at 83).

[120] Josh Blackman, *Why Exactly Was New York's COVID-19 Regime Not "Neutral"?*, REASON: VOLOKH CONSPIRACY (Nov. 26, 2020, 4:45 PM), https://reason.com/volokh/2020/11/26/why-exactly-was-new-yorks-covid-19-regime-not-neutral [https://perma.cc/XK7K-WD6D].

[121] 141 S. Ct. 1294 (2021) (per curiam).

doctrine and spelling out the precise approach. *Tandon* involved a challenge to California's COVID restrictions as applied to at-home religious services.[122] The per curiam opinion systematically laid out the Court's new free exercise approach, explaining that: (1) strict scrutiny is triggered when regulations "treat *any* comparable secular activity more favorably than religious exercise," and (2) comparability for such purposes is determined by "the asserted government interest that justifies the regulation at issue."[123]

The opinion stressed that comparable secular activities must be identified using only the rationale underpinning the regulation.[124] In *Tandon*, that meant focusing on the government's interest in "reducing the spread of COVID," the rationale behind California's regulations.[125] Other potential concerns, such as the reasons for which people gathered at certain locations, were inappropriate to consider since they lay outside the specific regulatory motivation.[126]

III. THE MOST-FAVORED-NATION DOCTRINE MEETS PUBLIC ACCOMMODATIONS LAW

The Supreme Court has not decided a religious challenge to a public accommodations law since embracing the most-favored-nation theory.[127] The methodology that the Court laid out in *Tandon*,[128] however, aligned closely with descriptions by the theory's scholarly proponents.[129] As noted above, this included using equal value as the sole determinant for comparability of religious and secular activities.[130] Laycock and his coauthor, Professor Steven Collis, penned perhaps the most developed articulation of the most-favored-nation approach[131]:

> We must look to the reasons the state offers for regulating religious conduct and then ask whether it permits secular conduct that causes the same or similar harms. . . . The secular conduct may be quite similar to the prohibited religious conduct . . . [o]r the conduct itself may be substantially

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[122] *See id.* at 1297.

[123] *Id.* at 1296 (citing *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 63, 67–68).

[124] *See id.*

[125] *Id.* at 1297; State Appellees' Answering Brief at 7–12, Tandon v. Newsom, 992 F.3d 916 (9th Cir. 2021) (No. 21-15228); Complaint for Injunctive and Declaratory Relief and Nominal Damages at 1–5, Tandon v. Newsom, 517 F. Supp. 3d 922 (N.D. Cal. 2021) (No. 20-CV-07108).

[126] *See Tandon*, 141 S. Ct. at 1296; *see also id.* at 1297 (applying the same rationale when reviewing the restrictions under strict scrutiny).

[127] Although *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), presented a challenge to the city's public accommodations law, the Court found that, as written, the ordinance did not apply to the petitioner. *See id.* at 1880–81.

[128] *See Tandon*, 141 S. Ct. at 1296–97.

[129] *See, e.g.*, Laycock & Collis, *supra* note 17, at 11, 16–23; Tebbe, *supra* note 23, at 2398–99, 2399 n.8, 2409–14, 2416–21 (collecting cases and articles embracing equal value); Duncan, *supra* note 75, at 868–69, 880–82; *see also* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366–67 (3d Cir. 1999).

[130] *See* sources cited *supra* notes 123–25 and accompanying text.

[131] Laycock & Collis, *supra* note 17, at 11–23.

different; it is still analogous if it harms or undermines the same or similar government interests.[132]

Notably, this distillation of the most-favored-nation doctrine places equal value at its center. This Part highlights the importance of equal value when applying the most-favored-nation theory to public accommodations laws.[133] First, it reviews the government interests in various public accommodations regimes and the different policy considerations they reflect. It then uses the *YU Pride Alliance* dissent as a "test case" to demonstrate the relevance of these differences in a world without meaningful equal-value analysis.

