

# THE REPEAL OF RELIGIOUS ACCOMMODATIONS – A CONSTITUTIONAL ANALYSIS

RONALD J. COLOMBO\*

*Under modern Supreme Court jurisprudence, the First Amendment ordinarily imposes no heightened standard of review upon neutral laws of general applicability that coincidentally burden the free exercise of religion. To relieve or minimize this burden, however, lawmakers are generally free to promulgate exemptions from, or accommodations to, such laws for the benefit of religious adherents. Such accommodations are common.*

*When a law is not neutral with respect to religion, or when the law is not generally applicable, then it will be subject to the exacting test of strict scrutiny to the extent that it burdens the free exercise of religion. Should the law fail this test, the Constitution requires—at a minimum—an exemption from the law to protect those whose religious exercise is burdened by its application.*

*An undertheorized phenomenon in this area is the repeal of a religious accommodation that had been previously granted. Although such an accommodation may not have been constitutionally required ex ante, it is far from clear that its repeal can be freely executed ex post. By its very terms, any such repeal would typically appear to be non-neutral with respect to religion, thereby implicating the test of strict scrutiny.*

*The Article addresses this lacuna in constitutional thought, concluding that, unless a religious accommodation is repealed alongside all other applicable exemptions to the law in question, such a repeal would indeed be subject to the text of strict scrutiny, and, consequently, most likely unconstitutional.*

---

\* Professor of Law, Maurice A. Deane School of Law, Hofstra University. I extend my appreciation to my colleagues at the Maurice A. Deane School for affording me an opportunity to workshop this piece, and especially to Akilah Folami, Robin Charlow, Alafair Burke, Jack Zarin-Rosenfeld, Jeremy Weintraub, Charis Damiano, Irina Manta, and Eric Freedman for their helpful comments and feedback.

## TABLE OF CONTENTS

Introduction.....	731
I. Religious Liberty .....	734
A. Brief History of the Religion Clauses of the First Amendment .....	734
B. The Establishment Clause .....	737
C. The Free Exercise Clause .....	739
II. Religious Accommodations and Exemptions.....	746
A. Statutory Accommodations of Religion.....	747
B. Judicially Mandated Exemptions .....	750
1. Hybrid situations.....	751
2. Facially problematic laws.....	753
3. Official expressions of hostility.....	754
4. Existence of individual accommodations based on factors excluding religious ones .....	763
5. Existence of categorical secular accommodations excluding religious ones .....	764
6. Discretionary accommodations .....	776
7. Regimes of disparate treatment.....	777
III. The Repeal of Religious Accommodations .....	784
A. Historical Examples .....	784
1. School vaccine requirements .....	785
2. Healthcare-worker vaccine requirements .....	785
3. Child-endangerment laws .....	785
4. Modification of state RFRAs.....	786
B. Legal Analysis .....	787
1. The repeal of only a religious accommodation from a rule or regulation to which at least one other accommodation remains.....	796
2. The repeal of all accommodations (religious and otherwise) from a rule or regulation which had heretofore recognized multiple accommodations.....	798
3. The repeal of religious and other accommodations from a rule or regulation to which at least one other accommodation remains.....	799
4. The repeal of a religious accommodation from a rule or regulation which had recognized no other grounds for	

accommodation .....	801
Conclusion .....	803

## INTRODUCTION

Justice Scalia opined that “[w]hen a legislature acts to accommodate religion, particularly a minority sect, ‘it follows the best of our traditions.’”<sup>1</sup> Via such accommodations, adherents are relieved from certain legal obligations that particularly and substantially burden their practice of religion.<sup>2</sup> The constitutionality of religious accommodations had been the subject of some debate, but that was significantly tampered down by the Supreme Court’s decisions in *Cutter v. Wilkinson*<sup>3</sup> and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,<sup>4</sup> (unanimously upholding the Religious Land Use and Institutionalized Persons Act<sup>5</sup> and unanimously applying the Religious Freedom Restoration Act,<sup>6</sup> two extremely robust federal statutory accommodations of religion).<sup>7</sup> Today, it is widely understood that governments have significant latitude in crafting religious accommodations.<sup>8</sup>

---

1. Ronald J. Colombo, *The Religious Liberty Jurisprudence of Justice Antonin Scalia*, 46 HOFSTRA L. REV. 433, 441 (2017) [hereinafter *Religious Jurisprudence of Scalia*] (quoting Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 744 (1994) (Scalia, J., dissenting) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952))).

2. See *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (discussing how a federal religious accommodation statute “alleviates exceptional government-created burdens on private religious exercise”), *remanded to* 423 F.3d 579 (6<sup>th</sup> Cir. 2005).

3. *Id.* at 712.

4. 546 U.S. 418 (2006).

5. 42 U.S.C. § 2000cc.

6. § 2000bb.

7. See *Gonzales*, 546 U.S. at 423 (holding the Religious Freedom Restoration Act trumped a law of otherwise general applicability: the Controlled Substance Act); *Cutter*, 544 U.S. at 714 (upholding the constitutionality of the Religious Land Use and Institutionalized Person Act of 2000). Some scholars had argued that the Religious Freedom Restoration Act was unconstitutional. *E.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 437 (1994) (arguing that the Religious Freedom Restoration Act is a legislative and judicial overreach that violates the principles of religious freedom).

8. See *infra* Section III.A (discussing state legislation that has removed religious exemptions for vaccination requirements and child endangerment laws).

Typically, a legislature's promulgation of a religious accommodation is not constitutionally compelled.<sup>9</sup> That is, the Constitution typically does not require the government to exempt religious believers from a law—the government can choose to apply the law even if doing so particularly burdens those believers.<sup>10</sup> Yet, for prudential reasons consonant with Justice Scalia's observation, legislatures can, and often do, provide religious accommodations.<sup>11</sup>

Once promulgated, rarely have religious accommodations been rescinded.<sup>12</sup> As such, "there is little precedent" regarding such acts of rescission.<sup>13</sup> As Christopher Lund has aptly noted, "[t]his is a remarkably undertheorized question in the law-and-religion field."<sup>14</sup> Courts and commentators have generally assumed, without any serious analysis, that an unrequired accommodation may be readily and discretionarily rescinded.<sup>15</sup> This glib and largely unchallenged assumption demands closer inspection.

As the Supreme Court has long explained, the First Amendment subjects to "strict scrutiny" those governmental actions that fail the test of "neutrality" when burdening the exercise of religion.<sup>16</sup> A government action breaches neutrality when it specifically targets

---

9. This was a question of significant controversy, largely put to rest by the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990) (holding that an Oregon law prohibiting the use of peyote applied to religious uses of peyote as well and did not violate the Constitution), *remanded to* 799 P.2d 148 (Or. 1990); *see infra* notes 72–78 and accompanying text (explaining that neutral laws of general applicability do not infringe on religious freedom and are therefore subjected to rational basis review).

10. *See* Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L. REV. 715, 733 (1998) (arguing that Congress would have to pass new legislation to increase religious freedom protections).

11. *See supra* note 1 and accompanying text (noting that the Free Exercise Clause does permit legislative accommodations of religion).

12. *See infra* Conclusion (arguing that repealing already-existing accommodations would virtually never be neutral).

13. Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1377 (2014).

14. Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA's*, 55 S.D. L. REV. 466, 494 (2010).

15. *E.g.*, *F.F. v. State*, 143 N.Y.S.3d 734, 737–39 (App. Div. 2021); Lea Ann Fracasso, *Developing Immunity: The Challenges in Mandating Vaccinations in the Wake of a Biological Terrorist Attack*, 13 DEPAUL J. HEALTH CARE L. 1, 32 (2010) (noting that repealing a vaccine requirement's religious exemption would likely pass muster under the Supreme Court's current precedent).

16. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77 (2021).

religious conduct for circumscription or regulation.<sup>17</sup> This includes, among other things, undertakings that “proceed[] in a manner intolerant of religious beliefs or restrict[] practices because of their religious nature.”<sup>18</sup>

Accordingly, the decision to remove a religious accommodation would seem to violate the Supreme Court’s neutrality test.<sup>19</sup> Even if a particular accommodation were not initially required, the act of removing it would arguably not be neutral at all, but rather it would be an act that solely targets religious believers and religious conduct.<sup>20</sup> Notwithstanding the allure of characterizing such an act as the mere restoration of a level playing field for both believers and non-believers, the fact remains that the act of rescission unquestionably singles out religious conduct for circumscription—specifically imposing upon religious believers a burden which had not previously been imposed upon them.<sup>21</sup> Framed this way, a government’s recession of a religious accommodation does not so obviously pass constitutional muster under modern First Amendment jurisprudence.

This Article represents the first (and to date only) effort to explore the constitutional propriety of a religious accommodation’s subsequent rescission. Although historically the rescission of a legislative religious accommodation was a rare event,<sup>22</sup> the recent uptick in such rescissions (especially with regard to vaccination mandates<sup>23</sup>) has made the issue an increasingly important one.<sup>24</sup>

---

17. *Id.*

18. *Id.*

19. *Cf. id.* (finding that a refusal to contract with a company that rejects same-sex couples who want to be foster parents violates the Free Exercise Clause of the First Amendment).

20. *See infra* notes 387–89 and accompanying text (reasoning that this type of repeal would violate the Supreme Court’s prohibition against government action that treats religiously based conduct as inferior to non-religious conduct).

21. *See id.* (distinguishing between permissible and impermissible accommodations based on the religious nature of their justifications triggers strict scrutiny because it is neither neutral nor generally applicable).

22. *See infra* Conclusion (discussing how legislatures have increasingly repealed religious accommodations).

23. *See id.* (arguing that governments currently have unchecked power to revoke religious accommodations, including repeals of vaccine exemptions as an example).

24. *See, e.g.,* *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) (*per curiam*) (addressing the constitutionality of a vaccine mandate for New York healthcare workers, regardless of the workers’ religious objections), *cert. denied*, 142 S. Ct. 2569 (2022).

Part I of this Article will set forth a primer on religious liberty under the U.S. Constitution. It will briefly cover the historical backdrop to the Constitution's religion clauses, and thereafter the religion clauses themselves. Part II will proceed to a discussion of the role and constitutional parameters of religious accommodations in American society, both judicial and legislative.

With Parts I and II having contextualized the issue, Part III will address the constitutional implications appurtenant to the rescission of a religious accommodation. Part III will first review some of the rare examples of rescission, and thereafter grapple with the thorny constitutional issue that is this Article's *raison d'être*.

This Article concludes that permissibility of an accommodation's recession is far from a closed question. Depending upon the circumstances and scope of the rescission, it may be subject to either the lenient rational basis test applicable to most challenged governmental actions affecting religion, or to the rigorous strict scrutiny test reserved for disfavored governmental actions that strike at the heart of religious liberty.

## I. RELIGIOUS LIBERTY

### A. *Brief History of the Religion Clauses of the First Amendment*

A review of recorded history suggests that persecution of religion, rather than liberty of religious belief and practice, has been the more common lot of mankind.<sup>25</sup> Yet voices of toleration were raised from time to time throughout the ages, including, prominently, those of St. Augustine and St. Thomas Aquinas,<sup>26</sup> and the counter-reformation theologian Francisco Suarez.<sup>27</sup> John Locke's *Letter Concerning Toleration*, written in 1689, is generally recognized as a watershed (if not *the* watershed) philosophical endorsement of religious toleration within the Western tradition—and a significant influence on America's

---

25. See W. COLE DURHAM, JR. & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* 3–4 (2d ed. 2019) (noting the prevalence of religious persecution as a norm in recorded history).

26. See Joseph Tompkins, Note, *An "Ungracious Silence": The Influence of Catholic Thought Upon the First Amendment and Its Impact Upon the Interpretation of the Free Exercise Clause*, 12 AVE MARIA L. REV. 359, 367–68 (2014) (discussing Aquinas' advocacy for religious toleration).

27. See Thomas Pink, *Conscience and Coercion*, FIRST THINGS 45, 50 (2012) (discussing the Catholic Church's conceptions of religious toleration).

founding generation.<sup>28</sup> Indeed, the English experience, progenitor to the American one, was marked by significant movement towards greater religious tolerance in the centuries preceding the American Revolution.<sup>29</sup>

Nevertheless, to the minds of America's constitutional Framers, the English example was unsatisfactory.<sup>30</sup> This is not particularly surprising for many reasons, as I have detailed elsewhere:<sup>31</sup>

1. “the religious ‘strife and intolerance’ that marked the Old World and particularly England” as a result of its approach towards religion;<sup>32</sup>
2. the positive colonial experiment with disestablishment and unparalleled religious liberty;<sup>33</sup>
3. the “intense religiosity of the [f]ounding generation”<sup>34</sup> (not surprising given the influx of pilgrims who settled America for the freedom to practice their faiths in peace).<sup>35</sup>

---

28. See DURHAM & SCHARFFS, *supra* note 25, at 13–14 (noting Locke's significant impact on Western philosophical approaches to religious toleration). *But see* RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 283, 292–93 (4th ed. 2003) (acknowledging Locke's influence, but concluding that “[a]t bottom, the thinking Americans of that day found their principles of order in no single political philosopher, but rather in what has been called the ‘Great Tradition,’ drawn from Hebrew and classical and Christian teaching, and tested by the personal and national experience of their British ancestors and their own colonial life”).

29. See DURHAM & SCHARFFS, *supra* note 25, at 11–13 (suggesting that laws protecting religious freedom were a reactive consequence of religious persecution by the English).

30. See MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, *RELIGION AND THE CONSTITUTION* 25, 40 (4th ed. 2016) (quoting Thomas Jefferson, George Mason, James Madison, and George Washington to demonstrate that the framers viewed English religious tolerance as an abstract thought that America would offer as an inalienable right); *see also* KIRK, *supra* note 28, at 432–39 (noting that the American Bill of Rights, ratified in 1791, shared a lot in common with the English Bill of Rights; however, the Establishment Clause of the First Amendment was uniquely shaped by the colonial experience).

31. See Ronald J. Colombo, *The Naked Private Square*, 51 *HOUS. L. REV.* 1, 28–31 (2013) [hereinafter *Naked Private Square*] (discussing the various factors in the colonial experience that influenced the Framers to establish a system that differed from the English example).

32. *Id.* at 28.

33. *Id.* at 29.

34. *Id.*

35. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 *U. PA. L. REV.* 1559, 1562 (1989).

Consequently, the new American republic would move beyond the checkered example of English religious *tolerance* toward an American ideal of religious *liberty*.<sup>36</sup> for “tolerance,” as James Madison and others pointed out, implies “an act of legislative grace.”<sup>37</sup> But fundamental rights, such as religious liberty, are not granted by the State. Rather, as the Declaration of Independence famously proclaims, each individual is “endowed by their Creator” with such rights.<sup>38</sup> Accordingly, constitutions and bills of rights merely recognize fundamental rights—they do not create them. As Thomas Paine remarked: “Toleration is not the *opposite* of intolerance, but is the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it.”<sup>39</sup>

Unfortunately, how to best protect a recognized right is not necessarily clear. The most appropriate balance between an individual’s rights and his or her responsibilities to the community has long plagued political thinkers.<sup>40</sup> In her concurring opinion in *McCreary County v. ACLU*,<sup>41</sup> Justice O’Connor eloquently contextualized the American approach to religious liberty, and explained how the Framers chose to operationalize this fundamental right via the religion clauses of the First Amendment to the Constitution:

The First Amendment expresses our Nation’s fundamental commitment to religious liberty by means of two provisions—one protecting the free exercise of religion, the other barring establishment of religion. They were written by the descendants of people who had come to this land precisely so that they could practice their religion freely. Together with the other First

---

36. See Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOB. LEGAL STUD. 503, 518 (2006) (“‘Toleration’ implied subordinate status and toleration by the grace of the established church; these connotations soon became unacceptable.”).

37. Colombo, *Naked Private Square*, *supra* note 31, at 31.

38. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

39. Colombo, *Naked Private Square*, *supra* note 31, at 31.

40. See, e.g., Berta Esperanza Hernández-Truyol, *The Rule of Law and Human Rights*, 16 FLA. J. INT’L L. 167, 178 (2004) (arguing that “the rule of law discourse emphasizes the notion of individual rights,” whereas other cultures place more emphasis on communitarianism). See generally CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM: THE CATHOLIC INTELLECTUAL TRADITION AND THE MORAL FOUNDATIONS OF DEMOCRACY 1 (Kenneth L. Grasso, Gerard V. Bradley & Robert P. Hunt eds. 1995) (discussing the ongoing debate about the balance between individual rights and the good of the greater community).

41. 545 U.S. 844 (2005).



Amendment guarantees—of free speech, a free press, and the rights to assemble and petition—the Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought. They embody an idea that was once considered radical: Free people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct.

Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat.<sup>42</sup>

### B. *The Establishment Clause*

The Establishment Clause precludes Congress from making any law “respecting an establishment of religion.”<sup>43</sup> This prohibition has generally been interpreted as applying to the other branches of the federal government,<sup>44</sup> and, pursuant to the Fourteenth Amendment, to state governments as well.<sup>45</sup>

What exactly constitutes an “establishment of religion” has been a subject of debate. There is universal agreement that the Clause prohibits the federal government from creating a state-sponsored church.<sup>46</sup> The courts have also held that, as per the doctrine of

---

42. *Id.* at 881–82 (O'Connor, J., concurring); accord Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 W. VA. L. REV. 359, 363, 365 (2007) (“Th[e] conceptual framework that has free exercise and no-establishment in outright war with one another is quite impossible . . . . Not only are the Religion Clauses not in conflict, but the Establishment Clause is pro-freedom of religion, same as the Free Exercise Clause. . . both clauses work to safeguard religious freedom, albeit they operate differently to bring that about.”).

43. U.S. CONST. amend. I.

44. Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed*, 2017 BYU L. REV. 331, 377 (2017).

45. *Freedom From Religion Found. v. Hanover Sch. Dist.*, 665 F. Supp. 2d 58, 63 (D.N.H. 2009), *aff'd*, 626 F.3d 1 (1st Cir. 2010). *But see* *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2095 (2019) (Thomas, J., concurring) (arguing that the Establishment Clause does not apply to the States).

46. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 292 (2001) (noting that interpreters of the Establishment Clause have universally agreed that the Fourteenth Amendment bars state and federal government from sponsoring religious institutions).

incorporation, the Fourteenth Amendment prohibits the state governments from doing the same.<sup>47</sup> What is less clear is the extent to which conduct falling short of establishing a state-sponsored church amounts to the prohibited “establishment of religion.” As the Supreme Court itself confessed: “[w]hile the concept of a formally established church is straightforward, pinning down the meaning of a ‘law respecting an establishment of religion’ has proved to be a vexing problem.”<sup>48</sup> In less diplomatic terms, one commentator has bemoaned that “[c]onfusion has long characterized the Court’s Establishment Clause jurisprudence.”<sup>49</sup> The Supreme Court has propounded, over the past few decades, multiple tests for ascertaining whether questionable government conduct rises to the level of the impermissible establishment of religion.<sup>50</sup>

Regardless of the test employed, precedent has made clear that the government violates the Establishment Clause when it provides preferential support to one particular sect (or set of sects) over others, or when government provides preferential support to religion over nonreligion in general.<sup>51</sup> Similarly, the Clause precludes the government from establishing a “religion of secularism” by preferring irreligion to religion.<sup>52</sup> Indeed, as per the Supreme Court’s own words, the “touchstone” of its Establishment Clause jurisprudence is “neutrality”—“the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”<sup>53</sup>

---

47. See *supra* notes 44–45 and accompanying text (addressing the broad applicability of the First Amendment).

48. *Am. Legion*, 139 S. Ct. at 2080.

49. Patrick M. Garry, *Establishment Clause Jurisprudence Still Gropping for Clarity: Articulating a New Constitutional Model*, 12 NE. U. L. REV. 660, 663 (2020).

50. See *id.* at 663–66 (discussing the Supreme Court’s confusing and inconsistent application of various constitutional tests in Establishment Clause cases). In its most recent decision regarding the Establishment Clause as of this writing, the Supreme Court heavily criticized its *Lemon* test, declaring that “considerations counsel against” its assessing the constitutionality of “longstanding monuments, symbols, and practices.” *Am. Legion*, 139 S. Ct. at 2081–82.

51. 16A AM. JUR. 2D *Constitutional Law* § 428 (2023).

52. *Id.*

53. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); see also Ronald J. Colombo, *When Exemptions Discriminate: Unlawfully Narrow Religious Exemptions to Vaccination Mandates by Private Colleges and Universities*, 44 W. NEW ENG. L. REV. 293, 307–08 (2022) [hereinafter *When Exemptions Discriminate*] (asserting that nondiscrimination and neutrality are the critical threads in all First Amendment cases).