A. Different Public Accommodations Laws Reflect Particular Government Interests

Public accommodations laws broadly protect members of the public from discriminatory treatment.[134] Such laws share many common features. These similarities, however, can mask important differences. For instance, the category of "public accommodations" is usually understood "to refer to places other than schools, workplaces, and homes."[135] But, in eleven states, the public accommodations law explicitly covers schools.[136] And, while states like Virginia and Michigan use similar language to describe public accommodations,[137] they draw different lines when defining which places are "in fact open to the public."[138]

1. The Scope of the New York City Human Rights Law[139] *(NYCHRL) and the Interests It Pursues.* — The NYCHRL, like most other public accommodations laws,[140] includes a definition of a "place or provider of

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132 *Id.* at 11.

133 This assumes that the Court will continue to employ a most-favored-nation approach. For the moment, eight of the Justices have at least acquiesced to it (the exception being Justice Jackson, who has yet to hear a post-*Tandon* case in which the doctrine might apply). Both the per curiam and the three-Justice dissent in *Tandon* signaled acceptance of the theory. *See Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting) (referring to the First Amendment's "requir[ing]" religious conduct to be treated at least as well as "secular analogue[s]"). The Chief Justice, who joined neither *Tandon* opinion, has signaled his assent elsewhere. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (avoiding citations to the COVID-19 cases but asserting that strict scrutiny applies when a law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–46 (1993))).

134 *See* BRODY & BICKFORD, *supra* note 51, at 4.

135 Lerman & Sanderson, *supra* note 52, at 217.

136 Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 639 n.27 (2016); *see, e.g.*, N.J. STAT. ANN. § 10:5-5(l) (West 2020).

137 *Compare* VA. CODE ANN. § 2.2-3904(B) (2022), *with* MICH. COMP. LAWS ANN. § 37.2301(a) (West 2013 & Supp. 2023).

138 VA. CODE ANN. § 2.2-3904(C). *Compare id.*, *with* MICH. COMP. LAWS ANN. § 37.2301(a) (i)–(iv).

139 N.Y.C., N.Y., ADMIN. CODE tit. 8 (2023).

140 *See* Sepper, *supra* note 136, at 639–44.

public accommodation."[141] The definition it provides is quite expansive.[142] However, it includes the following qualification:

> Such term does not include any club which proves that it is in its nature distinctly private. . . . For the purposes of this definition, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state . . . is deemed to be in its nature distinctly private.[143]

Public accommodations, by their very name, concern entities that hold themselves open to the public. Whether societies like those excluded from the NYCHRL can still be private therefore warrants exploration.

The public (or private) status of large fraternal organizations is not a new debate in public accommodations law.[144] Depending on the wording of the relevant statute, state courts have come out on both sides.[145] To avoid any doubt, some jurisdictions simply state that benevolent orders are not public accommodations because they don't exist to serve the general public.[146] The statutory grounds on which judges have relied when *including* such clubs as public accommodations, however, suggest that these entities are still not inherently public.[147] Rather, they are covered only insofar as they implicate the government interest behind a particular statute.[148]

In the case of the NYCHRL, the classification of benevolent groups as private fits within the broader context of the law. In 1984, New York City amended its human rights law to help women and minorities advance professionally.[149] To that end, the City Council held extensive hearings[150] to ensure that the amended law targeted all entities where business activity took place or gatherings aiding professional

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[141] ADMIN. § 8-102.

[142] *See id.* (including in its purview providers of any form of good or service and all locations where any goods or services are made available).

[143] *Id.* § 8-101.

[144] *See generally* Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs*, 2 MICH. J. GENDER & L. 27 (1994).

[145] *See id.* at 41–50.

[146] *See, e.g.*, KAN. STAT. ANN. § 44-1002(h) (West 2021); 43 PA. STAT. AND CONS. STAT. ANN. §§ 954(l), 955(h)(10) (West 2020).

[147] *See* Sepper, *supra* note 136, at 645 & n.58. *Compare, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171 (1972) ("Moose Lodge is a private club in the ordinary meaning of that term."), *with* Hum. Rels. Comm'n v. Loyal Ord. of Moose, Lodge No. 107, 294 A.2d 594, 598 (Pa. 1972) (holding, only seven weeks after *Irvis*, the state law's language regarding fraternal organizations exempted the Lodge as "distinctly private" for some activities but included it as a public accommodation for others).