Critically for our purposes, the Court does not look upon governmental action that recognizes the role or importance of religion in society as violative of neutrality. In commenting upon the constitutionality of legislative prayer, for example, the Supreme Court noted that this practice, initiated by the First Congress, “stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans.”<sup>54</sup> This understanding of the Free Exercise Clause helps inform its application to statutory accommodations of religion, as discussed in Section II.A, *infra*.

### C. *The Free Exercise Clause*

As with the entire Bill of Rights, the Establishment Clause was designed primarily as a restriction of federal power vis-à-vis the states.<sup>55</sup> Nevertheless, it also operated, and was intended to do so, as an indirect protection of personal religious liberty.<sup>56</sup> The First Amendment’s Framers, steeped in the Old World’s history of suppression of conscience and religious freedom, conflated the establishment of religion with religious persecution.<sup>57</sup> Hence, it was their hope and expectation that nonestablishment would minimize violations of religious liberty.<sup>58</sup>

---

54. *Am. Legion*, 139 S. Ct. at 2089.

55. Charles F. Hobson, *James Madison, the Bill of Rights, and the Problem of the States*, 31 WM. & MARY L. REV. 267, 273 (1990) (noting that the intention of the Bill of Rights was to restrict the power of the federal government).

56. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350 (2002) (highlighting that the secondary aims of the First Amendment valued the protection of individual liberty, in addition to limiting government power).

57. See *id.* at 351 (describing the Framers’ generational viewpoint that compulsory church attendance, mandatory worship, and required taxes to a religious institution against one’s beliefs violated freedom of conscience).

58. The Framers’ understanding of the role that state-established churches play in promoting religious persecution has proven to be both overinclusive and underinclusive. Some of the most horrific persecutions of religion have been committed by avowedly nonreligious governments, such as those of the former Soviet Union or modern China. See Steven Wales, *Remembering the Persecuted: An Analysis of the International Religious Freedom Act*, 24 HOUS. J. INT’L L. 579, 634 (2002) (China); June “Bonnie” M. Kelly, *Searching for Spiritual Security: The Tangled Relationship of the Russian Orthodox Church, the Russian State and Religious Freedom*, 25 U. MIA. INT’L & COMP. L. REV. 263, 281 (2018) (Russia). And on the other hand, many Western nations continue to

The Free Exercise Clause, however, directly safeguards the fundamental right to religious liberty by demanding that “Congress shall make no law . . . prohibiting the free exercise” of religion.<sup>59</sup> As with the Establishment Clause, the Free Exercise Clause has been interpreted as applicable to all branches of the federal government and, via the doctrine of incorporation, to state governments as well, following the passage of the Fourteenth Amendment.<sup>60</sup>

When an individual’s free exercise of religion is “substantial[ly] burden[ed]” by government action, he or she is entitled to relief unless the government is able to pass the test of “strict scrutiny” in defense of its conduct.<sup>61</sup> As per this test, the government must demonstrate that (1) the action furthers a compelling state interest and (2) the action is narrowly tailored (that is, the means chosen by the government minimize the burden upon religious exercise while still pursuing the interest in question).<sup>62</sup> Or, in the words of the Supreme Court in 2021:

A government policy can survive strict scrutiny only if it advances “interests of the highest order” and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.<sup>63</sup>

---

maintain official, state-sponsored churches (such as Norway and Lutheranism, Malta and Catholicism, and Greece and Greek Orthodoxy), yet none of these nations are characterized by state-sponsored religious persecution. See David M. Smolin, *Exporting the First Amendment?: Evangelism, Proselytism, and the International Religious Freedom Act*, 31 CUMB. L. REV. 685, 688 (2001).

59. U.S. CONST. amend. I.

60. See Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Ins v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 573 (2002) (noting that the First Amendment restricts legislative, executive, and judicial action despite only mentioning Congress). *But cf.* Christopher N. Elliott, Note, *Federalism and Religious Liberty: Were Church and State Meant to Be Separate?*, 2 RUTGERS J. L. & RELIGION 1, 34–35 (2000) (arguing that the Framers did not intend for the Establishment Clause to apply to the states).

61. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881, 1890 (2021) (internal citations omitted) (stating that, if possible, the government must achieve its interests in a manner that does not burden religion).

62. See George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 902 (1988) (explaining that the test for strict scrutiny is two-fold, and that a restriction can only survive if it is narrowly tailored relative to other alternatives).

63. *Fulton*, 141 S. Ct. at 1881.

If the government's conduct fails the test of strict scrutiny, the relief typically granted to the claimant is a judicially crafted exemption from the law or regulation at issue.<sup>64</sup>

The precise parameters of the Free Exercise Clause's prohibition have been fiercely debated. More specifically, courts and commentators have disagreed over what kind of government action triggers application of the strict scrutiny test under the Free Exercise Clause.<sup>65</sup> As I have explained elsewhere: "To some scholars, 'free exercise' was adopted for 'the prevention and eradication of discrimination against unpopular religions and religionists.'"<sup>66</sup> Pursuant to this line of thought, the First Amendment doesn't provide protection against "facially neutral laws passed in the absence of overt religious hostility."<sup>67</sup> What the First Amendment prohibits are laws intended to regulate an individual's religious beliefs *qua* religious beliefs and an individual's religious conduct *qua* religious conduct.<sup>68</sup>

Many, if not most, scholars, however, read the original intent of the Framers more broadly. As they have explained, religious conscience was sacrosanct to the Framers, and the First Amendment was designed to robustly protect this conscience.<sup>69</sup> Since conscience manifests itself in both thought and deed, these scholars read the First Amendment as protecting religiously motivated conduct even if such conduct wasn't specifically targeted for circumscription on account of its religious

---

64. See *id.* (explaining courts' analysis regarding the harm of permitting specific exemptions).

65. See *infra* Section II.B.2 (arguing that the repeal of all accommodations—religious and nonreligious alike—would most likely be subjected to rational basis review).

66. Ronald J. Colombo, *An Antitrust Approach to Corporate Free Exercise Claims*, 92 ST. JOHN'S L. REV. 29, 35 (2018) [hereinafter *Antitrust Approach*]; Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1259 (2008).

67. Krotoszynski, *supra* note 66, at 1273.

68. See *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (explaining that the freedom to believe under the First Amendment is absolute, but the freedom to act is subject to regulation for society's protection).

69. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1445–47, 1463–66 (1990) (noting the connection between liberty and conscience); see also Philip Hamburger, *More is Less*, 90 VA. L. REV. 835, 839 (2004) (discussing that the free exercise of religion was of particular and elevated importance to the framers).

nature.<sup>70</sup> Such protection manifests itself via the “compelling state interest” test.<sup>71</sup>

The Supreme Court, after several decisions which were largely read as supporting the broader view of free exercise,<sup>72</sup> ultimately embraced the narrower view in *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>73</sup> The *Smith* Court held that absent the presentation of certain situations (discussed below), the Free Exercise Clause does not provide special protection to religious believers against religiously neutral laws of general applicability.<sup>74</sup> Consequently, a neutral, generally applicable law that only incidentally burdens religious beliefs or practices is not subjected to strict scrutiny review.<sup>75</sup> Such laws are instead subject to the lenient “rational basis” standard of review.<sup>76</sup> “To invalidate a law reviewed under this [rational basis] standard, ‘[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.’”<sup>77</sup>

Of vital importance, however, is to grasp what the Free Exercise Clause, post-*Smith*, still unquestionably forbids: government infringement of religion *qua* religion by regulating conduct in a way that is not generally applicable or religiously neutral.<sup>78</sup> For example,

---

70. See Hamburger, *supra* note 69, at 856–57 n.64 (explaining that free exercise enjoys greater protection vis-à-vis other First Amendment protections).

71. Dent, *supra* note 62, at 902.

72. E.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 14-12 to 14-13 (2d ed. 1988) (discussing the jurisprudence that suggested the Supreme Court was altering how it reviewed state action).

73. 494 U.S. 872 (1990). Capturing the perspective of many, one commentator opined that in *Smith* “the Supreme Court rewrote First Amendment jurisprudence by dispensing with a balancing test in the case of neutral laws of general applicability and holding such laws to represent no free exercise violation.” Robyn Cheryl Miller, Annotation, *What Laws are Neutral and of General Applicability Within Meaning of Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876, 167 A.L.R. FED. 663 (2001).

74. *Smith*, 494 U.S. at 881–82.

75. *Id.* at 878, 881–82.

76. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1137 (9th Cir. 2009) (“When a law is neutral and generally applicable, the rational basis test applies.”).

77. *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993) (alteration in original)). In 1992, shortly following the *Smith* decision, Congress passed the Religious Freedom Restoration Act (“RFRA”), and several states followed suit. See *infra* text accompanying notes 351–55. Due to this Article’s focus on the First Amendment, RFRA and its state counterparts are beyond the scope of our discussion.

78. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (discussing the impermissibility of laws that appear neutral on their face but are in fact motivated by desire to suppress religious conduct).

the Free Exercise Clause forbids government action that specifically targets religious beliefs or practices for circumscription. Thus, whereas a law banning animal cruelty in general would not necessarily give rise to a Free Exercise claim on the part of an affected religious believer, a law banning animal “sacrifice” in religious ceremonies would be questionable under the Free Exercise Clause.<sup>79</sup> Whereas both might affect the religious practitioner of animal sacrifice equally, only the latter prohibition would be subject to strict scrutiny<sup>80</sup> because it lacks neutrality with respect to religion; the former does not.

That said, facial neutrality does not end the inquiry. This is because a crafty persecutor of religion can most likely find a way to formulate a discriminatory decree in such a way as to appear, in a vacuum, neutral. The Supreme Court addressed this squarely in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*<sup>81</sup>:

We reject the contention advanced by the city that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause “forbids subtle departures from neutrality” and “covert suppression of particular religious beliefs.” Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. “The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”<sup>82</sup>

---

79. *Id.*

80. *See supra* text accompanying notes 62–64 (identifying the Establishment Clause violation when government is non-neutral by preferring secularism over religion).

81. 508 U.S. 520 (1993).

82. *Id.* at 534 (internal citations omitted). It is important to distinguish the case of *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), in which statements made by Donald Trump as a candidate for president of the United States were used in court to challenge the constitutionality of a facially neutral executive order issued by President Trump restricting immigration “from seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—that had been previously identified by Congress or prior administrations as posing heightened terrorism risks.” *Trump*, 138 S. Ct. at 2417, 2403. Despite the plaintiffs’ characterization of the president’s actions as an unconstitutional “Muslim ban,” the Supreme Court did not decide the case under the Free Exercise Clause. *Id.* at 2417. Rather, the Court cited its long recognition that “the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control,” and applied the rational basis test. *Id.* at 2418, 2420 (internal quotations omitted).

Thus, government activity which genuinely targets “religious conduct for distinctive treatment” cannot hide behind the fig leaf of facially neutral texts and explanations.<sup>83</sup> If challenged, a constitutionally impermissible objective can be found “from both direct and circumstantial evidence.”<sup>84</sup> Again, the Supreme Court in *Church of Lukumi Babalu Aye, Inc.*, elucidates:

Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. These objective factors bear on the question of discriminatory object.<sup>85</sup>

Likewise, even a law or government action justified by “multiple concerns unrelated to religious animosity” can fall within the First Amendment’s prohibitions if such concerns are pretextual or addressed in a way prejudicial to religious adherents.<sup>86</sup>

The “effect of the law in its real operation is strong evidence of its object.”<sup>87</sup> Although not dispositive,<sup>88</sup> the degree to which the law or government action works, in practice, to undermine religious belief or exercise, or otherwise to the foreseeable disadvantage of individuals on account of their religion, is crucially relevant to the assessment of its characterization as neutral (or not).<sup>89</sup>

---

83. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534.

84. *Id.* at 540.

85. *Id.* (internal citations omitted).

86. *Id.* at 535.

87. *Id.*

88. *Id.* (“To be sure, adverse impact will not always lead to a finding of impermissible targeting.”).

89. “Indeed, the Second Circuit has recently reaffirmed that the relevant question in determining which level of scrutiny applies to a regulation is an analysis of its ‘operation,’ as assessed in ‘practice terms.’” *Muhammad v. N.Y.C. Transit Auth.*, 52 F. Supp. 3d 468, 489 (E.D.N.Y. 2014) (citing *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 194–95 (2d Cir. 2014) (quoting *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 535–36)). Impingement upon the free exercise of religion is not limited to outright penalties and fines for adhering to religious beliefs or practices, but extends also to denial of benefits made available to others:

As the Court put it more than 50 years ago, “[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” (The “proposition—that the law does not interfere with free exercise because it does not directly



How courts have weighed these various considerations will be examined further in this Article's review of judicially mandated exemptions for the benefit of religious claimants.<sup>90</sup>

---

prohibit religious activity, but merely conditions eligibility for office on its abandonment—is . . . squarely rejected by precedent”).

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) (internal citations omitted).

An interesting question is the degree to which direct yet inadvertent suppression of religious exercise runs afoul the First Amendment. That is, a law or regulation that is *objectively* discriminatory toward religion, yet *subjectively* innocent of such intent. This is closely related to the concept of a law of general applicability that only incidentally burdens religion, *see supra* notes 73–81 and accompanying text, and indeed may be indistinguishable in practice. Conceptually, however, I posit a difference might exist. For example, why would a rule that squarely burdens the free exercise of religion, and only the free exercise of religion, be deemed “neutral” and of “general applicability” merely because the burden imposed is inadvertent versus intentional? Imagine a neighborhood that begins to notice a phenomenon whereby groups of individuals gather together to form circles around and hug trees (literally). Residents find the practice unnerving, and the town council passes a law prohibiting it. Unbeknownst to the council members, however, is the fact that the practice in question is a form of worship central to a newly formed religious community. Would such law be “neutral” and of “general applicability” if, in practice, it served *only* to impede religious exercise, despite a lack of intent to do so? Although *Smith* does not define such terms via reference to effect, Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 338 (2006), it seems that at a certain point along the continuum, the effects of a particular law might be so deleteriously isolated toward the practice of religion that describing it as “neutral” and of “general applicability” become untenable. *See Cent. Rabbinical Cong. of U.S. & Can.*, 763 F.3d at 196–97 (law not neutral when its “burdens . . . fall on only a particular religious group”). Neutrality would be even more difficult to sustain if and when its operation and disproportionate effects are called to the attention of lawmakers. *See Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943, 952 (S.D. Ind. 2012) (“In determining whether a law has such an impermissible object, courts look to the law’s text, legislative history, and the actual effect of the law in operation.” (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533)); *accord* *On Young Advocs. for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 228 (E.D.N.Y. 2019). *But see Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015) (“The Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct.”). Indeed, a review of the very word “neutral” does not clearly seem to require intent as a component. *Cf. Neutral*, *Oxford English Dictionary*, [https://www.oed.com/dictionary/neutral\\_n?tab=meaning\\_and\\_use&tl=true](https://www.oed.com/dictionary/neutral_n?tab=meaning_and_use&tl=true) [<https://perma.cc/4NQG-CA28>].

90. *See infra* Section II.B (discussing the seven situations in which a law infringes upon free exercise of religion).

## II. RELIGIOUS ACCOMMODATIONS AND EXEMPTIONS

Having reviewed the operative constitutional texts addressing religious liberty in the United States, in addition to the leading Supreme Court decisions construing them, we are now well positioned to consider the issue of religious accommodations and exemptions.

Although most courts and commentators use the terms “accommodation” and “exemption” interchangeably,<sup>91</sup> I suggest the best practice is to use the term “accommodation” to refer to action undertaken by a legislative body and the term “exemption” to refer to action undertaken by a court.<sup>92</sup> To the extent possible, I will employ this nomenclature herein.

In both cases I refer to dispensations granted to religious individuals from compliance with certain legal requirements or restrictions. These could be statutorily promulgated, as when legislatures, agencies, or executive branches take into account the particularized burdens that government policy or action can be expected to impose upon certain religious believers, and, consequently, include provisions (“*accommodations*”) to lighten said burdens.<sup>93</sup> These could also be judicially mandated, as when a religious claimant asserts that a law or a government actor is violating the Free Exercise Clause of the First Amendment;<sup>94</sup> under such circumstances, a court could order an *exemption* for the benefit of the claimant or possibly invalidate the law (or action) altogether.<sup>95</sup> Each of these forms of dispensation will be examined in turn.

---

91. *E.g.*, *Lowe v. Mills*, No. 1:21-CV-00242-JDL, 2022 WL 3542187, at \*7 (D. Me. Aug. 18, 2022).

92. *E.g.*, Abner S. Greene, *Reflections/Lovingkindness*, 97 NOTRE DAME L. REV. REFLECTION 61, 63 (2022) (using the terms “judicial exemptions” and “legislative accommodations”); Colombo, *Antitrust Approach*, *supra* note 66, at 37 (referring to “legislative accommodations” and “judicially crafted exemptions”). *But see* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J. F. 201, 224 (2018) (employing the term “exemption” in the context of legislative statutes).

93. *See infra* Section II.A (summarizing the statutory accommodations of religion).

94. This is distinguishable from the situation in which a claimant asserts that his or her religious liberty rights are being infringed in violation of the Religious Freedom Restoration Act. *See supra* note 77.

95. *See infra* Section II.B (discussing judicially mandated religious exemptions).

A. *Statutory Accommodations of Religion*

Although some read the religion clauses of the First Amendment in tension with one another,<sup>96</sup> I submit the better view—echoed by Justice O’Connor above<sup>97</sup> and by a majority of the Supreme Court more recently<sup>98</sup>—is to read them as mutually reinforcing.<sup>99</sup> Indeed as far back as 1970, the Supreme Court explained that there was “play in the joints” between the Establishment and Free Exercise Clauses of the First Amendment, which was “productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”<sup>100</sup> As a result of this, “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.”<sup>101</sup> A prime example of this is the phenomenon of legislative accommodations of religion, pursuant to which religious organizations or adherents are relieved from complying with a generally applicable, government-imposed obligation.<sup>102</sup> According to Professor Michael McConnell, such accommodations are “relatively common,” and are included in thousands of state and federal statutes.<sup>103</sup> The rationale for these accommodations was, perhaps, most famously articulated by Justice Douglas in *Zorach v. Clausen*.<sup>104</sup> This 1952 case concerned New York City’s “released time” program, pursuant to which public school students were released early from

---

96. See JOHN E. NOWAK & RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* 857 (5th ed. 2007) (discussing the “natural antagonism” between the religion clauses).

97. See *supra* text accompanying note 42 (explaining that the religious clauses are meant to preserve and protect every individual’s right to diversity of beliefs and religious practices).

98. See *infra* text accompanying notes 299–334 (stating that a religious organization may not be excluded from neutral and secular programs exclusively because it is a religious organization).

99. See Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger when Both Clauses Are Taken Seriously*, 32 *CARDOZO L. REV.* 1701, 1702 (2011) (arguing for reading the Establishment Clause and the Free Exercise Clause as overlapping rights rather than clashing rights); see also *TRIBE, supra* note 72 § 14-2 (“To the Framers, the religion clauses were at least compatible and at best mutually supportive.”).

100. *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 669 (1970).

101. *Locke v. Davey*, 540 U.S. 712, 718–19 (2004).

102. See Michael W. McConnell, *The Problem of Singling out Religion*, 50 *DEPAUL L. REV.* 1, 3 (2000) [hereinafter *Singling out Religion*] (noting the long history of debate over whether these accommodations should be by right or political discretion).

103. *Id.* at 3, 5.

104. 343 U.S. 306 (1952).

school on certain days to accommodate private religious instruction elsewhere.<sup>105</sup> In upholding the constitutionality of this accommodation, Justice Douglas wrote the following:

We are a religious people whose institutions presuppose a Supreme Being . . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.<sup>106</sup>

That said, “accommodation is not a principle without limits . . . .”<sup>107</sup> Indeed, some of these limits are referenced in the quote set forth

---

105. *Id.* at 308–09.

106. *Id.* at 313–14; *see also* Scott W. Gaylord, *Neutrality Without a Tape Measure: Accommodating Religion After American Legion*, 19 AVE MARIA L. REV. 25, 26–27 (2021) (endorsing the perspective of those Supreme Court justices who believed that “[t]he Religion Clauses singled out religion for special protection” vis-a-vis the State, requiring neutrality “only between and among religions, not between religion and nonreligion”); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 943 (2019) (“Establishment Clause limits on accommodation—like accommodations themselves—are about furthering freedom for everyone, religious or not . . . . And in that way, they preserve religious freedom, a freedom that has always has been, in James Madison’s words, ‘the glory of our country.’”).

107. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706, (1994); *see also* 6 RONALD D. ROTUNDA & JOHN E. NOWAK, ROTUNDA AND NOWAK’S TREATISE ON CONSTITUTIONAL LAW § 21.6(D) (5th ed. 2023) (discussing the constitutional parameters of legislative accommodations of religion).

above.<sup>108</sup> Furthermore, claiming a religious accommodation does not justify an unconstitutional delegation of political power, meaning that the “delegation of political power to a religious group” is limited by the same constraints as the delegation of power to any other group.<sup>109</sup> Nor may an accommodation have the “purpose or effect of sponsoring certain religious tenets or religious belief in general.”<sup>110</sup> Indeed, there is reason to believe that an accommodation would be unconstitutionally “endorsing religion” if it were promulgated for a reason other than to “lift[] a government-imposed burden on free exercise.”<sup>111</sup>

In his article addressing the constitutionality of religious accommodations,<sup>112</sup> Professor Carl Esbeck identifies those characteristics which would cause a religious accommodation to violate the Establishment Clause:

- “Government may not purposefully discriminate among religions.”<sup>113</sup>
- “Government may not utilize classifications based on denominational or sectarian affiliation to impose burdens or extend benefits.”<sup>114</sup>
- “Government may not utilize classifications that single out a sect-specific religious practice (as opposed to language inclusive of a general category of religious observance) thereby favoring that practice.”<sup>115</sup>
- “Government may not delegate its sovereign authority to govern to a religious organization.”<sup>116</sup>

---

108. See *supra* text accompanying note 106 (outlining some limits that may be imposed on religious accommodations by the government, such as forcing people to be a member of a specific religion, or coercing participation in religious holidays or education).

109. *Grumet*, 512 U.S. at 706.

110. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 16–17 (1989) (plurality opinion).

111. See Gary J. Simson, *Permissible Accommodation or Impermissible Endorsement? A Proposed Approach to Religious Exemptions and the Establishment Clause*, 106 Ky. L.J. 535, 547 (2017–2018) (arguing it is an essential component of “the purpose prong of the endorsement test” under Justice O’Connor’s approach).

112. See Esbeck, *supra* note 42 (explaining that the prohibition on Congress from constructing new laws about “respecting an establishment of religion” has generally been interpreted as applying to the other branches of the federal government).

113. *Id.* at 387.

114. *Id.* at 388.

115. *Id.* at 389.

116. *Id.*

- “Government may not regulate the private sector with the purpose of creating an unyielding preference for religious observance over competing secular interests.”<sup>117</sup>

But subject to these broad parameters, the constitutionality of religious accommodations has been consistently upheld by the courts.<sup>118</sup> Indeed, in 2005, the Supreme Court unanimously upheld the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000, a robust federal legislative accommodation of religion,<sup>119</sup> and effectively put to rest the argument that governmental accommodation of religion per se violates the Establishment Clause.<sup>120</sup>

### B. *Judicially Mandated Exemptions*

As discussed, the Supreme Court in *Smith* held that the Free Exercise Clause does not ordinarily grant an individual the right to an exemption from a neutral law of general applicability that only incidentally burdens the practice of religion.<sup>121</sup> Notwithstanding this narrow reading of the Free Exercise Clause, there are still circumstances in which an individual may successfully petition the

---

117. *Id.* at 392.

118. See McConnell, *Singling out Religion*, *supra* note 102, at 5–6 (2000) (noting that the Supreme Court has repeatedly found religious accommodations constitutional, though not constitutionally required); Esbeck, *supra* note 42, at 359 (“[D]iscretionary legislative accommodations for the many and diverse religious beliefs that dot the land ought to be regarded as widely permitted except for a narrow range of cases that are disallowed by the Establishment Clause . . . . [T]he United States Supreme Court has indeed approached its modern accommodation cases permissively, and thus we will find that most legislation expanding religious freedom is upheld as constitutional.”).

119. See *Cutter v. Wilkinson*, 544 U.S. 709, 711–13 (2005) (limiting substantial governmental burdens on the religious exercise persons in government institutions to those “further[ing] ‘a compelling governmental interest’” and “by ‘the least restrictive means.’”).

120. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423, 436 (2006) (affirming a religious accommodation and leaving it to the courts to balance religious accommodations “case-by-case” under the “compelling interest test”); McConnell, *Singling out Religion*, *supra* note 102, at 7–8 (discussing legal arguments against religious accommodation).

121. See *supra* text accompanying notes 73–74. Perhaps reflecting a general shift in favor of Free Exercise claimants within the federal judiciary, the Sixth Circuit recently formulated the general understanding of modern Free Exercise jurisprudence somewhat differently: “[L]aws that burden religious exercise are presumptively unconstitutional unless they are both neutral and generally applicable.” *Meriwether v. Hartop*, 992 F.3d 492, 512 (6th Cir. 2021).

courts for an exemption from a law's (or governmental actor's<sup>122</sup>) infringement upon religion.<sup>123</sup> Or, perhaps more accurately, circumstances in which a law will be struck down, in whole or in part or as applied, because it runs afoul the Free Exercise Clause. Most of these circumstances (but not all) implicate laws that, upon closer inspection, are ultimately found not to be "neutral" or "generally applicable."<sup>124</sup> Consequently, the test of strict scrutiny is applied to the law (and this exacting test is rarely passed).<sup>125</sup> These situations can be divided into seven categories, some of which overlap significantly: (1) hybrid situations, (2) facially problematic laws, (3) official expressions of hostility, (4) existence of individual accommodations based on factors excluding religious ones, (5) existence of categorical secular accommodations excluding religious ones, (6) discretionary accommodations, and (7) regimes of disparate treatment.<sup>126</sup> Let us consider each in turn.

### 1. *Hybrid situations*

The Supreme Court in *Smith* acknowledged the existence of precedent in which "a neutral, generally applicable law" was subjected to strict scrutiny and consequently struck down as applied to religiously motivated conduct.<sup>127</sup> The Court observed that such cases "involved not the Free Exercise Clause alone, but the Free Exercise Clause in

---

122. To minimize cumbersomeness, going forward "the law" will also encompass actions by government officials.

123. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 361, 369–70 (2015) (finding that a prison grooming policy limiting beard length substantially burdened a prisoner's exercise of religion).

124. "Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). As may become apparent, the concepts of neutrality and general applicability are "interrelated," *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) and "overlapping," *Mitchell County v. Zimmerman*, 810 N.W.2d 1, 9 (Iowa 2012). For a compilation and analysis of cases discussing whether a particular law is "a neutral law of general applicability," see Miller, *supra* note 73, at 663.

125. See *supra* notes 61–63 and accompanying text. It should be noted that even a neutral law of general applicability could be struck down under the "rational basis" test, but this is a rarity. See *supra* notes 76–77 and accompanying text.

126. These terms and categorizations are my own—they do not borrow from a standardized nomenclature.

127. See *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 881–82 (1990) (concluding that a state may refuse to create an exception to its generally applicable criminal laws for religious practices by citing the Free Exercise Clause of the First Amendment).

conjunction with other constitutional protections,” and labeled them “hybrid situation[s].”<sup>128</sup> The Court provided examples concerning “freedom of speech and of the press or the rights of parents . . . to direct the education of their children.”<sup>129</sup> The Court also identified as hybrid situations those implicating “compelled expression,” and, potentially, “freedom of association.”<sup>130</sup>

Although *Smith* was decided over thirty years ago, the Supreme Court has yet to decide another Free Exercise case on “hybrid” grounds, nor has the Court provided any further elucidation of the hybrid concept. Only once, in a dissent to the Court’s denial of an application to vacate a stay, did a justice (Justice Gorsuch) even suggest its applicability.<sup>131</sup> The hybrid concept only appears in two other Supreme Court cases decided since *Smith*, only in concurrences, and disparagingly at that.<sup>132</sup> Indeed, commentators have suggested that *Smith*’s hybrid language was little more than an attempt to explain away precedent that did not fit its new approach to Free Exercise rights.<sup>133</sup>

---

128. *Id.*

129. *Id.* at 881 (citations omitted).

130. *Id.* at 881–82.

131. Justice Gorsuch writing that: “[U]nder this Court’s precedents, even neutral and generally applicable laws are subject to strict scrutiny where (as here) a plaintiff presents a ‘hybrid’ claim—meaning a claim involving the violation of the right to free exercise *and* another right, such as the right of parents ‘to direct the education of their children.’” *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from denial of application to vacate stay).

132. *See* *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1915 (2021) (Alito, J., concurring) (arguing for a reversal of *Smith*, and labeling its hybrid rule as a “special category of cases,” “invent[ed]” in order to conform to precedent); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567, 570–71 (1993) (Souter, J., concurring in part) (arguing for a reexamination of *Smith*, and calling its hybrid “distinction” as “ultimately untenable”); *see also* Dorit Rubinstein Reiss & Madeline Thomas, *More than a Mask: Stay-at-Home Orders and Religious Freedom*, 57 *SAN DIEGO L. REV.* 947, 958 (2020) (“Supreme Court Justices raised questions about the continuing viability of *Smith*, and a case currently before the Supreme Court may lead the Court to reexamine *Smith*. However, recent Supreme Court cases that ended with favorable outcomes for those challenging policies that allegedly interfered with their religion were carefully and intentionally decided on narrow grounds. The decisions ultimately reaffirmed—rather than overturned—*Smith*, suggesting that it is far from clear that *Smith* will be fully overturned.”) (footnote omitted).

133. *E.g.*, *McCONNELL ET AL., RELIGION AND THE CONSTITUTION*, *supra* note 30, at 159–60 (“Does this doctrine make any sense? Was it anything more than a clever way to distinguish previous decisions?”).



Not surprisingly, lower courts have struggled in their attempts to apply *Smith*'s rule concerning hybrid exceptions.<sup>134</sup> As per one commentator, “[t]he hybrid rights doctrine has frequently been criticized as illogical and untenable, and courts applying the ‘hybrid rights’ doctrine have had to face a number of questions.”<sup>135</sup> The approach upon which several courts have settled is as follows: “A hybrid claim triggers stricter review if, but only if, the non-free exercise claim is ‘colorable.’”<sup>136</sup>

## 2. *Facially problematic laws*

As has been adverted to,<sup>137</sup> laws specifically targeting religion or religious conduct for circumscription are subject to the test of strict scrutiny.<sup>138</sup> The Supreme Court has advised that, when assessing a law challenged under the Free Exercise Clause, the assessor is to “begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.”<sup>139</sup> Laws lacking facial neutrality typically give rise to the most easily recognized violations of the Free Exercise Clause.

For example, a New York City Transit Authority “Uniform Dress Code” policy that specifically (and repeatedly) made reference to a “khimar”<sup>140</sup> was not facially neutral and thereby would not survive strict scrutiny review.<sup>141</sup> Similarly, a proposed amendment to the Oklahoma State Constitution to explicitly “forbid[] courts from considering or

---

134. See generally Miller, *supra* note 73 (examining the myriad court applications of *Smith*'s rule and refusals to apply it).

135. *Id.* at § 2(a) (footnotes omitted).

136. MCCONNELL ET AL., *supra* note 30, at 160.

137. See *supra* text accompanying notes 84–85 (explaining that strict scrutiny is only applied when religion is specifically targeted, not when it is merely affected).

138. See *supra* text accompanying notes 84–85 (distinguishing between laws that may affect religion, where strict scrutiny would not apply, and laws that specifically target religion, where strict scrutiny does apply).

139. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

140. “A head covering or veil worn in public by some Muslim women, *spec.* one of a type covering the head, neck, and shoulders.” *Khimar*, Oxford English Dictionary, [https://www.oed.com/dictionary/khimar\\_n](https://www.oed.com/dictionary/khimar_n) [<https://perma.cc/648J-68MJ>] (Oct. 3, 2023).

141. See *Lewis v. N.Y.C. Transit Auth.*, 12 F. Supp. 3d 418, 455 (E.D.N.Y. 2014) (finding that the policy could not sustain intermediate scrutiny).

using Sharia Law” was not facially neutral<sup>142</sup> and thereby subject to strict scrutiny. Also lacking facial neutrality (and thus subject to strict scrutiny) was a Washington D.C. law that specifically referred to and distinguished “religious exemptions” from “medical exemptions” within the context of its vaccination policy.<sup>143</sup> Finally, in the Supreme Court’s 2022 decision in *Kennedy v. Bremerton School District*,<sup>144</sup> a school policy of forbidding “an employee, while still on duty, to engage in religious conduct” was deemed clearly “not neutral.”<sup>145</sup>

### 3. *Official expressions of hostility*

In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*,<sup>146</sup> the Supreme Court took notice of “official expressions of hostility to religion” on the part of government officials in assessing the constitutionality of an otherwise facially neutral legal regime.<sup>147</sup> Under review was the manner in which the Colorado Civil Rights Commission had enforced the Colorado Anti-Discrimination Act (“CADA”).<sup>148</sup> The law in question set forth a rather familiar modern prohibition on discrimination in multifarious forms:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .<sup>149</sup>

Defendant, Jack Phillips, a devout Christian and proprietor of Masterpiece Cakeshop (a bakery), was found in violation of CADA for failing to create a cake for a same-sex wedding.<sup>150</sup> Phillips predicated his defense on the First Amendment, arguing that applying CADA to force him to create cakes for same-sex weddings (1) amounted to

---

142. *Awad v. Zirriax*, 754 F. Supp. 2d 1298, 1301, 1307 (W.D. Okla. 2010), *aff’d*, 670 F.3d 1111 (10th Cir. 2012).

143. *Booth v. Bowser*, 597 F. Supp. 3d 1, 7, 26–27 (D.D.C. Mar. 18, 2022).

144. 142 S. Ct. 2407 (2022).

145. *Id.* at 2423.

146. 138 S. Ct. 1719 (2018).

147. *Id.* at 1732.

148. *Id.* at 1720.

149. COLO. REV. STAT. § 24-34-601(2)(a) (2017) (quoting *Masterpiece Cakeshop Ltd.*, 138 S. Ct. at 1725).

150. *Masterpiece Cakeshop Ltd.*, 138 S. Ct. at 1724, 1726.

compelled speech with which he disagreed and (2) violated the free exercise of his religion.<sup>151</sup>

Writing for the Court, Justice Kennedy opined that:

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.<sup>152</sup>

But the Court was able to largely side-step these “difficult questions” in finding that the Colorado Civil Rights Commission’s handling of the matter “was inconsistent with the State’s obligation of religious neutrality.”<sup>153</sup> This hostility was evidenced at formal public hearings of the matter, in which Phillips’ beliefs were openly disparaged.<sup>154</sup> As per the Court:

On May 30, 2014, the seven-member Commission convened publicly to consider Phillips’ case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado’s business community. One commissioner suggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.”<sup>155</sup>

---

151. *Id.* at 1726.

152. *Id.* at 1723. The Supreme Court appears to have subsequently resolved this issue, at least with respect to the question of compelled speech. *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308, 2318 (2023) (finding that CADA’s “Accommodation Clause,” prohibiting in part the denial of goods based on sexual orientation, posed a credible First Amendment threat to petitioner’s wedding website venture by unlawfully coercing speech “about a question of political and religious significance”).

153. *Masterpiece Cakeshop Ltd.*, 138 S. Ct. at 1723.

154. *See id.* at 1729 (emphasizing one Civil Rights Commissioner’s remarks that religion is “one of the most despicable pieces of rhetoric that people can use”).

155. *Id.*

Tellingly, the Court observed that the above-referenced statements “are susceptible of different interpretations.”<sup>156</sup> The Court elaborated:

On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor’s personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips’ free exercise rights and the dilemma he faced.<sup>157</sup>

How the Court would have ultimately characterized the commissioners’ statements, in the absence of any others, remains an open and important question. Where is the line that may not be crossed? Is the standard one of “reasonable doubt” or “reasonable suspicion”? Which party bears the burden of proof?<sup>158</sup> The answers to such questions remain on hold, for additional comments did follow, leading the Court to conclude that the more negative interpretation of the commissioners’ remarks “seem[ed] the more likely.”<sup>159</sup> At a subsequent hearing, one commissioner expressed the following opinions (to which none of his colleagues on the commission voiced objection):

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.<sup>160</sup>

The Court explained that “[t]o describe a man’s faith as ‘one of the most despicable pieces of rhetoric that people can use’ is to disparage his religion in at least two distinct ways.”<sup>161</sup> *First*, “by describing it as despicable,” and *second*, “by characterizing it as merely rhetorical,” thereby suggesting it as “something insubstantial and even insincere.”<sup>162</sup> The commissioner’s comparison of Phillips’ invocation

---

156. *Id.*

157. *Id.*

158. *Cf. Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1124 (Or. Ct. App. 2022) (discussing the ambiguity of *Masterpiece Cakeshop*’s standard for determining religious neutrality), *vacated*, 143 S. Ct. 2686 (2023) (mem.).

159. *Masterpiece Cakeshop Ltd.*, 138 S. Ct. at 1729.

160. *Id.*

161. *Id.*

162. *Id.*

of his sincerely held religious beliefs “to defenses of slavery and the Holocaust” was “inappropriate” given his “solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law.”<sup>163</sup>

These remarks were juxtaposed against the Commission’s precedent of permitting conscience-based objections in other situations where a requested cake contained images and text conveying “disapproval of same-sex marriage.”<sup>164</sup> This would seem to implicate the problem of a regime of individualized exemptions, discussed below.<sup>165</sup> It also, unfortunately for analytical purposes, obfuscates the question of what primarily drove the Court’s conclusion that Phillips’s First Amendment rights had been violated: the commission’s *words* or the commission’s *deeds*?<sup>166</sup>

In a later case, the Court clarified that verbal hostility toward religion, per se, can serve as the basis of a successful free exercise claim.<sup>167</sup> Commenting on *Masterpiece Cakeshop*, the Court in *Kennedy v.*

---

163. *Id.*

164. *Id.* at 1730 (emphasis added).

165. *See infra* Section II.B.4 (describing the perils of generally applicable laws under the Free Exercise Clause if marked by a system of individualized exemptions that fail to account for religious hardship).

166. *See, e.g., Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1124 (Or. Ct. App. 2022) (“From the perspective of an intermediate appellate court called upon to apply the holding of *Masterpiece Cakeshop* on direct judicial review of an agency adjudication, it is difficult to discern, precisely, the rule of law announced or how to apply it.”), *vacated*, 143 S. Ct. 2686 (2023) (mem.). That said, “[t]o be sure, where governmental bodies discriminate out of ‘animus’ against particular religions, such decisions are plainly unconstitutional.” *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008). The question in *Masterpiece Cakeshop* is somewhat different: To what extent can improper discrimination be inferred from statements of animus?

167. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n.1 (2022) (dicta) (noting that “official expressions of hostility” may alternatively form the basis of a free exercise violation); *see also Dr. A v. Hochul*, 142 S. Ct. 552, 553, 555 (2021) (Gorsuch, J., dissenting from denial of injunctive relief) (determining that the governor’s statements that those who sought an exemption from the state’s COVID-19 vaccine mandate were not “listening to God and what God wants,” rendered the mandate unconstitutional as applied to the applicants because it “exude[d] suspicion of those who hold unpopular religious beliefs”). *But see Trump v. Hawaii*, 138 S. Ct. 2392, 2438–40 (2018) (Sotomayor, J., dissenting) (criticizing the Court’s failure to find an Establishment Clause violation with regard to a facially neutral law that was supported by religiously disparaging comments). Of course, asserting that statements amount to religious hostility or disparagement do not make them so. *See Slockish v. U.S. Fed. Highway Admin.*, No. 3:08-cv-01169-YY, 2018 WL 4909902, at \*3 (D. Or. Oct. 10, 2018) (rejecting plaintiff’s assertion that certain statements made by a government engineer evinced hostility toward religion).

*Bremerton School District* explained: “A plaintiff may . . . prove a free exercise violation by showing that ‘official expressions of hostility’ to religion accompany laws or policies burdening religious exercise.”<sup>168</sup> No mention of disparate treatment was annexed to that explanation.<sup>169</sup> As a lower court summarized the precedent: “when ‘official expressions of hostility to religion’ accompany laws or policies burdening free exercise—the Supreme Court has simply ‘set aside’ the policies without further inquiry.”<sup>170</sup> Better still is this articulation of the emerging rule as articulated by the Southern District of Indiana:

[A] plaintiff bears the initial burden of showing that the limitation on their sincere religious practice is pursuant to a statute that is (1) not neutral because the “object” of the policy is to suppress religious exercise; (2) not generally applicable because it “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way”; or (3) accompanied by “official expressions of hostility to religion.” If any of these deficiencies are shown, the government must satisfy strict scrutiny by demonstrating the law advances a “compelling state interest” and that the law is narrowly tailored to “the least restrictive means” to “justify an inroad on religious liberty.”<sup>171</sup>

Regarding the specific question of how to assess alleged verbal hostility towards religion, the Oregon Court of Appeals discerned “three principles” to guide the assessment<sup>172</sup>:

The first is that, in evaluating on direct review a litigant’s claim that an adjudication is premised, in whole or in part, on unconstitutional hostility to religious beliefs, a reviewing court must examine the

---

168. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. at 2422 n.1.