[148] *See* cases cited *supra* note 147.

[149] *See* N.Y.C. COMM. ON GEN. WELFARE, REPORT OF LEGAL SERVICES DIVISION, INT. NO. 513-A, at 1–2 (1984).

[150] *See* Brief for Appellee at 18, N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988) (No. 86-1836).

advancement might occur.[151] The city issued detailed legislative findings[152] and included summaries of those findings within the text of the law.[153] The City Council's determination not to include benevolent orders stemmed from the fact that, by law,[154] they did not implicate the city's interest.[155] That is, the state laws governing their incorporation prohibited them from being sites for business meetings.[156] The Supreme Court heard a challenge to the NYCHRL's benevolent-order classification in 1988 and found that "[t]he City Council's explanation for exempting benevolent orders . . . from Local Law 63's coverage reflects a view that these associations are different in kind."[157]

The NYCHRL's classification of educational institutions, including private universities, as public accommodations also stems from a well-documented and carefully tailored amendment to the law. Like most public accommodations laws,[158] the NYCHRL at one time excluded schools from its public accommodations provisions.[159] In 1991, however, the City Council chose to eliminate that exclusion due to the city's "overriding interest in routing out discrimination from its schools."[160] The change came as part of a broad overhaul of the NYCHRL[161] motivated by the steep increase in bias-motivated violence around the city.[162] Testifying about the bleak situation, the city's Commissioner on Human Rights maintained that conditions at educational institutions, along with issues in employment, housing, and lending, were to blame for the worsening conditions in the city.[163] The inclusion of educational institutions, including universities, as public accommodations was intended to reduce feelings of alienation and experiences of prejudice

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[151] *See, e.g.*, *N.Y. State Club Ass'n*, 487 U.S. at 5–7; *see also* Frank, *supra* note 144, at 67 n.189 (relating how the City crafted NYCHRL's exemptions to distinguish "purely social" groups from those that "facilitate[d] a business").

[152] *See generally* N.Y.C. COMM. ON GEN. WELFARE, *supra* note 149.

[153] *See* N.Y.C., N.Y., Local Law 1984/63, § 1 (Oct. 24, 1984).

[154] *See* N.Y. INS. LAW § 4501(a) (McKinney 2023) (defining fraternal order as one "formed, organized and carried on solely for the benefit of its members and of their beneficiaries and not for profit").

[155] *See* N.Y.C. COMM. ON GEN. WELFARE, *supra* note 149, at 5; *see also N.Y. State Club Ass'n*, 487 U.S. at 21 (Scalia, J., concurring in part and concurring in the judgment) ("[I]t was rational to think that [lodge and fraternal type] organizations did not significantly contribute to the problem the City Council was addressing.").

[156] *See N.Y. State Club Ass'n*, 487 U.S. at 16–17.

[157] *Id.* at 18.

[158] *See* Lerman & Sanderson, *supra* note 52, at 217.

[159] *See* N.Y.C., N.Y., Local Law 1991/39, § 8-102(9) (June 18, 1991) (removing those exceptions from the new text of the law); *see also* N.Y.C. COMM. ON GEN. WELFARE, REPORT OF THE LEGAL DIVISION, INT. NO. 465-A § II(3) (1991); *id.* § 8-105.

[160] N.Y.C. COMM. ON GEN. WELFARE, *supra* note 159, at 4.

[161] *See* David N. Dinkins, Mayor, N.Y.C., Remarks by Mayor David N. Dinkins at Public Hearing on Local Laws 2 (June 18, 1991).

[162] *See* N.Y.C. COMM. ON GEN. WELFARE, *supra* note 159, pmbl. (relaying statistics and polls about the rise in bias-driven violence, bias-driven crime, and racial turf wars and the deteriorating experiences of individual New Yorkers).

[163] *See id.*

within those establishments. By ensuring equal access to the tangible and intangible benefits that schools provide, the law aimed both to improve students' subjective experiences and to position them to succeed professionally.

2. The Scope of Title II and the Interests It Pursues. — Title II presents the clearest example of a public accommodations law tailored to address particular interests. Nearly every state's public accommodations regime covers retail establishments.[164] Title II does not.[165] This doesn't suggest a proretail bias on Congress's part or indicate a shortcoming in the law's scope. It instead reflects the reality that the provision pursues different interests than do the laws of most states.

Title II's lack of coverage for retail stores is hardly surprising given its history. Congress enacted the provision pursuant to its powers under the Commerce Clause and drafted the law to target those establishments where discrimination most hampered interstate commerce.[166] The provision was still an explicit antidiscrimination measure.[167] Its narrow scope simply indicates the interest it furthers.[168]

B. YU Pride Alliance *and Equal Value*

Justice Alito's dissent in *YU Pride Alliance* implicitly invoked the most-favored-nation theory developed in *Catholic Diocese* and *Tandon*. He declared that the NYCHRL "treats a vast category of secular groups more favorably than religious schools like Yeshiva."[169] To support this claim, he cited the fact that the law did not cover "corporation[s] incorporated under the benevolent orders law or described in the benevolent orders law."[170] Because YU was denied a religious exemption while "exemptions [were] afforded to hundreds of diverse secular groups," the NYCHRL was not neutral and generally applicable and was therefore

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[164] *See* Jeremy D. Bayless & Sophie F. Wang, *Racism on Aisle Two: A Survey of Federal and State Anti-discrimination Public Accommodation Laws*, 2 WM. & MARY POL'Y REV. 288, 300–04 (2011) (reviewing all such laws and finding that only one, which copies the text of Title II, definitively excludes retail stores, while in four other states their inclusion is ambiguous).

[165] *See* U.S. DEP'T OF JUST., CONFRONTING DISCRIMINATION IN HOTELS, RESTAURANTS, BARS, AND OTHER PLACES OF PUBLIC ACCOMMODATION 1 (2022); *see also* Reba Graham Rasor, Comment, *Regulation of Public Accommodations via the Commerce Clause — The Civil Rights Act of 1964*, 19 SW. L.J. 329, 331 (1965).

[166] *See Civil Rights — Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Com.*, 88th Cong. pt. 1, at 2–3, 277–78 (1963) [hereinafter *Hearings on S. 1732*]; *Hearings on Miscellaneous Proposals*, *supra* note 44, at 1373–77 (statement of Robert F. Kennedy, Att'y Gen. of the United States).

[167] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 1, 78 Stat. 241, 241; *Hearings on Miscellaneous Proposals*, *supra* note 44, at 1372–73 (statement of Robert F. Kennedy, Att'y Gen. of the United States); *see also Hearings on S. 1732*, *supra* note 166, at 191, 194–95 (statements of Sen. John Sherman Cooper) (explaining effect on law's scope of interstate commerce focus).

[168] *See* Lerman & Sanderson, *supra* note 52, at 221–22, 240–41, 250–51, 290–93; Sepper, *supra* note 136, at 640; 42 U.S.C. § 2000a(b); *Civil Rights — Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Com.,* 88th Cong. pt. 2, at 1144–45 (1963) (statements of Bruce Bromley).

[169] Yeshiva Univ. v. YU Pride All., 143 S. Ct. 1, 2 (2022) (Alito, J., dissenting).

[170] *Id.* (quoting N.Y.C., N.Y., ADMIN. CODE § 8-102 (2022)).

subject to strict scrutiny review.[171] There's just one problem with this analysis: the NYCHRL doesn't contain exemptions to its public accommodations provisions like those described. The law's scope was simply tailored to meet specific goals.