169. *See id.* (expressing the “official expressions of hostility” cause of action as a straight-forward test requiring no “further inquiry”).

170. *Katz v. N.Y.C. Hous. Pres. & Dev.*, No. 21 Civ. 2933 (JPC), 2022 WL 3156178, at \*4 (S.D.N.Y. Aug. 8, 2022); *accord Meriwether v. Hartop*, 992 F.3d 492, 514 (6th Cir. 2021) (reversing the district court’s dismissal of petitioner’s First Amendment claim of religious hostility where “the university derided him and equated his good-faith convictions with racism”).

171. *Doe No. 1. v. Att’y Gen. of Ind.*, 630 F.3d 1033, 1043–44 (2022) (citations and footnote omitted). The court’s second of these three prongs essentially combines items four through six of our list. *See infra* Sections II.B.4–II.B.6 (describing situations in which laws are ultimately found not to be neutral or generally applicable, and thus have strict scrutiny applied to them, including the existence of individual accommodations, the existence of categorical secular accommodations, and discretionary accommodations).

172. *Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1124–25, *vacated*, 143 S. Ct. 2686 (2023) (mem.).

entire record of the case, including each stage of the case. The second is that, where, as here, a governmental adjudicator is called upon to determine whether a person's conduct violates a generally applicable, neutral law, and that conduct was motivated by a religious belief, the adjudicator must walk a tightwire, acting scrupulously to ensure that the adjudication targets only the unlawful conduct, and is not, in any way, the product of the adjudicator's hostility toward the belief itself. Third, and finally, because even "subtle departures" from neutrality violate the First Amendment, even "subtle departures" require some form of corrective action from a reviewing court.<sup>173</sup>

In applying these principles, the Court deemed violative of the First Amendment (1) a prosecutor's closing argument that appeared to equate the claimant's religious beliefs with "prejudice," and (2) an administrative agency's reasoning which suggested it had "passed judgment" upon claimant's religious beliefs.<sup>174</sup>

Importantly, although expressions of hostility toward religion subject government conduct to the test of strict scrutiny, their absence does not necessarily forestall the application of strict scrutiny.<sup>175</sup> Indeed, it must be borne in mind that the over-arching issue in the analysis of a Free Exercise claim is one of *neutrality* with respect to

---

173. *Id.*

174. *Id.* More specifically, the court criticized the prosecutor for distinguishing between an Oregonian's right to "harbor whatever prejudices they choose" from the requirement to refrain from "acts of discrimination in public accommodations" in connection with a reference to the claimant's religious beliefs. *Id.* at 161. The court criticized the agency for its dismissiveness with regard to whether the plaintiff's use of the term "abomination" was the plaintiff's own word choice or a quote from Leviticus. *Id.* at 1126.

175. *But see* Petition for Writ of Certiorari at 23–25, *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022) (mem.) (No. 21-1143) (suggesting that several circuits have required a showing of governmental hostility toward religion in order to proceed with a Free Exercise claim (citing *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 331–32 (D.C. Cir. 2018)); *Cassell v. Snyders*, 990 F.3d 539, 550 (7th Cir. 2021) (requiring "evidence of hostile targeting"); *Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017) (finding laws neutral where "they do not target religion or religious institutions" and there is "no allegation of an underlying religious animus"); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 999 (7th Cir. 2006) (finding churches could be "neutrally" targeted as long as religion was not the focus); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (requiring "intent of discriminating"); *St. John's United Church of Christ v. Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) (requiring an actual showing the government was "targeting religious institutions or practices"); *Does 1–6 v. Mills*, 16 F.4th 20, 34 (1st Cir. 2021) (holding Maine's law as neutral because it lacked an "improper motive").

religion, not hostility per se.<sup>176</sup> The Sixth Circuit captured this well when, in striking down an anti-COVID-19 measure undertaken by the State of Kentucky, it explained: “Nor does it make a difference that faith-based bigotry did not motivate the orders. The constitutional benchmark is ‘government neutrality,’ not ‘governmental avoidance of bigotry.’”<sup>177</sup>

Nevertheless, some courts appear to confuse this critical distinction, suggesting that a finding of religious neutrality on the part of the government follows from the absence of religious hostility. An arguable example of this was presented in *CompassCare v. Cuomo*.<sup>178</sup> *CompassCare* concerned a challenge to a law entitled “[p]rohibition on discrimination based on an employee’s or dependent’s reproductive health decision making.”<sup>179</sup> The legislative history of the law was replete with references to religion, and upon that basis, plaintiffs argued that the law was not neutral.<sup>180</sup> These references included:

- A state senator’s complaint that “[s]ince enactment of the Affordable Care Act, over 100 lawsuits have been filed by employers determined to deny workers coverage of reproductive health services and products based on the employer’s own personal and political beliefs” and that, as a result of the *Hobby Lobby* decision, “[t]he court has essentially treated for-profit corporations as people capable of exercising religion, putting us on a dangerous path with regard to employees’ privacy and personal freedoms.”<sup>181</sup>
- An assemblywoman’s argument that: “Employers should not be allowed to use their personal beliefs to discriminate against their employees.”<sup>182</sup>
- Another assemblywoman’s argument that “a worker accessing birth control, an LGBT couple adopting, a person having a child

---

176. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–34 (1993) (centering the Free Exercise inquiry on neutrality, both facial and actual).

177. *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020) (per curiam) (citing *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008)).

178. 465 F. Supp. 3d 122 (N.D.N.Y. 2020), *appeal docketed, sub nom. Compasscare v. Hochul*, No. 22-951 (2d Cir. Apr. 29, 2022).

179. *Id.* at 139.

180. See, e.g., *id.* at 151 (describing reasons why the New York law should not be considered neutral).

181. *Id.* (quoting Justice Ginsburg).

182. *Id.* at 152.



outside of marriage, using in vitro fertilization or having a vasectomy” should be able to do so “free from fear of retaliation by their boss because their boss holds other views. Workers should be evaluated on their work performance and not their reproductive health decisions.”<sup>183</sup>

- A contemporaneous memorandum justifying the legislation as necessary in light of “employers [who] have challenged a mandate in the [Affordable Care Act] that employer-provided health care include ‘FDA-approved birth control methods without out-of-pocket costs,’ citing their ‘personal beliefs.’”<sup>184</sup>

To plaintiffs, the above-quoted references to “personal beliefs” and “views” were essentially coded references to religion and religious convictions, and hence problematic.<sup>185</sup> Perhaps tellingly, the court did not squarely reject this characterization. Instead, the court limited its focus to whether these references were “critical” toward religion:

While Plaintiffs claim that an animus towards their religion motivated such criticism, the statements cited and quoted by the Plaintiffs do not criticize the religious views of the employers who brought suit in *Hobby Lobby*. While the employers in *Hobby Lobby* certainly stated religious doctrines as their motivations, the sponsors of the New York bill did not address such religious motivations but relied instead on the way that the views of employers interfered with the rights of New Yorkers to exercise their constitutional rights to contraception and abortion.<sup>186</sup>

Given the Supreme Court’s increased solicitousness toward Free Exercise claims,<sup>187</sup> the viability of such a narrowly focused approach remains to be seen.<sup>188</sup>

---

183. *Id.* at 153.

184. *Id.*

185. *See id.* (“Plaintiffs argue that evidence that the law was ‘targeted’ at their religious practice comes in the statute’s sponsors’ mention of the Hobby Lobby case, which indicates that the legislature ‘passed’ the statute ‘to prevent religious employers from operating in accord with their faith.’”).

186. *Id.* at 154.

187. *See infra* notes 296–329 and accompanying text (describing the cases in which the Roberts Court more carefully policed Free Exercise claims).

188. Other questionable but arguably distinguishable examples of courts dismissing the import of statements concerning religion on the part of government officials exist. *See, e.g., Kane v. De Blasio*, 19 F.4th 152, 165 (2d Cir. 2021) (per curiam) (concerning New York City Mayor Bill de Blasio’s statements “suggesting that religious adherents should be vaccinated because the Pope supports vaccination”). These did not make a

---

city vaccine mandate non-neutral with respect to religion because, as per the court, “these statements reflect nothing more than the Mayors’ personal belief that religious accommodations will be rare.” *Id.* Moreover, and critically, “the Mayor did not have a meaningful role in establishing or implementing the Mandate’s accommodation process.” *Id.*

More disconcerting were the remarks of New York Governor Hochul, at issue in *We the Patriots USA, Inc. v. Hochul*. See 17 F.4th 266, 283–84 (2d Cir. 2021) (per curiam) (analyzing comments made by Governor Hochul during church services and press conferences in which she expressed “her own religious belief” that it was “a moral imperative to become vaccinated”), *cert. denied, sub nom. Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022) (mem.). In support of a state vaccine mandate, Governor Hochul made the following comments at a pair of church services:

[God] made them come up with a vaccine. That is from God to us and we must say, thank you, God . . . All, of you, yes, I know you’re vaccinated, you’re the smart ones, but you know there’s people out there who aren’t listening to God and what God wants. You know who they are. I need you to be my apostles.

*Rush Transcript: Governor Hochul Attends Service at Christian Cultural Center*, N.Y. STATE GOVERNOR’S OFF. (Sept. 26, 2021), <https://www.governor.ny.gov/news/rush-transcript-governor-hochul-attends-service-christian-cultural-center> [<https://perma.cc/2HN8-693F>].

How can you believe that God would give a vaccine that would cause you harm? That is not the truth. Those are just lies out there on social media. And all of you, have to be not just the true believers, but our apostles to go out there and spread the word that we can get out of this once and for all, if everybody gets vaccinated.

*Video, Audio, Photos & Rush Transcript: Governor Hochul Attends Service at Abyssinian Baptist Church in Harlem*, N.Y. STATE GOVERNOR’S OFF. (Sept. 12, 2021), <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-hochul-attends-services-abyssinian-baptist-church> [<https://perma.cc/766N-FLBT>].

The Second Circuit, in denying plaintiff’s request for a preliminary injunction on Free Exercise grounds, held that “Governor Hochul’s expression of her own religious belief as a moral imperative to become vaccinated cannot reasonably be understood to imply an intent on the part of the State to target those with religious beliefs contrary to hers.” *We the Patriots USA, Inc. v. Hochul*, 17 F.4th at 283. It acknowledged, however, that “factual development can be expected to shed more light on the circumstances surrounding the creation of [the mandate] . . . and validate or disprove Plaintiff’s allegations.” *Id.* at 283 n.20.

Finally, in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court held that President Trump’s statements regarding “Muslim Immigration” did not undermine the constitutionality of government action “expressly premised on legitimate purposes.” *Id.* at 2417, 2421. This result was driven largely by application of the rational basis test, the deferential standard applicable to Presidential action within the immigration context. *Id.* at 2418–20.

4. *Existence of individual accommodations based on factors excluding religious ones*

Although the lack of religious neutrality was explicit in many of the examples set forth in the preceding sections,<sup>189</sup> oftentimes constitutional infirmities are less readily apparent. To escape strict scrutiny review under the Free Exercise Clause, not only must a law be facially neutral, but it must be “operationally neutral” as well.<sup>190</sup> And when evidence arises, “courts have an obligation to meticulously scrutinize irregularities to determine whether a law is being used to suppress religious beliefs.”<sup>191</sup> How courts go about assessing laws that are less overtly pernicious for obscured non-neutrality are addressed in this and the following sections.<sup>192</sup>

*Smith* acknowledged that a seemingly generally applicable law could be problematic under the Free Exercise Clause if marked by a system of “individualized exemptions” that fail to take into account “religious hardship” as a relevant factor.<sup>193</sup> Thus, “in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of “religious hardship” without compelling reason.’”<sup>194</sup>

A classic example of this infirmity was provided in the 1963 Supreme Court case of *Sherbert v. Verner*.<sup>195</sup> *Sherbert* concerned plaintiff’s ineligibility for unemployment compensation benefits on the basis of

---

189. See *supra* Sections III.B.2–III.B.3 (describing facially problematic laws and “official expressions of hostility” that clearly run afoul of the Free Exercise Clause).

190. See *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1071–72, 1076 (9th Cir. 2015) (finding that the commission’s “Delivery Rule” operated neutrally in requiring pharmacists to fill all lawfully prescribed drugs in a timely manner).

191. *Meriwether v. Hartop*, 992 F.3d 492, 514 (6th Cir. 2021).

192. See *infra* Sections III.B.1–III.B.4. (discussing the various scenarios involving the repeal of religious accommodations from rules and regulations, considering the impact on diversity, comprehensiveness, broader accommodations, and religious freedom).

193. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990); see also *Stormans, Inc.*, 794 F.3d at 1081 (explaining why *Smith* refused to extend the doctrine of individualized exemptions to the criminal prohibition of peyote use).

194. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993) (quoting *Smith*, 494 U.S. at 884). Conversely, if a law or regulation applies “without exception or allowances for discretionary exceptions,” the claimant will need to find some other justification for the imposition of the strict scrutiny test. See *Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1120 (Or. Ct. App. 2022) (discussing the Kleins’ search for alternative exceptions in the Oregon Constitution in the absence of statutory exceptions), *vacated*, 143 S. Ct. 2686 (2023) (mem.).

195. 374 U.S. 398 (1963).

her failure to accept available suitable employment “without good cause.”<sup>196</sup> Plaintiff’s inability to accept Saturday work, given her religious obligations to observe the Sabbath Day of her faith, was deemed not to constitute “good cause” by her state’s Employment Security Commission (thereby depriving her of unemployment benefits).<sup>197</sup> The Supreme Court held that the Employment Security Commission’s decision violated the Free Exercise Clause because a state “may not constitutionally apply the eligibility provisions [of its unemployment compensation law] so as to constrain a worker to abandon his religious convictions respecting the day of rest.”<sup>198</sup> This would appear to adopt the “broad view” of free exercise rights, rejected by the Supreme Court in *Smith*.<sup>199</sup> However, as the Court explained in *Smith*, the problem in *Sherbert* was the existence of “individual exemptions” based upon “good cause” that excluded consideration of “religious hardship.”<sup>200</sup>

5. *Existence of categorical secular accommodations excluding religious ones*

Closely related to the problem of individualized accommodations based upon a particular list of factors exclusive of religious hardship would be the problem of a law marked by certain clearly defined categorical accommodations that, similarly, exclude religiously based ones.<sup>201</sup> Courts have noted that the two are not the same: “an exemption is not individualized simply because it contains express exceptions for objectively defined categories of persons.”<sup>202</sup> And whereas a regime of individualized accommodations exclusive of

---

196. *Id.* at 401.

197. *Id.* at 399–401.

198. *Id.* at 410.

199. See text accompanying *supra* notes 73–77 (explaining how the “broad view” of free exercise protects religiously motivated conduct despite whether this conduct was targeted by the law for its religious nature, whereas *Smith* generally limits free exercise to protection against facially discriminatory laws).

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

201. Similarly, “At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.” *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012).

202. 303 *Creative LLC v. Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021) (internal quotation marks and alteration omitted) (quoting *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288 (2d Cir. 2021)), *rev’d*, 600 U.S. 570 (2023).

religious hardship is per se problematic,<sup>203</sup> a system of categorical accommodations is not. That said, the explicit exclusion of religious hardship from a list of categorized exceptions could transform the law from one of general applicability to one lacking general applicability.<sup>204</sup> This would, in turn, subject the law to the test of strict scrutiny.<sup>205</sup>

This situation presented itself on the heels of *Smith* in the Supreme Court's 1993 decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>206</sup> *Church of the Lukumi Babalu* concerned a series of local ordinances prohibiting "ritualistic animal sacrifices."<sup>207</sup> The ordinances generally restricted the killing of animals, but excepted from its provisions the work of licensed slaughterhouses and others.<sup>208</sup> No exceptions were recognized for those whose killing of animals was part of a "public or private ritual or ceremony not for the primary purpose of food consumption"—indeed such activity was expressly

---

203. See *supra* Section III.B.4 (exhibiting *Smith*'s conclusion that the existence of individualized exemptions based upon good cause and without the consideration of religious hardship is problematic).

204. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993); see also Rubinstein Reiss & Thomas, *supra* note 132, at 963 (2020) (concluding that a law excluding "faith-based" activities from a list of exceptions that were "life-sustaining" activities is not generally applicable).

205. See Gaylord, *supra* note 106, at 60 (analyzing how laws and regulations which contain at least one exception allow "religious practitioners to secure strict scrutiny of their free exercise challenges").

206. 508 U.S. 520, 537–38 (1993). This understanding did not always hold—at one time the government attempted to limit the *Smith* rule to only regimes of "individualized exemptions." *E.g.*, *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) ("We also reject the argument that, because the medical exemption is not an 'individualized exemption,' the *Smith/Lukumi* rule does not apply."). As then-Judge Alito explained in a decision written for the Third Circuit:

While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

*Id.*

207. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 527.

208. *Id.* at 527–28.

prohibited.<sup>209</sup> The Court addressed the statutory structure, finding the promulgation of broad prohibitions coupled with exemptions for purely secular purposes troubling:

As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” Respondent’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. Thus, religious practice is being singled out for discriminatory treatment.<sup>210</sup>

Consequently, the Supreme Court subjected the ordinances to strict scrutiny and struck them down.<sup>211</sup>

With reference to a Third Circuit opinion authored by then-Circuit Judge Alito,<sup>212</sup> the Iowa Supreme Court summarized the approach to be taken when evaluating a law containing categorical secular exemptions for “potential underinclusiveness or nongenerality.”<sup>213</sup> As per the court:

[F]irst identif[y] the governmental purposes that the ordinance was designed to promote or protect and then ask[] whether it exempted or left unregulated any type of secular conduct that threatened those purposes as much as the religious conduct that had been prohibited. If a law allowed secular conduct to undermine its purposes, then it could not forbid religiously motivated conduct that did the same because this would amount to an unconstitutional “value judgment in favor of secular motivations, but [against] religious motivations.” However, if the governmental entity could show that exempted secular conduct was sufficiently different in terms of its impact on

---

209. *Id.* at 527.

210. *Id.* at 537–38 (internal citations omitted). The Court added:

Respondent claims that Ordinances 87–40, 87–52, and 87–71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential.

*Id.* at 543.

211. *Id.* at 534.

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

213. *Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1, 12 (Iowa 2012).

the purpose of the law, the exemption would not render the law underinclusive.<sup>214</sup>

Thus, there may be occasions where a particular nonreligious accommodation (or list of accommodations) is justifiable whereas a religious exemption is not.<sup>215</sup> The critical question is whether the nonreligious “categorical exemption . . . is consistent with the interests advanced by the policy” in question in ways that a religious accommodation would not be.<sup>216</sup> When such is the case, the law’s constitutionality will turn upon the more lenient rational basis test, rather than that of strict scrutiny.<sup>217</sup> Because of the importance of this distinction to our inquiry, sustained attention to this issue is merited.

Consider the case of *King v. Christie*.<sup>218</sup> *King* concerned a New Jersey law prohibiting state licensed practitioners who engage in counseling services “from treating minors using methods of Sexual Orientation Change Efforts (‘SOCE’), more commonly known as ‘gay conversion therapy.’”<sup>219</sup> The law was predicated, among other things, upon the legislature’s finding that “this type of treatment subjects minors to potentially harmful consequences.”<sup>220</sup> Plaintiffs brought suit complaining, in part, that the law infringed on their religious belief that providing spiritual counsel to clients who seek it would “honor their clients’ right to self-determination and . . . their own sincerely held religious beliefs to counsel on the subject matter of same-sex attractions . . . .”<sup>221</sup> In support of their contention that the law was not generally applicable, plaintiffs pointed to five accommodations from

---

214. *Id.* (final alteration (“[against]”) in original) (internal citations omitted).

215. *See* *Trefelner v. Burrell Sch. Dist.*, 655 F. Supp. 2d 581, 594 (W.D. Pa. 2009) (“If the state-mandated [secular] exemptions were not made, then the policy would violate state law[.]”); *see also* Rubinstein Reiss & Thomas, *supra* note 132, at 957 (describing that exemptions that “do not make a value judgment” between secular and religious views would not trigger the same concerns).

216. *Trefelner*, 655 F. Supp. 2d at 594; *see also* *King v. Christie*, 981 F. Supp. 2d 296, 332 (D.N.J. 2013), *aff’d sub nom.* *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014) (finding that nonreligious exemptions did not undermine a law’s general applicability because said exemptions did not undermine the law’s purpose).