Of course, a law's framing can't alone determine the interests it addresses without welcoming legislative gamesmanship. Its scope can still be under- or overinclusive relative to other implicated activities or entities. The archetypal example involving free exercise is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[172] In that case, the City of Hialeah had passed four ordinances that collectively outlawed ritual animal sacrifice.[173] The city claimed that its actions were justified by its interests in safeguarding public health and preventing animal cruelty.[174] The regulations, however, failed to encompass numerous activities "that endanger[ed] these interests in a similar or greater degree"[175] than the prohibited religious sacrifices.[176] As *Lukumi* shows, a law's definitional purview cannot stand in for a meaningful comparison between its scope and the interests it addresses.[177]

Unlike in *Lukumi*, however, the NYCHRL's scope does — or at least arguably does — align with the relevant government interests. As the previous section shows, public accommodations laws can look quite different from one another for legitimate policy reasons. The *YU Pride Alliance* dissent made much of the statute's failure to cover benevolent orders.[178] The dissent boldly asserted that exempting YU from the law's purview would do no more to "undermine the policy goals of the NYCHRL" than the law's own exclusion of fraternal orders.[179] Absent was any mention of what those goals were or how those groups implicated them. Without considering the interests embodied in the NYCHRL, the dissent had no ability to consider equal value. And, without equal value, what remained of the most-favored-nation test was strict scrutiny, since *some* category of entity was unregulated.

A meaningful consideration of equal value in *YU Pride Alliance* would have looked quite distinct from Justice Alito's dissent. The NYCHRL is known for being one of the most expansive laws of its

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[171] *Id.* at 3.
[172] 508 U.S. 520 (1993); *see* Duncan, *supra* note 75, at 866–69; Kendrick & Schwartzman, *supra* note 59, at 137.
[173] *See Lukumi*, 508 U.S. at 526–28.
[174] *See id.* at 543.
[175] *Id.*
[176] *See id.* at 543–45.
[177] *See* Laycock & Collis, *supra* note 17, at 16 (critiquing circular reasoning governments employ to claim challenged laws are generally applicable); *see also* Laycock, *supra* note 82, at 29 ("[R]egulatory categories are not self-defining. The government likes to focus on the narrow law under challenge, and claim that the law is generally applicable to everything that it applies to.").
[178] Yeshiva Univ. v. YU Pride All., 143 S. Ct. 1, 2–3 (2022) (Alito, J., dissenting).
[179] *Id.* at 3.

kind.[180] Therefore, the first step in the analysis would entail an assessment of the city's interest in regulating universities as public accommodations.[181] The *Tandon* per curiam, as well as leading scholars,[182] suggests that the government's asserted interest should guide judges.[183] However, unlike in the COVID-19 cases, where hasty decisionmaking and unknown science made it difficult to pinpoint the interest reflected in particular regulations, no such difficulty existed in *YU Pride Alliance*. The City Council drafted detailed reports explaining each change to the NYCHRL.[184] In relevant part, those included ensuring nondiscriminatory access to all locations where business activity took place and reducing prejudice at institutions affecting residents' job prospects.[185] These rationales map rather cleanly onto the scope of the law.

At the second step, the Court would have inquired into how the NYCHRL treated other public accommodations included in the law or establishments not subject to the law but implicating the same regulatory interest. The NYCHRL doesn't include tiers of regulation for different public accommodations,[186] so, barring unequal application of the law, no public accommodations in the city are treated better than YU. Furthermore, the broad language of the law[187] and its explicit requirements regarding judicial construction[188] suggest the unlikelihood of unregulated establishments implicating the city's interest. Of course, that would be a question to resolve over the course of litigation. But, without more information, the equal-value analysis suggests an absence of unregulated secular analogues.

Justice Alito ignored equal value and therefore missed the factors indicating alignment between the interests embedded in the NYCHRL and its regulatory scope. The *YU Pride Alliance* dissent pointed to the law's lack of coverage for benevolent orders. These entities, however, weren't classified as public accommodations specifically because they didn't implicate the city's interest, a conclusion previously reached by the Supreme Court.[189] That is, these societies are prevented by law from being sites of even informal meetings and professional advancement,