217. *See* *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081–82, 1084 (9th Cir. 2015) (adopting rational basis review for state rules containing secular, but not religious, exemptions to requiring pharmacists to dispense certain drugs).

218. 981 F. Supp. 2d 296 (D.N.J. 2013), *aff’d sub nom.* *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014).

219. *Id.* at 302.

220. *Id.*

221. *Id.* at 305.

the law, none of which covered religious practitioners.<sup>222</sup> The accommodations provided were as follows:

- (1) minors seeking to transition from one gender to another;
- (2) minors struggling with or confused about heterosexual attractions, behaviors, or identity;
- (3) counseling that facilitates exploration and development of same-sex attraction, behaviors, or identity;
- (4) individuals over the age of [eighteen] who are seeking to reduce or eliminate same-sex attraction; and
- (5) counseling provided by unlicensed persons.<sup>223</sup>

The court rejected the plaintiffs' argument, finding that each of these secular exceptions either (a) addressed activity that fell "outside the purpose of the statute," (b) was "consistent with the Legislature's concern that conversion therapy is harmful," or (c) simply covered activity that did "not fall within the State's comprehensive regulatory schemes."<sup>224</sup>

Perhaps a clearer (and better) example can be found in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*.<sup>225</sup> At issue was the "no-beard" policy the Newark Police Department adopted to foster a "uniform appearance" among that city's law enforcement personnel.<sup>226</sup> Although an exception to this policy was available to undercover officers, no exception was available to those who could not shave their beards for religious reasons.<sup>227</sup> The Third Circuit observed that this did not trigger strict scrutiny under the First Amendment because the exception for undercover officers "does not undermine the

---

222. *Id.* at 331–32.

223. *Id.*

224. *Id.* at 332; *see also* *Does 1–2 v. Hochul*, 632 F. Supp. 3d 120, 139 (E.D.N.Y. 2022) (describing the rational state interest in keeping employees healthy and avoiding staffing shortages as justifying the regulation at issue); *Does 1–6 v. Mills*, 16 F.4th 20, 29–30 (1st Cir. 2021) (affirming that a law is not generally applicable if it treats religious and secular behavior differently even if both similarly affect the government interest); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1180 (9th Cir. 2021) (holding that the vaccination provisions at issue were of sufficient government interest and did not pose the same constitutional risk as religious exemption provisions). It should be noted that the Supreme Court, in 2018, severely criticized *King* for recognizing "'professional speech' as a separate category of speech subject to different rules." *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2365 (2018). This would not, however, seem to call into question *King's* determination that the law in question was generally applicable.

225. 170 F.3d 359 (3d Cir. 1999).

226. *Id.* at 361, 366.

227. *Id.* at 360–61.



Department's interest in uniformity because undercover officers 'obviously are not held out to the public as law enforcement person[ne].'"<sup>228</sup>

Some courts have applied this principle within the context of the COVID-19 vaccine mandates to hold that the lack of a religious accommodation does not trigger strict scrutiny under the First Amendment.<sup>229</sup> Illustrative of this is the case of *Does 1–2 v. Hochul*.<sup>230</sup> *Hochul* concerned New York State's regulation requiring that "most healthcare workers . . . be 'fully vaccinated against COVID-19.'"<sup>231</sup> Plaintiffs sought a temporary restraining order predicated, in part, upon the regulation's omission of a religious accommodation for those healthcare workers who were unable to take any of the available COVID-19 vaccines on religious grounds.<sup>232</sup> Plaintiffs argued that this omission deprived the regulation of neutrality for purposes of Free Exercise Clause analysis given that the regulation contained exceptions to its requirements for medical reasons.<sup>233</sup> Judge Donnelly of the Eastern District of New York disagreed, explaining that the "asserted government interest that justifies the regulation at issue" would be undermined by religious accommodations yet not by medical accommodations.<sup>234</sup> As per Judge Donnelly:

The State identified its objectives in adopting Section 2.61 in the Regulatory Impact Statement: to prevent the spread of COVID[-]19 in healthcare facilities among employees, residents and patients, and to protect healthcare workers so that they can continue working,

---

228. *Id.* at 366. Conversely, the existence of a medical accommodation to the "no-beard" policy did trigger strict scrutiny because that accommodation did undermine the government's asserted interest in a uniform appearance. *See infra* text accompanying notes 261–65.

229. *E.g.*, *Hochul*, 632 F. Supp. 3d at 142–43.

230. 632 F. Supp. 3d 120 (E.D.N.Y. 2022).

231. *Id.* at 126.

232. *See id.* at 132–33 (seeking to continue providing healthcare to patients under protective measures, but with a blanket exemption from the COVID-19 vaccine requirement).

233. *See id.* at 137 (arguing that the mandate "treats religious exemptions less favorably than some nonreligious exemptions" and that this "double standard is not a neutral standard").

234. *Id.* at 139 (quoting *Tandon v. Newsom* 141 S. Ct. 1294, 1296 (2021) (per curiam) (citation omitted)).

which in turn avoids staffing shortages, thus protecting patients and residents “even beyond a COVID-19 infection.”<sup>235</sup>

It is self-evident that requiring an employee to be vaccinated even if the employee has a documented medical condition that makes vaccination unsafe would not promote the State’s interest in protecting healthcare workers. In addition, “applying the vaccine to individuals in the face of certain contraindications, depending on their nature, could run counter to the State’s ‘interest in protecting the integrity and ethics of the medical profession.’”<sup>236</sup> Nor would it promote the State’s interest in avoiding staffing shortages, which pose additional risks to patients, since the healthcare worker made ill by the vaccination could very well need to be absent from work. On the other hand, requiring someone with a religious objection to be vaccinated does not endanger that person’s health, but clearly protects that employee, patients, and elderly residents, as well as other employees from infection.<sup>237</sup>

Close inspection reveals much that is problematic with Judge Donnelly’s reasoning.<sup>238</sup> As Judge Donnelly noted, the state in *Hochul* identified three government interests served by the vaccine mandate: (1) “to prevent the spread of COVID[-]19 in healthcare facilities,” (2) “to protect healthcare workers,” and (3) to “avoid[] staffing shortages.”<sup>239</sup> What the court ought to have done is critically and methodically analyze how each of these interests is served (or undermined) by both the existing medical accommodation and the omitted religious accommodation. Judge Donnelly fails to do that. Not only was her analysis incomplete, it was also poorly executed.

Let us demonstrate a more appropriate approach.

The first interest identified by the government was to “prevent the spread of COVID[-]19 in healthcare facilities.”<sup>240</sup> Assuming that the COVID-19 vaccine does indeed help prevent the spread of the COVID-

---

235. *Id.* at 140 (quoting *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285 (2d Cir. 2021) (per curiam)).

236. *Id.* (quoting *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285 (2d Cir. 2021) (per curiam)).

237. *Id.* at 139–40 (citations omitted).

238. *Cf.* *Does 1–6 v. Mills*, 16 F.4th 20, 20 (1st Cir. 2021) (applying arguably more cursory reasoning in affirming denial of motion for preliminary injunction).

239. *Hochul*, 632 F. Supp. 3d at 139.

240. *Id.* (citations omitted).

19 virus,<sup>241</sup> a religious exemption from the vaccine requirement would undermine that interest no more than a medical exemption would. An unvaccinated healthcare worker is an unvaccinated healthcare worker, and whatever risk he or she poses to a healthcare facility and its patients does not vary according to the reason for being unvaccinated.<sup>242</sup>

The second interest identified by the government was to “protect healthcare workers.”<sup>243</sup> But to protect them from what? From COVID-19.<sup>244</sup> Once again, with respect to this interest a religious exemption differs little from a medical exemption; each similarly affects one’s susceptibility to a COVID-19 infection.<sup>245</sup> Judge Donnelly attempts to salvage the government’s case by asserting that it is “self-evident that requiring an employee to be vaccinated even if the employee has a documented medical condition that makes vaccination unsafe would not promote the State’s interest in protecting healthcare workers.”<sup>246</sup> The point is a fair one; the State’s interest in protecting healthcare workers from COVID-19 should be viewed as simply part of its overall interest in protecting healthcare workers generally. Consequently, the degree to which the vaccine mandate would itself undermine a worker’s health could justly factor into the propriety of an exemption. Judge Donnelly recognizes that a medically contraindicated vaccine would undermine a worker’s health, but glibly remarks that “[o]n the other hand, requiring someone with a religious objection to be vaccinated does not endanger that person’s health.”<sup>247</sup> Judge Donnelly

---

241. “It is the consensus of reliable public health authorities that the COVID-19 vaccine prevents the spread of the virus . . . .” *Id.* at 127. This is not an assumption that has aged well. *See, e.g.,* *Garvey v. City of New York*, 180 N.Y.S.3d 476, 488 (S. Ct. 2022) (“Being vaccinated does not prevent an individual from contracting or transmitting COVID-19.”).

242. *See Hochul*, 632 F. Supp. 3d at 139 (“According to the plaintiffs, an unvaccinated worker can contract and spread COVID-19 whether the worker is unvaccinated for religious or medical reasons . . . .”); *see also* *Does 1–3 v. Mills*, 142 S. Ct. 17, 19–20 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief).

243. *Hochul*, 632 F. Supp. 3d at 139.

244. *Id.*

245. *See Does 1–3*, 142 S. Ct. at 19–20 (Gorsuch, J., dissenting from denial of application for injunctive relief) (recognizing individuals with medical exemptions are not more likely to “wear protective gear, submit to testing, or take other precautions than someone seeking a religious exemption”).

246. *Hochul*, 632 F. Supp. 3d at 140.

247. *See id.* (noting that forcing healthcare workers with medical exemptions to get the vaccine would be unsafe for them).

either misapprehends or chooses to neglect society's modern understanding of "health." The World Health Organization, in a leading definition, states health is "a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity."<sup>248</sup> Additionally, it is generally accepted that "[s]piritual, emotional, and financial health also contribute to overall health."<sup>249</sup> Consequently, if the state has a genuine interest in its healthcare workers, concern for their well-being would extend beyond simply medical contraindications to a vaccine, but also to their mental, social, emotional, spiritual, and financial health. In the legislative history to the Civil Rights Act of 1991, Congress explained the effects of intentional discrimination upon a victim:

Victims of *intentional* discrimination often endure terrible humiliation, pain and suffering while on the job. This distress often manifests itself in emotional disorders and medical problems, which in turn cause victims of discrimination to suffer substantial out-of-pocket medical expenses and other economic losses as a result of the discrimination.<sup>250</sup>

Although the reckless failure to provide for a religious accommodation constitutes "intentional discrimination" as a matter of law,<sup>251</sup> I posit that it is not difficult to see how the aforementioned harms identified by Congress are potentially inflicted upon anyone who is forced to violate deeply held religious beliefs, regardless of intentionality. Indeed, having to choose between one's religious values and one's vocation has been the subject of many compelling literary dramas.<sup>252</sup> As such, it is not tenable to hold that the state's interest in

---

248. Adam Felman, *What is Good Health?*, MED. NEWS TODAY (Apr. 19, 2023), <https://www.medicalnewstoday.com/articles/150999> [<https://perma.cc/Q5FW-2WPB>].

249. *Id.* "Health" has been defined expansively by the Supreme Court in the context of abortion. See *Doe v. Bolton*, 410 U.S. 179, 192 (1973) ("We agree with the District Court . . . that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health."), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

250. H.R. No. 102-40(I), at 14-15 (1991), *reprinted* in 1991 U.S.C.C.A.N. at 552.

251. *Cf.* *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1034-35 (8th Cir. 2008) (acknowledging that failure to provide for a religious accommodation can constitute intentional discrimination for purposes of punitive damages under the Civil Rights Act of 1991).

252. See *generally* ROBERT BOLT, *A MAN FOR ALL SEASONS* (1960) (detailing the struggle of a British statesmen choosing between obeying the monarch and standing

the well-being of healthcare workers is furthered by medical accommodations to a vaccine mandate but not to religious accommodations to that same mandate. To do so would be to pass judgment on the relative value of physical well-being versus spiritual well-being (despite the dubiousness of this dichotomy for reasons just discussed).<sup>253</sup> This is exactly the kind of value judgment that courts have repeatedly condemned as constitutionally problematic under the First Amendment.<sup>254</sup>

In further support of a medical accommodation (and in contrast to a religious accommodation), Judge Donnelly references the “State’s ‘interest in protecting the integrity and ethics of the medical profession.’”<sup>255</sup> She explains that this interest would be undermined by the absence of a medical exemption to the vaccine mandate in situations where the vaccine was contraindicated for a particular individual.<sup>256</sup> This is somewhat paradoxical, as the very question of a vaccine mandate is itself controversial among medical ethicists—let alone a mandate omitting an accommodation for reasons of religion or conscience.<sup>257</sup>

---

by his Catholic principles); SHŪSAKU ENDŌ, *SILENCE* (William Johnston trans., 1969) (telling the story of a Jesuit missionary enduring religious persecution in the time of Kakure Kirishitan).

253. See *supra* text accompanying notes 247–49 (discussing how the modern definition of health includes physical, mental, and spiritual health).

254. See, e.g., *infra* note 265 and accompanying text (citing to cases where courts have struck down policies that unduly burdened religious conduct compared to secular conduct).

255. *Does 1–2 v. Hochul*, 632 F. Supp. 3d 120, 140 (E.D.N.Y. 2022) (quoting *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285 (2d Cir. 2021) (per curiam)).

256. *Id.*

257. See Aaron Kheriaty & Gerard V. Bradley, *University Vaccine Mandates Violate Medical Ethics*, WALL ST. J. (June 14, 2021, 12:47 PM), <https://www.wsj.com/articles/university-vaccine-mandates-violate-medical-ethics-11623689220> [<https://perma.cc/W3SH-EHYZ>] (contesting the idea of forcing vaccinations on individuals with minimal risk of dying of COVID-19); *COVID-19 and Mandatory Vaccination: Ethical Considerations*, WORLD HEALTH ORG. (May 30, 2022), <https://www.who.int/publications/i/item/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2022.1> [<https://perma.cc/35V6-MZMH>] (arguing policymakers should use less intrusive methods to ethically encourage voluntary vaccinations only); Robert S. Olick, Jana Shaw & Tony Yang, *Ethical Issues in Mandating COVID-19 Vaccination for Health Care Personnel*, MAYO CLINIC PROC. (Oct. 20, 2021), [https://www.mayoclinicproceedings.org/article/S0025-6196\(21\)00804-1/full-text](https://www.mayoclinicproceedings.org/article/S0025-6196(21)00804-1/full-text) [<https://perma.cc/9GTJ-QCHC>] (asserting that proponents of autonomous choice wrongly imply that respect for autonomy is absolute against the needs of the health care system).

The third of the three government interests purportedly furthered by the vaccine mandate was to “avoid[] staffing shortages.”<sup>258</sup> The mandate will presumably help workers avoid infection, thereby guarding against absenteeism. Again, since the risk of infection and absence is not greater in a person who remains unvaccinated on account of a religious accommodation versus a medical accommodation, it is difficult to see how this particular interest is furthered by a medical accommodation yet undermined by a religious one.<sup>259</sup> Perversely, the mandate did lead (perhaps predictably) to a reduction in New York’s health care workforce, as many workers accepted the loss of their jobs as the cost of remaining faithful to their consciences; this reduction could have been avoided in whole or in part via recognition of a religious accommodation.<sup>260</sup>

The deficiencies of Judge Donnelly’s reasoning in *Hochul* notwithstanding, its key takeaway stands: if a court finds legitimate distinctions between a religious accommodation and a nonreligious accommodation, then the failure to promulgate the latter but not the former ought not to trigger strict scrutiny review.<sup>261</sup>

---

258. *Does 1–2*, 632 F. Supp. 3d at 139.

259. *See Does 1–3 v. Mills*, 142 S. Ct. 17, 19–20 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief) (noting that individuals with medical exemptions are as likely to contract COVID-19 as individuals with religious exemptions).

260. *See id.*; David Robinson, *NY COVID-19 Vaccine Mandate Reduced Health Care Workforce by 3%. Here’s the Biggest Impact*, LOHUD. (Oct. 14, 2021, 6:23 PM), <https://www.lohud.com/story/news/coronavirus/2021/10/14/how-many-health-workers-lost-job-s-due-ny-vaccine-mandate/8449413002> [<https://perma.cc/2X96-LDL4>] (discussing how New York state’s vaccine mandate led to a reduction in the healthcare workforce, noting in particular that healthcare workers who had claimed a religious exemption were initially suspended for failing to comply with the mandate).

261. On an admittedly “sparse” and “undeveloped” record, the Second Circuit denied injunctive relief to different plaintiffs with respect to the same regulation a year earlier. *See We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 287–88 (2d Cir. 2021) (per curiam). In assessing whether plaintiffs had met their burden of proving a “[l]ikelihood of [s]uccess on the [m]erits” with respect to their Free Exercise claim, the Second Circuit, as did Judge Donnelly, needed to consider the regulation’s omission of a religious exemption in light of its inclusion of a medical exemption. *See generally id.* at 280–288. Its analysis was similarly unimpressive, but it did suggest two potential distinctions between the exemptions that Judge Donnelly did not. First, the court opined that the medical exemption “is defined to be limited in duration, as the vaccine requirement is ‘inapplicable only until such immunization is found no longer to be detrimental to such personnel member’s health.’” *Id.* at 286 (citing 10 N.Y.C.R.R.

On the other hand, if the accommodations accompanying a legal regime were themselves inconsistent with that regime's objectives, then failure to provide for religiously grounded accommodations "would demonstrate that [the regime] values secular motivations more than religious motivations," implicating the Free Exercise Clause.<sup>262</sup> Thus, a police department's decision to allow medical exemptions to its "no-beard" policy, but not religious exemptions, was subject to heightened scrutiny.<sup>263</sup> The stated reason of the policy was "uniformity" of appearance;<sup>264</sup> although the religious exemption requested would have undermined that policy, so did the medical exemptions.<sup>265</sup> Consequently, the policy failed the test of strict scrutiny and the religious claimants that brought the case did not have to abide by it.<sup>266</sup>

---

§ 2.61(d)(1)). This is an odd distinction because the religious exemption could be similarly limited—limited until such time as "the approval of new vaccines . . . developed in a different way" (a critical concern for many of those whose religious objection was grounded on the COVID-19 vaccines' connection to fetal stem cell lines derived from procured abortions). *Id.*; see *When Exemptions Discriminate*, *supra* note 53, at 319. Second, the court opined that "medical exemptions are likely to be more limited in number than religious exemptions." *We the Patriots USA, Inc.*, 17 F.4th at 286. It is extremely unclear whether a purely quantitative distinction such as this passes muster under the Supreme Court's First Amendment precedent; the Court's opinions on the subject have all propounded the need for the government to articulate a qualitative difference between a religious exemption versus a nonreligious one. See *infra* text accompanying notes 308–26.

262. *Trefelner v. Burrell Sch. Dist.*, 655 F. Supp. 2d 581, 594 (W.D. Pa. 2009).

263. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999); *accord* *Cunningham v. City of Shreveport*, 407 F. Supp. 3d 595, 607–08 (W.D. La. 2019) (holding that a no-beard policy which allowed medical exemptions prioritized secular exemptions over religious ones).

264. *City of Newark*, 170 F.3d at 366 (holding that the no-beard policy at issue similarly undermined stated interests by allowing medical exemptions and thus warranted a heightened scrutiny evaluation).

265. *Id.*

266. *Id.* at 367; see also *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 481–82 (6th Cir. 2020) (finding that a policy did not survive strict scrutiny because its restrictions burdened plaintiffs' conduct more than secular conduct); *Trefelner*, 655 F. Supp. 2d at 594–95 (holding that a policy limiting a school district's extracurricular offerings to public school students, with exceptions for home-schooled and charter-schooled students but not students attending religious schools, violated the Free Exercise Clause); *Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1, 12, 18 (Iowa 2012) (concluding that a road protection ordinance that banned Mennonite tractors violated the Free Exercise Clause because its use of steel wheels was a religious practice and church rule and the ordinance's goal could be accomplished through alternative means); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232–

#### 6. *Discretionary Accommodations*

Another practice triggering strict scrutiny, under the First Amendment, is that of granting a government actor discretionary authority to accommodate an individual's request on an ad hoc basis. The potential mischief these accommodations invite is obvious. An agency could, for example, promulgate a stringent requirement but discretionarily grant exemptions upon request to most applicants. Were these exemptions not granted when originating from a religious basis, the agency could very well be engaged in religious discrimination.<sup>267</sup> Thus, the "no individualized exemptions" rule helps guard against the existence of a policy that may be generally applicable in theory but not so in practice.<sup>268</sup>

As might be discernible, the existence of discretion wielded by the government in such situations is critical to the constitutional analysis. Barring any discretion whatsoever, a government official's good faith application of religiously neutral factors is unlikely to present a free exercise problem.<sup>269</sup> On the other hand, even without evidence of unfair administration, a legal regime characterized by an abundance of discretion is apparently problematic *per se*.<sup>270</sup> As per the Court in *Fulton*, "the inclusion of a formal system of entirely discretionary exceptions . . . renders the [law] not generally applicable."<sup>271</sup> As one

---

33 (11th Cir. 2004) (finding that the ordinance violated the Free Exercise Clause's requirements of neutrality and general applicability).

267. See *Church of The Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of its object.").

268. *Id.*

269. That does not, of course, preclude a claimant from asserting a nonviable free exercise claim. See *Pilz v. Inslee*, No. 3:21-cv-05735-BJR, 2022 WL 1719172, at \*4 (W.D. Wash. May 27, 2022) ("*Fulton* did not hold any law containing exemptions is *per se* not generally applicable. The Ordinance in *Fulton* contained a 'system of *entirely discretionary* exemptions.'"); see also *Finnie v. Lee County*, 907 F. Supp. 2d 750, 766–67 (N.D. Miss. 2012) (noting that the petitioner presented no evidence of discriminatory enforcement in a case where the underlying statute was facially neutral).

270. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021) (affirming that the government remains constrained, even in a managerial role with discretion, from discriminating against religion).

271. *Id.* This invites the question: To what extent might an official's exercise of discretion be sufficiently curtailed to avoid triggering strict scrutiny under the First Amendment? Cf. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1082 (9th Cir. 2015) ("The mere existence of an exemption that affords some minimal governmental discretion does not destroy a law's general applicability."). But see *Zalman Rothschild*,



commentator noted, this rule even extends to situations where discretion had not been exercised, but where it was “*theoretically* permitted.”<sup>272</sup> Consequently, any law characterized by such discretionary exceptions must pass the test of strict scrutiny if it is to be deemed enforceable upon those whose free exercise of religion it burdens.<sup>273</sup>

An example of this can be found in the Supreme Court’s 2022 case *Kennedy v. Bremerton School District*.<sup>274</sup> *Kennedy* concerned a high school football coach who, after each game, offered a prayer of thanksgiving before exiting the field.<sup>275</sup> Among other things, the coach’s school district faulted him for “fail[ing] to supervise student-athletes after games” on account of his time spent in prayer.<sup>276</sup> However, the school district allowed brief, non-religious activities by coaches, including taking “personal phone calls” and meeting “with friends,” instead of watching the students after games.<sup>277</sup> Consequently, the Court observed that “any sort of postgame supervisory requirement was not applied in an evenhanded, across-the-board way.”<sup>278</sup> *Ergo*, the district’s challenged directives were not “generally applicable.”<sup>279</sup>

### 7. *Regimes of Disparate Treatment*

It is important to recall that the Court’s focus in *Smith* was on laws that treated religion and religious practices in a non-neutral

---

*Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1127–28 (2022) (suggesting that pursuant to the courts’ “formalistic antidiscretion rule,” even a modicum of discretion can make a rule non-neutral and thereby subject to strict scrutiny). Alas, such an interesting inquiry is beyond the scope of this Article.

272. Rothschild, *supra* note 271, at 1119–20.

273. *Fulton*, 141 S. Ct. at 1881. Simply alleging that government action was taken pursuant to a “discretionary system” does not, of course, make it so. *See, e.g.*, *Canaan Christian Church v. Montgomery Cnty.*, 29 F.4th 182, 198–99 (2022) (rejecting appellants argument that their free exercise rights had been violated; contrary to the allegations set forth, government actors were not making “individualized determinations” under a “discretionary system,” but rather applying a prohibition that admitted no exceptions).

274. 142 S. Ct. 2407, 2423 (2022).

275. *Id.* at 2416.

276. *Id.* at 2423.

277. *Id.*

278. *Id.*

279. *Id.*

manner.<sup>280</sup> This was stressed in the Court's follow-up decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, promulgated a mere three years after *Smith*.<sup>281</sup> But what exactly constitutes religious "neutrality" has split the lower courts.<sup>282</sup> Seizing upon portions of the *Smith* and *Church of Lukumi Babalu* decisions, some courts have held that neutrality is only called into question "where the State has in place a system of individual exemptions"<sup>283</sup> or where "religious animosity" can be demonstrated.<sup>284</sup> This narrow understanding of what constitutes religious neutrality (and its violation) does not appear tenable in light of more recent precedent construing the Free Exercise Clause and the *Smith* decision.<sup>285</sup>

Indeed, decisions subsequent to *Smith* hold that a legal regime containing benefits and privileges, as well as accommodations and carve-outs, for certain groups and practices, but not for comparable religious groups and practices, is *not* a law of general applicability.<sup>286</sup> Consequently, any substantial burden upon free exercise occasioned

---

280. See *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 881–82 (1990) (noting the prohibition against use of peyote included religiously inspired peyote use).

281. See 508 U.S. 520, 526 (1993) (recognizing the law incorporated prohibitions against animal killings to target the Santeria faith).

282. See generally Brief for the United States as First Liberty Institute as Amicus Curiae in Support of Petitioners at 10, *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 368 (2021) (No. 21-1143) (listing circuits that have misapplied Supreme Court precedent).

283. *Smith*, 494 U.S. at 884; see, e.g., *Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775, 784 (10th Cir. 2005), *vacated*, 451 F.3d 643 (10th Cir. 2006).

284. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535; see, e.g., *Ass'n of Christian Sch. Int'l v. Stearns*, 679 F. Supp. 2d 1083, 1111 (C.D. Cal. 2008), *aff'd*, 362 F. App'x 640 (9th Cir. 2010).

285. See *infra* note 284 and accompanying text (finding a violation of the Establishment Clause when a state grant scheme disqualified religious organizations).

286. But see *Locke v. Davey*, 540 U.S. 712, 715 (2004) (upholding a Washington State scholarship program that would not permit scholarships to be used at an institution where the student would be "pursuing a degree in devotional theology"); *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 838–39 (W.D. Mich. 2005), *aff'd*, 479 F.3d 403 (6th Cir. 2007) (holding that Michigan's Family Independence Agency did not violate the Free Exercise clause by not contracting with a Christian youth home). The Supreme Court's attempt to distinguish *Locke* in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2023 (2017), has not been entirely persuasive to either commentators or its own members. See Edward Correia, *Trinity Lutheran Church v. Comer: An Unfortunate New Anti-Discrimination Principle*, 18 RUTGERS J.L. & RELIGION 280, 287 (2017); *Trinity Lutheran Church*, 137 S. Ct. at 2025 (Thomas J., & Gorsuch, J., concurring in part); *id.* at 2035–40 (Sotomayor, J., & Ginsburg, J., dissenting).

by said regime would be subject to strict scrutiny.<sup>287</sup> Failure to survive strict scrutiny would require the state to extend the same benefits and privileges (or exemptions and carve-outs) to religious groups and individuals on a footing equal to that of nonreligious groups and individuals.

This concept is closely related to the problem of individualized or categorical accommodations,<sup>288</sup> but is not exactly the same—it is broader in scope. Although the question of an explicit policy of accommodations is encompassed within its purview, the problem of disparate treatment extends to any situation in which the government treats religion and religious believers as inferior to secular counterparts. It need not be limited to accommodations per se. It reaches, for example, even the imposition of “additional obstacle[s]” as part of a religious person or institution’s application for a particular government benefit—even if that benefit may potentially still be received.<sup>289</sup> As the Court stated in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, “[t]he Free Exercise Clause bars even ‘subtle departures from neutrality’ on matters of religion.”<sup>290</sup> On this point, the Roberts Court, in particular, has been exceedingly clear and has, moreover, policed such departures vigorously and repeatedly.<sup>291</sup> The Court’s relevant decisions on disparate treatment merit review because of their centrality to this Article.

Let us consider first the 2017 case of *Trinity Lutheran Church of Columbia, Inc. v. Comer*.<sup>292</sup> *Trinity Lutheran* concerned a program in Missouri pursuant to which state grants were offered to “help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled

---

287. See *Trinity Lutheran Church*, 137 S. Ct. at 2035–40 (Sotomayor, J., & Ginsburg, J., dissenting) (noting the majority has utilized strict scrutiny rather than the usual balancing approach); see also text accompanying *supra* notes 62–64 (detailing the strict scrutiny standard).

288. See *supra* Section II.B.5 (noting that unlike individualized accommodations, categorical accommodations are not problematic unless they explicitly exclude religious hardship which forces them to be subject to strict scrutiny). Admittedly, as one court observed, at a certain point the distinction becomes one of “word play.” *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam).

289. *A.M. v. French*, 431 F. Supp. 3d 432, 444 (D. Vt. 2019).

290. 138 S. Ct. 1719, 1731 (2018) (quoting *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 534 (1993)).

291. See *infra* text accompanying notes 291–307 (noting cases that deemed benefits given to religious organizations as unconstitutional).

292. *Trinity Lutheran Church*, 137 S. Ct. at 2012.

tires.”<sup>293</sup> In its implementation of the program, the state “had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program.”<sup>294</sup> Consequently, when Trinity Lutheran Church applied for a grant to install a rubber playground surface for its preschool and daycare center, it was denied.<sup>295</sup>

Given existing precedent, “[t]he parties agree[d] that the Establishment Clause . . . does not prevent Missouri from including Trinity Lutheran in the . . . Program.”<sup>296</sup> In other words, as the Eighth Circuit had noted, “it was ‘rather clear’ that Missouri *could* award a . . . grant to Trinity Lutheran without running afoul of the Establishment Clause of the United States Constitution.”<sup>297</sup> Rather, the question before the Supreme Court was whether the Free Exercise Clause *compelled* the State to weigh Trinity Lutheran’s request for a grant on the same terms as all other program applicants.<sup>298</sup> The answer was “yes”: via application of the strict scrutiny test,<sup>299</sup> the Court adjudged Missouri’s exclusion of Trinity Lutheran to be unconstitutional.<sup>300</sup> As the Court explained, “[i]n this case, there is no dispute that Trinity Lutheran is put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply.”<sup>301</sup> Such an “exclusion” from a “public benefit for which it otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand.”<sup>302</sup>

---

293. *Id.* at 2017.

294. *Id.*

295. *Id.*

296. *Id.* at 2019.

297. *Id.* at 2018 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 784 (8th Cir. 2015)).

298. *See id.* (explaining that although Missouri could award the grant to Trinity Lutheran without violating the Establishment Clause, this did not mean that the Free Exercise Clause required the State to ignore the antiestablishment clause in its own Constitution).

299. *See supra* text accompanying notes 62–64 (defining “strict scrutiny” and explaining that the government must demonstrate its restriction is narrowly tailored to a compelling state interest).

300. *Trinity Lutheran Church*, 137 S. Ct. at 2024.

301. *Id.*

302. *Id.* at 2025.

The holding of *Trinity Lutheran Church* was applied to a pair of cases hailing from Montana and Maine (in 2020 and 2022, respectively).<sup>303</sup> Each of those cases concerned a state scholarship and tuition assistance program for students.<sup>304</sup> In each of those cases, although students could apply funds received from the programs toward private schools, they were prohibited from doing so if the school in question was religiously affiliated.<sup>305</sup> Quoting *Trinity Lutheran Church*, the Court (in both cases) reminded the states that they could not “expressly discriminate against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.”<sup>306</sup> This was deemed “unremarkable” given Court precedent,<sup>307</sup> and in each case the state’s conduct was deemed unconstitutional.<sup>308</sup>

The Supreme Court further underscored its robust understanding of Free Exercise mandated “neutrality” in a pair of cases challenging governmental action taken during the COVID-19 pandemic.<sup>309</sup> The first, hailing from New York, involved a restriction limiting the number of persons who may attend a religious service to ten in “red zones” and to twenty-five in “orange zones.”<sup>310</sup> For businesses within “red zones” that were deemed “essential,” however, no such limitation was imposed.<sup>311</sup> Included among the list of “essential” businesses were “acupuncture facilities, camp grounds, garages, as well as many whose services were not limited to those that can be regarded as essential.”<sup>312</sup> In “orange zones,” “even non-essential businesses” could “decide for themselves how many persons to admit.”<sup>313</sup>

---

303. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022).

304. *Espinoza*, 140 S. Ct. at 2251; *Carson*, 142 S. Ct. at 1993.

305. *Espinoza*, 140 S. Ct. at 2251; *Carson*, 142 S. Ct. at 1993.

306. *Carson*, 142 S. Ct. at 1996 (quoting *Trinity Lutheran Church*, 137 S. Ct. at 2021); *Espinoza*, 140 S. Ct. at 2255.

307. *Carson*, 142 S. Ct. at 1997; *Espinoza*, 140 S. Ct. at 2255.

308. *Espinoza*, 140 S. Ct. at 2262; *Carson*, 142 S. Ct. at 2002. The continued vitality of *Locke v. Davey*, 540 U.S. 712 (2004), in light of *Espinoza* and *Carson*, is questionable. The Court in *Espinoza* dutifully distinguished *Locke*, see *Espinoza*, 140 S. Ct. at 2257–58, but perhaps Justice Breyer was correct in questioning the persuasiveness of this effort, see *id.* at 2284–86 (Breyer, J., dissenting).

309. *Tandon v. Newson*, 141 S. Ct. 1294, 1296 (2021) (per curium); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020) (per curium).

310. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65–66. Zone designations were related to COVID-19 infection rates. See *id.* at 72–73.

311. *Id.* at 66.

312. *Id.*

313. *Id.*

The second case, hailing from California, involved, among other things, a restriction on “private gatherings.”<sup>314</sup> Defined as “social situations that bring together people from different households at the same time in a single space or place,” “gatherings” were prohibited indoors in “Tier 1” zones and limited to “three households” everywhere else.<sup>315</sup> This prohibited individuals from holding “in-home Bible studies and communal worship with more than three households in attendance.”<sup>316</sup> Not included in the definition of “gatherings,” however, and thereby permitted under the California regulations, were “many comparable secular activities.”<sup>317</sup> For example, “hair salons, barbershops, and ‘personal care services’” could be indoors “without maximum household restrictions.”<sup>318</sup>

The Supreme Court granted emergency injunctive relief to the religious claimants in both cases.<sup>319</sup>

In its decision granting emergency injunctive relief in the California case, the Supreme Court set forth its clearest definition of neutrality for purposes of the First Amendment to date: “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.”<sup>320</sup> And to underscore that “any” means “any,” the Court immediately added: “It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.”<sup>321</sup> The robustness of this rule is such that it

---

314. *Tandon v. Newsom*, 992 F.3d 916, 917 (9th Cir. 2021), *rev’d per curiam*, *Tandon*, 141 S. Ct. at 1296.

315. *Tandon*, 992 F.3d at 918. Tier designations were related to COVID-19 infection rates. *See id.*

316. *Id.* at 919.

317. *Id.* at 933 (Bumatay, J., dissenting in part and concurring in part).

318. *Id.* “Personal care services” included “nail salons, tattoo parlors, body waxing, facials and other skincare services, and massages.” *Id.*

319. *Tandon*, 141 S. Ct. at 1296; *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 69.

320. *Tandon*, 141 S. Ct. at 1296; *accord Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67–68 (applying strict scrutiny because the restrictions are not “neutral” and “of ‘general applicability’”). I prescind from discussing additional actions taken by the Supreme Court during the pandemic that contained only the briefest of explanations, even those that were accompanied by lengthy concurrences or dissents. *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

321. *Tandon*, 141 S. Ct. at 1296. Despite the relatively recent vintage of the cases reviewed in this Section, the Roberts Court is arguably not breaking new ground but

has commonly been referred to as a “most favored nation” approach to religious liberty.<sup>322</sup>

A threshold question, of course, is that of “comparability.” The Court explained that whether or not an activity is deemed “comparable . . . must be judged against the asserted government interest that justifies the regulation at issue.”<sup>323</sup> As the Second Circuit explained, “[a] law is . . . not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it.”<sup>324</sup> This builds upon precedent, previously discussed, construing whether secular categorical accommodations are “sufficiently different” from a requested religious accommodation to justify exclusion of the latter.<sup>325</sup> In the context of the COVID-19 regulations discussed above, the Supreme Court explained that “[c]omparability is concerned with the risks various activities pose, not the reasons why people gather.”<sup>326</sup> The Court, in each case, found the prohibited religious activity comparable to permitted secular activity, consequently applied strict scrutiny to the

---

rather simply applying *Smith* as best understood. *See, e.g.*, *Horen v. Commonwealth*, 479 S.E.2d 553, 555–57 (Va. App. 1997) (declaring a law prohibiting the possession of wild bird feathers “not religiously neutral” because it permitted such possession for “a variety of legitimate secular uses” yet “inexplicably denies an exception for bona fide religious uses”); *see also* Thomas C. Berg, *Religious Freedom Amid the Tumult*, 17 U. ST. THOMAS L.J. 735, 738 (2022) (“[D]evaluating religion should count as a constitutional wrong, even absent targeting or hostility.”).

322. *See* *Rothschild*, *supra* note 271, at 1111, 1120–21 (“The most-favored-nation rule dictates that whenever the government provides exemptions for secular interests, it must also provide them for ‘comparable’ religious interests.”).

323. *Tandon*, 141 S. Ct. at 1296. Tier designations were related to COVID-19 infection rates and other factors. *See* *Tandon v. Newsom*, 992 F.3d 916, 918 n.1 (9th Cir. 2021).

324. *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014). Applying this standard, the Second Circuit found not generally applicable a law that applied “exclusively to religious conduct implicating fewer than 10% of the cases of neonatal HSV infection” while failing to regulate “nonreligious conduct accounting for all other cases” of such infection. *Id.*

325. *See supra* text accompanying notes 222–65 (describing examples of courts applying the test to secular exemptions).

326. *Tandon*, 141 S. Ct. at 1296.

regulation, and ultimately enjoined its enforcement against the religious claimants.<sup>327</sup>

### III. THE REPEAL OF RELIGIOUS ACCOMMODATIONS

As has been indicated, in a wide variety of circumstances the state is under no constitutional obligation to promulgate a statutory or regulatory accommodation of religion in conjunction with its enactment or enforcement of law.<sup>328</sup> This is most typically because the law in question is found to be a neutral one of general applicability.<sup>329</sup> However, there is nevertheless enough “play in the joints” of the First Amendment’s religion clauses to permit a state to promulgate such an accommodation in these very same circumstances should it wish to do so.<sup>330</sup> The question to which we shall now finally turn is that posed at the opening of this Article: under what circumstances, if any, may the state repeal such a discretionarily promulgated accommodation?<sup>331</sup> The answer to that question turns on how the act of repeal is to be assessed: as a nonproblematic, religiously neutral, generally applicable act of the government, or, instead, as an example of problematic state action targeting religion?

#### A. *Historical Examples*

Before delving into the legal analysis of the question presented, let us first recount some of the rare historical examples in which a previously promulgated religious accommodation was thereafter repealed.

---

327. *Tandon*, 141 S. Ct. at 1297–98; *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66–67, 69. Conversely, if religious activity created “elevated risks” of transmission for COVID-19, it could arguably be treated differently by the state. See Berg, *supra* note 320, at 740. The Roberts Court also decided *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, discussed previously. See *supra* text accompanying note 289.

328. This does not preclude an obligation to accommodate religion under federal or state statutory law, the prime example of which would be the Religious Freedom Restoration Act. See *supra* note 77.

329. See *supra* text accompanying note 121 (acknowledging that there are limits on religious accommodation and that accommodations cannot be completely unfettered).

330. See *supra* text accompanying notes 100–02 (discussing how facially neutral laws can nonetheless burden religion).

331. This is distinct from a question we will not be examining: whether the state may withdraw a religious exemption from a particular person or entity upon a finding that said person or entity no longer qualifies for the exemption. *E.g.*, *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15 (D.D.C. 1999).