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[180] *See* N.Y.C. COMM. ON C.R., COMMITTEE REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION, INT. NO. 805-A, at 5 (2016); *supra* section III.A.1, pp. 1460–62.
[181] *See* Laycock & Collis, *supra* note 17, at 11.
[182] *See, e.g.*, *id.*
[183] Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).
[184] *E.g.*, N.Y.C. COMM. ON GEN. WELFARE, *supra* note 159; N.Y.C. COMM. ON GEN. WELFARE, *supra* note 149.
[185] *See supra* pp. 1461–62.
[186] *See* N.Y.C., N.Y., ADMIN. CODE §§ 8-102, -107(4), -107(28)(b) (2023).
[187] *See id.* § 8-102; N.Y.C. COMM. ON C.R., *supra* note 180, at 5–6.
[188] *See* ADMIN. § 8-130.
[189] *See* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 16 (1988).

and, as noncommercial actors closed to the public,[190] they do not give rise to the economic and dignitary harms that the law targets.[191]

Universities, on the other hand, squarely implicate the interests reflected in the NYCHRL. The city's interest in nondiscriminatory environments, including educational ones, centers around creating a sense of communal belonging and ensuring equal access to the resources that city residents need for future success.[192] The *YU Pride Alliance* plaintiffs detailed the ways in which YU's actions caused subjective harm and deprived them of resources and experiences that help other students succeed in school and after entering the city's workforce.[193] As they explained:

> Plaintiffs have experienced feelings of isolation, fear, and rejection. . . . These deprivations . . . contribute to a campus environment that prevents students from having full and equal access to a successful college experience[,] . . . [including] allowing students to build leadership and civic engagement skillsets, develop peer and mentoring networks, and experience belonging and support.[194]

The plaintiffs also laid out in detail the factors that made YU a public, rather than "distinctly private,"[195] entity. These included the university's role vis-à-vis its student public,[196] its public-facing mission, its dynamic relationships with employers throughout the city, and its deep engagement with the local community.[197] This cursory analysis points to the importance of equal value. Without it, the critical differences between a university and a benevolent society — differences that directly relate to the law under review — can go unnoticed.

C. *Implications for Other Jurisdictions*

Two Justices have now penned opinions using a most-favored-nation approach without equal value, and two others have signed on to such

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[190] *See* N.Y. INS. LAW § 4501(a) (McKinney 2004); *N.Y. State Club Ass'n*, 487 U.S. at 16–17; N.Y.C., N.Y., Local Law 1984/63, § 1 (Oct. 24, 1984) (contrasting benevolent orders with clubs that, despite being "organized for social, cultural, civic or educational purposes," nonetheless host commercial activity with "prejudicial impact . . . on business, professional and employment opportunities of minorities and women").

[191] *See* N.Y.C., N.Y., Local Law 1991/39, § 8-101 (June 18, 1991); N.Y.C. COMM. ON GEN. WELFARE, *supra* note 159, at 4; Memorandum of Law in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment at 22–23, YU Pride All. v. Yeshiva Univ., No. 154010/2021 (N.Y. Sup. Ct. June 14, 2022).

[192] *See supra* section III.A.1, pp. 1460–62.

[193] *See, e.g.*, Memorandum of Law in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment, *supra* note 191, at 1, 21–23; Complaint ¶¶ 2–3, 120–124, *YU Pride All.*, No. 154010/2021. *See generally* Report of Dr. Jason C. Garvey, April 26, 2021, *YU Pride All.*, No. 154010/2021, 2021 WL 5042568.

[194] Complaint, *supra* note 193, ¶¶ 120, 122–123.

[195] *See* N.Y.C., N.Y., ADMIN. CODE § 8-102 (2023).

[196] *See* Memorandum of Law in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment, *supra* note 191, at 19 (citing PGA Tour, Inc. v. Martin, 532 U.S. 661, 690 (2001)).

[197] *See id.* at 20–22.

an opinion. Given how recently the Court adopted the most-favored-nation approach to free exercise claims, it may continue to tweak the doctrine.[198] Were one of the Justices opposed to equal value to hold the key swing vote in a case or to author an opinion that otherwise appeals to their colleagues, equal value could easily drop from the Court's analysis. This prospect holds ominous implications for public accommodations laws like Title II.