### 1. *School vaccine requirements*

Elementary schools have long required their students to have received certain vaccinations as a condition of attendance.<sup>332</sup> All recognize medical exemptions for situations in which a particular vaccination is contraindicated.<sup>333</sup> The vast majority also recognize religious and/or philosophical exemptions from the requirement.<sup>334</sup> In 2015 and 2019, California and New York (respectively) eliminated all religious and philosophical exemptions from their compulsory school vaccination laws.<sup>335</sup> Similarly, in 2021 Connecticut phased out its religious exemption policy regarding mandatory elementary school immunizations.<sup>336</sup>

### 2. *Healthcare-worker vaccine requirements*

Several states have mandated that their healthcare workers receive vaccination against certain specified diseases.<sup>337</sup> In the midst of the COVID-19 pandemic, several states added to this list of mandatory vaccinations.<sup>338</sup> Although religious exemptions from these requirements were recognized by certain states in the past, some states, over time, decided to rescind such exemptions.<sup>339</sup>

### 3. *Child-endangerment laws*

The failure of parents to seek appropriate medical care for their children constitutes child endangerment or neglect under the state

---

332. Debbie Kaminer, *Vaccines in the Time of COVID-19: How Government and Businesses Can Help Us Reach Herd Immunity*, 2020 WIS. L. REV. FORWARD 101, 110 (2020).

333. *Id.* at 110–11.

334. As of 2020, “forty-five states have at least one of these two types of exemptions from mandatory school vaccinations.” *Id.* at 112.

335. *Id.*

336. See *Keira v. Lamont*, No. FST-CV-22-6056249-S, 2022 WL 6422264, at \*1 (Conn. Super. Ct. Sept. 13, 2022) (denying school’s motion to dismiss claims of parents whose children were denied religious vaccine exemption).

337. See Leila Barraza, Cason Schmit & Aila Hoss, *The Latest in Vaccine Policies: Selected Issues in School Vaccinations, Healthcare Worker Vaccinations, and Pharmacist Vaccination Authority Laws*, 45 J.L. MED. & ETHICS 16, 17 (2017) (noting that eight states require healthcare workers to be vaccinated against influenza or to have a valid medical or religious exemption or other declination statement).

338. *State COVID-19 Data and Policy Actions*, KAISER FAM. FOUND. (Feb. 10, 2022), <https://www.kff.org/report-section/state-covid-19-data-and-policy-actions-policy-actions> [<https://perma.cc/5EWB-4YKW>].

339. *E.g.*, *Does 1–6 v. Mills*, 566 F. Supp. 3d 34, 42 (D. Me. 2021).

law.<sup>340</sup> A number of states recognize religious exemptions to these laws, excusing or downgrading the culpability of parents who pursue “faith-healing” or other forms of religiously-based treatments instead of mainstream medical practices.<sup>341</sup> Over the last few decades, Oregon, Maryland, Tennessee, and South Carolina have removed some or all of these exemptions.<sup>342</sup>

#### 4. *Modification of state RFRA*

In the wake of the Supreme Court’s decision in *Smith*,<sup>343</sup> Congress passed the Religious Freedom Restoration Act<sup>344</sup> (“RFRA”) in 1992.<sup>345</sup> RFRA “restores” application of the compelling government interest test to laws of general applicability when they substantially burden a claimant’s exercise of religion.<sup>346</sup> RFRA was upheld as constitutional with regard to federal legislation and activity but struck down as unconstitutional with regard to state legislation and activity.<sup>347</sup>

---

340. See Donna K. LeClair, *Faith-Healing and Religious-Treatment Exemptions to Child-Endangerment Laws: Should Parental Religious Practices Excuse the Failure to Provide Necessary Medical Care to Children?*, 13 U. DAYTON L. REV. 79, 79 (1987) (criticizing religious exemptions in child welfare statutes); Baruch Gitlin, Annotation, *Parents’ Criminal Liability for Failure to Provide Medical Attention to Their Children*, 118 A.L.R.5TH 253, 253 (2004) (“It is generally recognized that parents have a duty to provide medical attention to their children. Violation of this duty can lead to criminal charges against the parent.”).

341. See Jennifer Stanfield, *Faith Healing and Religious Treatment Exemptions to Child-Endangerment Laws: Should Parents Be Allowed to Refuse Necessary Medical Treatment for Their Children Based on Their Religious Beliefs?*, 22 HAMLINE J. PUB. L. & POL’Y 45, 57, 61 (2000) (noting that state to state differences in the exemptions render the jurisprudence on the issue widely varied); Shaakirrah R. Sanders, *Religious Healing Exemptions and the Jurisprudential Gap Between Substantive Due Process and Free Exercise Rights*, 8 U.C. IRVINE L. REV. 633, 645 (2018) (“Forty-three states and the District of Columbia have had at least one type of religious healing exemption.”).

342. Sanders, *supra* note 341, at 637.

343. Capturing the perspective of many, one commentator opined that in *Smith* “the Supreme Court rewrote First Amendment jurisprudence by dispensing with a balancing test in the case of neutral laws of general applicability and holding such laws to represent no free exercise violation.” MILLER, *supra* note 73, at 663.

344. 42 U.S.C. § 2000bb-1(a) (2006).

345. *Id.* § 2000bb-1(a).

346. *Id.* § 2000bb-1(a).

347. See *City of Boerne v. Flores*, 521 U.S. 507, 533–35 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (finding that RFRA constituted a “considerable congressional intrusion” into a State’s authority to regulate for the general welfare); Nadia N. Sawicki, *The Hollow*

Subsequently, several states have adopted their own versions of RFRA to cover state-based burdens upon the free exercise of religion.<sup>348</sup> Over time, however, some states grew irritated by the restrictions placed upon them by their RFRA legislation.<sup>349</sup> Two of them, Illinois and Florida, amended their RFRA statutes to remove some of the protections they had originally recognized.<sup>350</sup> Illinois carved out potential claims brought in connection with the expansion of Chicago's O'Hare airport (which involved, among other things, the relocation of religious cemeteries), and Florida carved out potential claims brought in connection with its requirement that a driver's license or other identification card feature a "fullface photograph or digital image of the identification card holder."<sup>351</sup>

### B. Legal Analysis

Most (if not all) of the aforementioned repeals of religious exemptions were subject to legal challenge, but none were ultimately enjoined or reversed as unconstitutional.<sup>352</sup> Routinely, those who

---

*Promise of Freedom Of Conscience*, 33 CARDOZO L. REV. 1389, 1412 (2012) (explaining that since RFRA is still enforceable when applied to federal law, it has been used by plaintiffs in a variety of contexts, including health care and prisoners' rights).

348. See Lund, *supra* note 14, at 474–77 (detailing the movement towards adoption and the required threshold showing for states having passed legislation).

349. *Id.* at 493–95.

350. See *id.* (discussing RFRA carveouts in states' respective legislation).

351. See *id.* at 495 (arguing that religious minorities may not be able to use state RFRA to protect their religious expression since a state is free to amend its RFRA to exclude unpopular religious accommodation claims from coverage); see also *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616 (7th Cir. 2007) (holding that the amendment to Illinois' RFRA which excluded Chicago's relocation of cemeteries for the O'Hare project did not violate a religious cemetery's rights under the Free Exercise Clause because this was the least restrictive alternative available); *Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 50 (Fla. Dist. Ct. App. 2006) (holding that a Muslim woman who was not permitted to wear her veil in her driver's license photo did not demonstrate a substantial burden to her free exercise of religion).

352. See Rubinstein Reiss & Thomas, *supra* note 132, at 957. (“[I]n a recent set of decisions examining claims that removing nonmedical exemptions from school immunization mandates violates the Free Exercise Clause of the First Amendment, several courts concluded that the requirements are subject to *Smith* and constitutionally valid . . .”).

justify such repeals do so in conclusory terms and without any genuine analysis.<sup>353</sup>

*F.F. v. State*<sup>354</sup> provides the closest thing to a sustained legal analysis of a religious exemption's repeal.<sup>355</sup> For that reason, let us first review *F.F.* in detail, using it as a springboard to consider the constitutional issues more generally.

*F.F.* concerned New York's decision, in 2019, to repeal its religious exemptions to the immunizations required to attend any public or private school or child care facility.<sup>356</sup> This repeal occurred in the wake of a measles outbreak in 2018, largely concentrated in communities with "precipitously low immunization rates."<sup>357</sup> Plaintiffs brought suit "to have the repeal declared unconstitutional and the legislation enjoined,"<sup>358</sup> primarily on the grounds that it violated the Free Exercise Clause.<sup>359</sup>

The Appellate Division of the New York Supreme Court began its analysis, correctly, by analyzing whether the repeal legislation was "a neutral law of general applicability,"<sup>360</sup> for that determination drives the appropriate standard of review (strict scrutiny versus rational

---

353. *E.g.*, Kaminer, *supra* note 332, at 113 (stating that neutral laws of general applicability are constitutional). Professor Kaminer's article is typical, declaring that "[w]hile eliminating religious and philosophical exemptions may be politically controversial, it is clearly legal and constitutional to do so." *Id.* What immediately follows is not a First Amendment analysis of exemption *repeals*, but rather a First Amendment analysis of mandatory vaccination laws in general. In support of her declaration, Professor Kaminer cites to Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 609 (2016). But as that article's title suggests, its First Amendment analysis is focused entirely on the *promulgation* of compulsory vaccination laws; it never addresses the *revocation* of religious exemptions to compulsory vaccination laws. *See id.* at 609.

354. 143 N.Y.S. 3d 734 (App. Div. 2021), *appeal dismissed*, 176 N.E.3d 304 (N.Y. 2021).

355. *Id.*

356. *Id.* at 737–38.

357. *Id.* (quoting Sponsor's Mem, S2994A, Reg. Sess. (N.Y. 2019)).

358. *Id.* at 738.

359. *See id.* at 737–38 (explaining how the plaintiffs argued that the repeal was not a neutral law because it was not enacted until after the height of the measles outbreak, no public hearings were held on the repeal despite multiple requests from plaintiffs and others, and statements of legislators indicate religious animus).

360. *Id.* at 739 (emphasis omitted).

basis).<sup>361</sup> With regard to that question, plaintiffs alleged “three reasons in their complaint why the repeal was not a neutral law”:

[F]irst, that the Legislature failed to act during the height of the measles outbreak, asserting that the timing of the legislation undermines the public health concerns it relied upon in adopting the repeal; second, that, despite multiple requests from plaintiffs and others in the six months between the proposal of the bills and their adoption, no public hearings were held on the matter; and third, that the alleged religious animus is reflected in certain statements made by some of the legislators.<sup>362</sup>

Over the course of merely a couple of pages the court rejected all three of plaintiff’s allegations.<sup>363</sup> With regard to timing, the court noted that “the record reflects that the repeal simply worked its way through the basic legislative process and was motivated by a prescient public health concern.”<sup>364</sup> With regard to the lack of public hearings, the court suggested that these were unnecessary “given the Legislature’s reliance upon data from the Centers for Disease Control and Prevention and other public health officials, including the amici,” the “spirited floor debate among legislators,” and “several hundred letters . . . received, mostly in opposition to the repeal[.]”<sup>365</sup>

As for plaintiffs’ allegations of “religious animus . . . reflected in certain statements made by some of the legislators,” the court did not contest these allegations but rather downplayed them and ultimately rejected their importance.<sup>366</sup> The court noted that the “[eleven] statements alleged to suggest religious hostility were attributed to only five of the over 200 legislatures in office at any given time.”<sup>367</sup> This did

---

361. *See id.* (explaining that if the law is neutral, the court reviews it under the less-stringent rational basis test, but laws that are not neutral are analyzed using strict scrutiny); *see also supra* Section II.C (explaining how both rational basis and strict scrutiny are applied in Free Exercise Clause claims).

362. *F.F.*, 143 N.Y.S. 3d at 739.

363. *See id.* at 739–41 (dismissing plaintiffs’ first allegation because the record indicated the repeal worked through the normal legislative process to address a compelling public health concern, the second allegation because floor debate of the repeal addressed constituent concerns, and the third allegation because the statements were attributable to less than three percent of the legislature).

364. *Id.* at 739.

365. *Id.* at 740.

366. *See id.* at 739–40 (noting that, in addition to the few legislators the statements were attributed to, many of the statements did not express animus toward a particular religion, but concern over whether parents were falsifying religious beliefs to avoid the vaccination requirement).

367. *Id.* at 740–41.

not “taint the actions of the whole” according to the court.<sup>368</sup> (Query whether any other members “of the whole” voiced disapproval over the comments in question, and the degree to which their silence can be interpreted as acquiescence—a fact the Supreme Court pointedly noted in *Masterpiece Cakeshop*.<sup>369</sup>) Finally, the court questioned the degree to which “many of the statements” demonstrated actual “religious animus.”<sup>370</sup>

As for the overlapping issue of “general applicability,” the court acknowledged that “at first blush, the repeal of a religious exemption naturally seems to target the First Amendment . . . .”<sup>371</sup> But the court ultimately concluded otherwise.<sup>372</sup> The court’s reasoning is supplied via four sentences which merit reproduction in full and close examination:

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court of the United States determined that an executive order that imposed restrictions on attendance at religious services in certain areas in response to the COVID-19 pandemic would likely not be considered neutral and of general applicability and thus must satisfy strict scrutiny. As noted by Justice Kavanaugh in a concurring opinion, the regulation created a favored class of businesses and it thus needed to justify why houses of worship were excluded from that favored class. By contrast, here, the religious exemption previously created a benefit to the covered class, and now the elimination of the exemption subjects those in the previously covered class to vaccine rules that are generally applicable to the public. In fact, the sole purpose of the repeal is to make the vaccine requirement generally applicable to the public at large in order to achieve herd immunity.<sup>373</sup>

---

368. *Id.* at 741.

369. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1729 (2018) (“The record shows no objection to these comments [disparaging religion] from other commissioners.”).

370. *F.F.*, 143 N.Y.S.3d at 741. The court nevertheless conceded that “[t]o be sure, there were certain insensitive comments that could be construed as demonstrating religious animus.” *Id.* But see *supra* note 177 and accompanying text (“The constitutional benchmark is government neutrality, not governmental avoidance of bigotry.”) (internal quotations omitted).

371. *F.F.*, 143 N.Y.S.3d at 741.

372. See *id.* (reasoning that since the religious exemption conferred a benefit to the covered class, the repeal of such exemption was generally applicable since it applied to the public at large).

373. *Id.* at 741 (internal citations omitted).

The first two of the court's four sentences offered in justification of its conclusion discuss *Roman Catholic Diocese of Brooklyn v. Cuomo*.<sup>374</sup> The court correctly stated that in *Roman Catholic Diocese of Brooklyn*, the U.S. Supreme Court enjoined an executive order (also hailing from New York) that infringed upon religious liberty in violation of the Free Exercise Clause.<sup>375</sup> As has been previously explained, the order restricted the number of persons who may attend a religious service to ten in "red zones" and to twenty-five in "orange zones."<sup>376</sup> But for businesses within "red zones" that were deemed "essential," no such restriction was imposed.<sup>377</sup> Included among the list of "essential" businesses were "acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential[.]"<sup>378</sup> In "orange zones," "even non-essential businesses" could "decide for themselves how many persons to admit."<sup>379</sup>

In explaining the court's rationale in enjoining the executive order, the Appellate Division cites only from a concurrence penned by Justice Kavanaugh. Not cited is the concurrence penned by Justice Gorsuch which declares that: "Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling government interest and using the least restrictive means available."<sup>380</sup>

Nor cited in *F.F.* is the per curiam opinion of the Court in *Roman Catholic Diocese of Brooklyn*. Contrary to the court in *F.F.*, the Supreme Court in *Roman Catholic Diocese of Brooklyn* credited (rather than rejected) plaintiff's concerns regarding potential religious animus stemming from "statements made in connection with the challenged rules."<sup>381</sup>

---

374. 141 S. Ct. 63 (2020) (per curiam).

375. See *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65–66 (describing how the executive order issued by the Governor of New York imposed very severe restrictions on religious service attendance); *F.F.*, 143 N.Y.S.3d at 741 (distinguishing the outcome of the general applicability requirement when applied to the facts of each case).

376. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65–66. Zone designations were related to COVID-19 infection rates. See *id.* at 66–67.

377. *Id.* at 66.

378. *Id.*

379. *Id.*

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

381. *Id.* at 66.

In short, the majority opinion in *Roman Catholic Diocese of Brooklyn*, read in conjunction with the concurrences, stands for the proposition that religiously motivated conduct and activity cannot be treated differently from nonreligiously motivated conduct and activity absent a justification that survives the test of strict scrutiny. This was subsequently affirmed by the Supreme Court in *Tandon v. Newsom*,<sup>382</sup> decided one month after *F.F.*

The Appellate Division attempted to distinguish the law it confronted in *F.F.* with that enjoined by the Supreme Court in *Roman Catholic Diocese of Brooklyn* by observing that in *F.F.*, “the religious exemption previously created a benefit to the covered class, and now the elimination of the exemption subjects those in the previously covered class to vaccine rules that are generally applicable to the public[.]”<sup>383</sup> It proceeded to emphasize that “[i]n fact, the sole purpose of the repeal [was] to make the vaccine requirement generally applicable to the public at large in order to achieve herd immunity.”<sup>384</sup> The Appellate Division’s statements implicate two issues.

*First*, the court in *F.F.* appears to have mischaracterized the legal regime before it. Put differently, the Appellate Division’s understanding of “general applicability” does not appear to comport with the Supreme Court’s understanding of that term, as has been discussed previously.<sup>385</sup> Regrettably, the Appellate Division did not expound upon this conclusory observation.<sup>386</sup> It failed to explain, or

---

382. See *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (holding that a government regulation is not neutral and generally applicable when it treats “any comparable secular activity more favorably than religious exercise,” and is therefore subject to strict scrutiny); see also *supra* note 306 and accompanying text (explaining the rule in the context of state scholarship programs used for religiously-affiliated schools).

383. See *F.F. v. State*, 143 N.Y.S.3d 734, 741 (App. Div. 2021), *appeal dismissed*, 176 N.E.3d 304 (N.Y. 2021) (emphasizing the fact that repealing the religious exemption resulted in a transition from a specific benefit to broader applicability of vaccine requirements).

384. *Id.*

385. See *supra* Section II.B.5 (explaining that, under Supreme Court precedent, explicit exclusion of religious hardship from categorical exceptions turns a law into one that lacks general applicability).

386. See *generally F.F.*, 143 N.Y.S.3d at 737–38 (discussing how after the measles outbreak, the New York legislature only repealed the religious, but not the medical, exception to the vaccination requirement)



even consider, how a vaccine requirement that some may avoid for medical reasons is truly “generally applicable.”<sup>387</sup>

As previously discussed, a law permitting accommodations on the basis of nonreligious grounds while excluding accommodations on the basis of religious grounds would seem to implicate the rule concerning the existence of categorical secular exemptions<sup>388</sup> as well as the Supreme Court’s prohibition against government action that treats religiously based conduct as inferior to nonreligiously based conduct.<sup>389</sup> Whether the conduct in question is the choice to gather for a given purpose (as in *Roman Catholic Diocese of Brooklyn*) or the choice to seek a vaccine exemption (as in *F.F.*), it would seem as though the government were making distinctions between what is permissible versus what is impermissible, in part, on the basis of religion. Such action would not be considered neutral and generally applicable and, consequently, should trigger strict scrutiny.

*Second*, the court correctly observes that whereas *Roman Catholic Diocese of Brooklyn* concerned a newly promulgated regime of rules and accompanying accommodations, *F.F.* concerned the elimination of an accommodation from a pre-existing regime. This is, of course, the crux of the issue, and takes us to the final leg of our analysis. Is there a constitutionally relevant distinction between failing to promulgate a religious accommodation and repealing a previously promulgated religious accommodation? As with much legal analysis, it depends.

Let us first dispense with the easiest of cases. To the extent that a religious accommodation is required in the first place for reasons previously discussed,<sup>390</sup> removal of said accommodation would, barring a considerable change of circumstances, be unconstitutional. Also of dubious constitutionality would be any repeal accompanied by unambiguous statements of religious animus.<sup>391</sup>

---

387. *Id.* at 741.

388. *See supra* Section II.B.5 (addressing the issue of categorical accommodations that exclude religiously-based accommodations and the need to distinguish between such exemptions to ensure equitable treatment).

389. Or, more accurately, the prohibition on government action that treats religiously based conduct inferior to nonreligiously based conduct *absent* a narrowly tailored approach, designed to encroach upon religious exercise as minimally as possible, in furtherance of a compelling government interest. *See supra* Section II.B.6.

390. *See supra* Sections II.A–B (explaining both statutory and judicially-mandated accommodations).

391. *See supra* Section II.B.3 (discussing the Supreme Court’s consideration of government officials’ expressions of hostility toward religion in its analysis).

The more difficult cases concern accommodations that were not constitutionally compelled in the first place.