Soon after the passage of the 1964 Civil Rights Act, the Supreme Court had occasion to review a covered establishment's challenge to the Act's application. In *Newman v. Piggie Park Enterprises, Inc.*,[199] the proprietor of several South Carolina restaurants that discriminated against Black patrons claimed that Title II violated his First Amendment right to free exercise.[200] The district court acknowledged that the defendant's "religious beliefs compel him to oppose any integration of the races whatever."[201] The court nonetheless held that "[t]he free exercise of one's beliefs . . . is subject to regulation when religious acts require accommodation to society,"[202] and, therefore, the defendant lacked "a constitutional right to refuse to serve members of the Negro race . . . upon the ground that to do so would violate his sacred religious beliefs."[203] The Supreme Court found the free exercise defense unavailing[204] and directed the trial judge to award the cost of attorney's fees to the plaintiffs.[205]

The future of *Piggie Park* becomes uncertain if the Court does away with equal value as part of its most-favored-nation approach. Take, for example, the Supreme Court's landmark ruling in *Heart of Atlanta Motel, Inc. v. United States*.[206] For decades, the case has embodied the notion that businesses included in Title II's definition of "public accommodation" cannot escape the law's reach.[207] Title II, however, is a uniquely narrow public accommodations law: entire categories of business, including some central to the concept of a "public accommodation," do not fall within its reach, and even those included, like hotels, have carveouts.[208]

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[198] *See* Tebbe, *supra* note 23, at 2420–21.
[199] 390 U.S. 400 (1968).
[200] Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 943–44 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968).
[201] *Id.* at 944; *see id.* at 944–45.
[202] *Id.* at 945 (citing United States v. Ballard, 322 U.S. 78 (1944); Reynolds v. United States, 98 U.S. 145 (1878); Prince v. Massachusetts, 321 U.S. 158 (1944)).
[203] *Id.*
[204] *Piggie Park*, 390 U.S. at 402 n.5.
[205] *Id.* at 402–03.
[206] 379 U.S. 241 (1964).
[207] *See* Alberto B. Lopez, *The Road to, And Through,* Heart of Atlanta Motel, 2 SAVANNAH L. REV. 59, 70–72 (2015).
[208] *See* 42 U.S.C. § 2000a(b)(1).

Title II's scope and explicit carveouts make it easier to see what a most-favored-nation doctrine lacking equal-value analysis would look like. The suggestion here is not that a future challenge to *Heart of Atlanta Motel* would prevail without equal value. However, taking seriously a most-favored-nation test without equal value, such a challenge would be possible. If, for instance, a hotel owner held a sincere religious objection to queer couples sharing a room, what would prevent them from arguing that the exemption for small-scale, owner-occupied establishments[209] treats a secular rationale like privacy in one's home more favorably than a religious one? Meaningful equal-value analysis would likely find that the government's interest in regulating a hotel isn't implicated by a boarding house, especially given Title II's focus on regulating interstate commerce. Allowing litigants to trot out establishments that serve dissimilar public and economic roles — and are therefore regulated separately — to force exemptions creates a religious trump card to skirt the law.

CONCLUSION

The number of high-profile cases seeking religious exemptions from antidiscrimination laws is increasing.[210] With the Court's embrace of the most-favored-nation theory, such cases will now be reviewed under that doctrine. For the moment, the Court's most-favored-nation doctrine includes equal value. But two Justices have written opinions dispensing with equal-value determinations — one of which explicitly disavowed such considerations — and two others have signaled their readiness to do so. Fortunately, a majority of the Court has yet to abandon the equal-value prong that makes the most-favored-nation approach viable. Recognizing the centrality of equal value can protect critical public accommodations laws from increasing attacks and safeguard the nondiscriminatory public spaces most Americans take for granted.

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[209] *Id.*

[210] *See generally* VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10833, RELIGIOUS OBJECTIONS TO NONDISCRIMINATION LAWS: SUPREME COURT OCTOBER TERM 2022 (2022).