As a preliminary note, let's first recall that religious exemptions cannot be promulgated willy-nilly.<sup>392</sup> As discussed, they are subject to certain limitations, and exist to remove a government-imposed burden upon religious exercise.<sup>393</sup> To the extent that an accommodation is unnecessary to remove such a burden, it probably fails as a constitutionally infirm endorsement of religion.<sup>394</sup> This helpfully reminds us that any religious accommodation under consideration for potential repeal has presumably, already, been screened for constitutionality<sup>395</sup> and is serving the salutary purpose of removing a government-imposed burden upon religious exercise. If not, the accommodation could be challenged (and potentially struck down) under the Establishment Clause.<sup>396</sup>

Additionally, expectation interests in this area are significant. Although state-promulgated religious liberty rights are not necessarily protected by substantive due process,<sup>397</sup> some account ought to be made for the fact that lives will inevitably have been lived and organized pursuant to the understanding that these accommodations would remain in place (for their repeal has been rare indeed). This includes matters as weighty as where people choose to live, work, and study. I do not explore further the degree to which these interests

---

392. See *supra* Section II.A (providing a historical overview of the constitutional limits of statutory accommodations of religion).

393. See *supra* Section II.A (identifying certain characteristics likely to find a legislative religious accommodation violates the Establishment Clause).

394. See *supra* Sections II.A–B (noting the primary purpose of religious accommodations as lifting a government-imposed burden on religious exercise and that such accommodations may not necessarily be granted when laws only incidentally burden religious activity).

395. See *supra* Section II.B (discussing methods of challenging laws burdening religious exercise which, upon closer inspection, may be found unconstitutional). And, if of questionable constitutionally, has probably survived a judicial challenge.

396. See *supra* Section II.A (discussing several characteristics of laws which may result in finding an accommodation unconstitutional).

397. See *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (“In short, areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because ‘substantive due process rights are created only by the Constitution.’” (quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring))). “As a result, these state law based rights constitutionally may be rescinded so long as the elements of procedural—not substantive—due process are observed.” *Id.*

should bear upon the constitutional calculus—I simply highlight them as worthy of concern and further attention.

Moreover, consider the message sent to people of faith when a religious accommodation is removed. The removal squarely targets religiously motivated conduct that had previously been accommodated. Would not the reasonable observer view this change in policy as reflecting a shift in the public's attitudes toward the affected individuals, their religious practices, their religious beliefs, religion in general, or all of the above? Absent some considerable change in other circumstances,<sup>398</sup> one would be hard-pressed to articulate a justification for society's lack of continued willingness to accommodate the religious beliefs and practices it had previously accommodated. This becomes even more disturbing when one considers that the Free Exercise Clause's importance arguably arises when protecting those individuals and organizations whose religious beliefs are less popular, as they are less likely to successfully defend themselves through the political process.<sup>399</sup> In other words, can it really be the case that religious accommodations can be withdrawn if the group(s) they protect find themselves less popular than before?

To this point, the Supreme Court case of *American Legion v. American Humanist Association*,<sup>400</sup> which might have initially appeared inapposite, enters into relevance. *American Legion* concerned a suit brought to compel the removal of a cross-shaped World War I religious monument on public land.<sup>401</sup> Although there was certainly no obligation on the part of the government to erect the monument, the Court opined upon the practical effect of its removal in terms that are, I suggest, germane to our inquiry:

[W]hen time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine

---

398. Most probably, any such action will be accompanied by justifications secular in nature. But the Supreme Court has warned against accepting such justifications at face value as they can be pretextual. *See supra* note 77 and accompanying text.

399. *Cf. Colombo, Religious Jurisprudence of Scalia, supra* note 1, at 441 (discussing Scalia's view that the Court should not use the Establishment Clause to "repeal" legislative religious accommodations).

400. 139 S. Ct. 2067 (2019).

401. *Id.* at 2074.

will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive.<sup>402</sup>

Admittedly there are clear distinctions between monuments and accommodations. But the Court's observation that removal "may no longer appear neutral,"<sup>403</sup> is, I suggest, trenchant. Not building the monument in the first place, versus taking it down after it has been constructed, conveys messages that are significantly different. Similarly, it is extremely difficult to deny that, regardless of motivations, government action to restrict or eliminate an accommodation that served to protect a religious community will widely be perceived as an attack upon that community. As Justice O'Connor suggested in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>404</sup> government conduct leading to such perceptions is constitutionally problematic.<sup>405</sup>

The Supreme Court's most recent Free Exercise decisions provide the clearest guidance of all with regard to rescission of a religious accommodation. From these cases, it has become clear that our touchstone in assessing such matters must be that of equal treatment under the law. Unless such a rescission withstands strict scrutiny, any government action that treats religious conduct (and religious bases of conduct) differently from nonreligious conduct (and nonreligious bases of conduct) violates the First Amendment.<sup>406</sup>

The preceding discussion enables us to analyze the four remaining situations in which a religious accommodation might be eliminated:

1. *The repeal of only a religious accommodation from a rule or regulation to which at least one other accommodation remains*

The first scenario is that previously discussed in *F.F. v. State*: the situation in which a law recognizing two or more accommodations thereto is subsequently amended to pare away only its religious

---

402. *Id.* at 2084–85.

403. *Id.* at 2084.

404. 515 U.S. 819 (1995).

405. *Id.* at 846 (O'Connor, J., concurring).

406. See *supra* note 214 and accompanying text (quoting the Iowa Supreme Court's discussion of potentially underinclusive laws allowing secular conduct that undermines governmental purposes while prohibiting religious conduct for the same purpose).

accommodation.<sup>407</sup> In this situation, all indications point to the unconstitutionality of such removal. Throughout the history of its Free Exercise jurisprudence, the Supreme Court has recognized that the lack of facial religious neutrality is deeply problematic.<sup>408</sup> Semantic gymnastics aside,<sup>409</sup> a law explicitly repealing a religious accommodation—and only a religious accommodation—is, I suggest, presumptively violative of the First Amendment. Most likely, the repeal legislation will explicitly reference religion itself, as was the case in the New York legislation in *F.F.*, described officially as:

AN ACT to amend the public health law, in relation to exemptions from vaccination due to religious beliefs; to repeal subdivision 9 of section 2164 of the public health law, relating to exemption from vaccination due to religious beliefs; and providing for the repeal of certain provisions upon expiration thereof.<sup>410</sup>

Even if the legislation lacked such overt references to religion, its focus on religious conduct would be inescapable to any factfinder.

As discussed, whether religious hostility, versus the mere acknowledgement of religion, renders government action “non-neutral” for purposes of the Free Exercise clause is the subject of some debate.<sup>411</sup> As such, some may argue (as others have in the past) that reference to religion as the object of the legislation does not implicate the Free Exercise clause in the absence of animus towards religion.<sup>412</sup> However, when this repeal is coupled with the persistence of other, nonreligious accommodations, a finding of non-neutrality with respect

---

407. See *supra* text accompanying notes 354–88 (discussing the constitutional review of a case where the government allows exemptions for vaccine requirements on nonreligious grounds (e.g., medical) but prohibits exemptions on religious grounds, which the court ultimately upheld).

408. See *supra* Section II.B.2 (noting the Court’s consistent characterization of laws which facially discriminate on religious bases as the most blatant examples of First Amendment violations).

409. See, e.g., *supra* notes 385–87 and accompanying text (noting that appellate courts and the Supreme Court have not uniformly applied an identical meaning of “general applicability”).

410. 2019 N.Y. Sess. Laws Ch. 35 (A. 2371-A) (McKinney).

411. See *supra* text accompanying notes 176–88 (noting that the benchmark of constitutional review is neutrality, not hostility, but that the two concepts are often confused as a number of courts have made the assumption that the absence of religious hostility means a law is neutral towards religion).

412. See *supra* text accompanying notes 176–88 (emphasizing that the key factor to Free Exercise claim analysis is government neutrality, rather than hostility towards religion).

to religion is virtually assured. Indeed, the Supreme Court's most recent decisions strongly suggest that a religious accommodation is constitutionally compelled in such situations, for this would appear to implicate the rule against the promulgation of secular accommodations without accompanying religious accommodations.<sup>413</sup> Therefore, the only way for the government to avoid the application of strict scrutiny<sup>414</sup> here would be to successfully argue that the religious conduct no longer being accommodated is not genuinely comparable to the secular conduct still being accommodated.<sup>415</sup>

Assuming that courts would apply strict scrutiny to the religious accommodation's repeal, it bears recalling that application of strict scrutiny is not inevitably fatal to the repeal. That said, the government's acknowledged ability to accommodate other concerns and claims of hardship would, all things being equal, make it extremely difficult to justify its inability to accommodate religiously motivated conduct.

*2. The repeal of all accommodations (religious and otherwise) from a rule or regulation which had heretofore recognized multiple accommodations*

The removal of all accommodations to a rule or regulation, religious and nonreligious alike, is most likely constitutional. Unlike the first case, any such decree of removal could be facially neutral with respect to religion. A simple statement declaring that, henceforth, no accommodations to the law in question would be recognized, without reference to religion, would seem to suffice. Such a decree would most likely pass muster under the Supreme Court's Free Exercise jurisprudence because it would be treating religious and secular activity alike. There would be no favoring of the latter over the former, nor any reasonable perceptions thereof. Thus, the removal here would

---

413. See *supra* Section II.B.5 (discussing the problematic nature of secular accommodations when corresponding religious accommodations are excluded).

414. To the extent that the religious accommodation was removed alongside another accommodation (or certain other accommodations), the government's ability to defend the action as constitutional would seem to be significantly improved. Nevertheless, the persistence of any other accommodations would, I submit, seriously undermine the removal's constitutionality in most circumstances.

415. See *supra* text accompanying notes 320–27 (examining the question of comparability between secular and religious conduct insofar as they burden the governmental interest at stake; when religious conduct is prohibited and secular conduct is not, there must be a showing that the secular conduct is “sufficiently different” in terms of its impact on the governmental interest).

be pursuant to a law of authentic general applicability, to which constitutional review under the rational basis test would be most likely to apply.

Although arguably dicta, the Seventh Circuit's decision in *St. John's United Church of Christ v. City of Chicago*<sup>416</sup> provides support for this conclusion. *St. John's United Church of Christ* was the aforementioned case arising out of Illinois's decision to pare back its state-RFRA so as to facilitate the expansion of O'Hare International Airport.<sup>417</sup> The text of the repeal legislation was facially neutral: "Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein."<sup>418</sup> Digging deeper, the Seventh Circuit found nothing invidious hiding behind this facial neutrality—as per the court: "the record as a whole strongly supports the position the City has urged throughout these proceedings: the [O'Hare Modernization Act] was designed to remove any and all state-law based impediments to the O'Hare expansion project, no matter what their source."<sup>419</sup> Accordingly, the court declared that the revision of RFRA was "a neutral law of general applicability" not subject to strict scrutiny because it was part of a legislative package that removed all obstacles toward a particular state objective, leaving no accommodations standing.<sup>420</sup>

3. *The repeal of religious and other accommodations from a rule or regulation to which at least one other accommodation remains*

Occupying the space between the first and second scenarios would be the situation in which a religious accommodation, along with other accommodations, are repealed despite the continued existence of at least one other accommodation. For example, the repeal of a religious

---

416. 502 F.3d 616 (7th Cir. 2007).

417. *Id.* at 622.

418. *Id.*

419. *Id.* at 633.

420. *See id.* at 634 (holding that, because other religious cemeteries were not affected by the OMA, the Illinois legislature had a nondiscriminatory purpose for clearing the land needed for O'Hare airport's suggested expansion). The court's reasoning is arguably *dicta* because the court proceeded to hold that the legislation in question satisfied the test of strict scrutiny in any event. *Id.*

and philosophical exemption from a vaccine mandate while retaining a medical exemption.<sup>421</sup>

Prior to the Supreme Court's most recent pronouncements on the Free Exercise Clause, it would be reasonable to argue that such a repeal would not trigger strict scrutiny. As per this line of reasoning, the repeal legislation, by targeting both religious and nonreligious conduct, could be deemed neutral. Reviewed in isolation, this would appear to be so. But viewed in its fuller context—namely, the continued existence of at least one other (nonreligious) accommodation—a different picture emerges. What presents itself is a statutory or regulatory scheme in which a religious accommodation no longer exists but in which one or more nonreligious accommodations continue to exist. Especially in light of the Supreme Court's 2021 decision in *Tandon v. Newsom*, the constitutional propriety of this situation is highly doubtful.<sup>422</sup> In *Tandon*, the Court 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.”<sup>423</sup> Indeed, as explained in our discussion of the first scenario, a religious accommodation may be constitutionally compelled under circumstances such as those hypothesized here.<sup>424</sup>

---

421. See Kaminer, *supra* note 332, at 111 (noting that allowing physician-advised medical exemptions is uncontroversial because the purpose of a vaccine mandate is to promote health).

422. See *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–98 (2021) (per curiam) (noting that regulations which treat *any* secular conduct more favorably than religious conduct is subject to strict scrutiny and that applicants were likely to succeed on their Free Exercise claim because the government contained accommodations for secular activities but none on religious grounds).

423. *Id.* at 1296; accord *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67–68 (2020) (per curiam) (noting that policies requiring capacity limits on places of worship but not on a secular, large store were subject to strict scrutiny). I prescind from discussing additional actions taken by the Supreme Court during the pandemic that contained only the briefest of explanations, even those that were accompanied by lengthy concurrences or dissents. See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (mem.).

424. See *supra* text accompanying notes 407–15 (asserting that promulgating secular accommodations without also allowing religious accommodations is presumptively violative of the First Amendment).



4. *The repeal of a religious accommodation from a rule or regulation which had recognized no other grounds for accommodation*

The most difficult scenario would be that where a particular legal regime recognizes only religious accommodations thereto and said religious accommodations are subsequently repealed.

On the one hand, a repeal under such circumstances could be couched in facially neutral terms, as in “any and all accommodations to this regulation are hereby repealed.” Moreover, since “all” accommodations would be rescinded, the repeal would be technically neutral as well.

On the other hand, the substantive content of the repeal would be wholly and unavoidably focused on religion. No factfinder or serious observer would fail to discern that the object of the legislation in question is religious conduct that, for whatever reason, is no longer tolerable. This calls to mind, for example, the spectacle of the government’s decision to remove a longstanding religious monument, discussed previously—arguably giving rise to constitutionally problematic perceptions.<sup>425</sup>

This was not lost upon Judge Ripple who, in *St. John’s United Church of Christ v. City of Chicago*, authored a separate opinion concurring in part and dissenting in part.<sup>426</sup> *St. John’s United Church of Christ*, discussed previously, involved the curtailment of Illinois’s RFRA as part of the expansion of O’Hare International Airport.<sup>427</sup> The majority found this curtailment neutral because it was part of legislation designed to remove all impediments to the airport’s expansion, regardless of whether they might have been religious or secular in nature.<sup>428</sup> More specifically, it empowered the City of Chicago to relocate cemeteries

---

425. See *supra* text accompanying notes 399–402 (noting the difference in disallowing religious monuments and tearing down religious monuments, which may be perceived as hostile toward religion).

426. *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 644 (7th Cir. 2007).

427. See *supra* Section III.A.4 (discussing that Illinois, growing irritated with certain RFRA restrictions, was one of two states to amend their RFRA statutes to remove some of the protections the state had originally recognized); see also *supra* text accompanying notes 416–20 (discussing the Seventh Circuit’s holding that repealing a religious accommodation to expand the airport was constitutional, as it was generally applicable to *all* impediments to the project, not solely religious ones).

428. See *supra* text accompanying note 419 (noting that the law was facially neutral in this way).

or graves regardless of whether they were religiously affiliated or not.<sup>429</sup> But the majority's analysis failed in that the only cemeteries impacted by the amendment were religious ones.<sup>430</sup> Consequently, regardless of how the legislation was worded, when viewed in its full context, it lacks neutrality.<sup>431</sup> It would seem to me that, on this point at least, Judge Ripple's opinion comports better with Supreme Court precedent since *St. John's United Church of Christ* was decided (2007) than does the majority.

Thus, in a situation in which the only accommodation to a particular law is a religious accommodation, its repeal should be characterized as non-neutral regarding religion and thereby subject to strict scrutiny. The Supreme Court has simply been too insistent on the need to scrupulously police potential deviations from neutrality when it comes to the Free Exercise Clause to expect such government action to readily escape the judiciary's close inspection.

Recall again, however, that application of strict scrutiny does not ineluctably lead to victory on the part of the religious claimant. The government may very well be able to justify its conduct constitutionally. Although the hill is steep, it is not insurmountable. As previously explained, the government would need to demonstrate that the religiously significant distinctions it made were in furtherance of (1) a compelling state interest and (2) narrowly tailored so as to avoid infringing upon religious liberty.<sup>432</sup> And the government's ability to do so under this fourth scenario should be significantly improved vis-à-vis its ability to do so under other situations considered.<sup>433</sup> Whereas the government would be hard-pressed to justify the removal of a religious accommodation in light of the continued recognition of another (or other) accommodation(s), justification of the removal of the only

---

429. See *supra* text accompanying note 418 (noting that the text of the statute was facially neutral).

430. *St. John's United Church of Christ*, 502 F.3d at 644 (Ripple, J., concurring in part and dissenting in part).

431. *Id.* at 645.

432. See *supra* note 62 and accompanying text (initially discussing the two-fold test for strict scrutiny and that "narrowly tailored" requires that the means chosen by the government minimize the burden upon religious exercise while still pursuing the interest in question).

433. See Rebecca Bucchieri, *Religious Freedom Versus Public Health: The Necessity of Compulsory [sic] Vaccination for Schoolchildren*, 25 B.U. PUB. INT. L.J. 265, 267 (2016) ("When reviewing a legal challenge to the Mississippi RFRA, the state's Supreme Court specifically held that a state vaccination law without religious exemptions withstands strict scrutiny.").

accommodation to a law—even if religiously based—would seem to be a much lighter lift. Assertions of changed conditions would be far more likely to withstand scrutinization for indications of pretext when no other exemptions are retained.<sup>434</sup>

#### CONCLUSION

What emerges from the preceding analysis is a constitutionally relevant distinction between the world *ex ante* versus *ex post* a religious accommodation's promulgation. Before an accommodation's promulgation, a neutral law of general applicability would not ordinarily require a religious exemption. But following an accommodation's promulgation, any effort to turn back the clock and repeal that accommodation would virtually always require action on the part of government that was not neutral with regard to religion. The act of repeal would invariably target religious conduct in one of two ways: by specifically requiring certain religious adherents to comply with some provision of law that the government had previously permitted them not to comply with, or by forbidding some specific religious practice or undertaking that that the government had previously tolerated. Any proper assessment of such action on the part of government should almost always be characterized as non-neutral with respect to religion, thereby triggering the test of strict scrutiny.

---

434. *Cf. supra* note 89 and accompanying text (discussing the importance of a law's practical effects when courts assess its neutrality). Perhaps to avoid the prospect of strict scrutiny, a government actor may decide to repeal the underlying law itself (that is, not simply the accommodation to the law but the actual law that the accommodation attaches to), only to re-introduce it as a neutral law of general applicability *sans* any religious accommodation. Given the Supreme Court's insistence that government conduct be scrutinized for even "subtle departures" from religious neutrality, *see supra* text accompanying note 82, I do not believe that such machinations would ultimately affect the outcome of the situation; the courts will most likely prioritize substance over form and apply the appropriate standard of constitutional review for the repeal of a religious exemption. *See* *Fellowship of Christian Athletes v. San Jose Unified Sch. Bd. of Ed.*, 82 F.4th 664, 690 (9th Cir. 2023) (en banc) ("As part of evaluating the neutrality of government actions, we must therefore examine 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'").

Some who have considered this conclusion fear that, if correct, “it would create some very bad incentives.”<sup>435</sup> I refer once again to Christopher Lund, who warned that:

Once legislatures become aware that they cannot revoke religious exemptions, they will hesitate to ever give them. They will be particularly reluctant to give controversial religious exemptions and would never give across-the-board ones like state RFRAs. As a result then, we should have very limited judicial review over revocations of religious exemptions. The answer, I believe, must be this: legislatures should be as free to revoke religious exemptions as they are to deny them in the first instance. A religious group should only be able to challenge the revocation of a religious exemption on the same terms that it can challenge its outright denial.<sup>436</sup>

Professor Lund raises a very real concern: once we acknowledge that the creation of accommodations is a one-way street, we can indeed expect considerable reticence with respect to their future promulgation. But I would offer at least three thoughts in response.

First, given the Supreme Court’s most recent Free Exercise pronouncements (which Professor Lund’s 2010 comments predate by approximately a decade), the space between the situations where (1) a “religious group should . . . be able to challenge . . . [the] outright denial” of a religious accommodation and (2) all other situations of an accommodation’s repeal have narrowed considerably.<sup>437</sup> In light of *Tandon*, this would really seem to implicate solely those situations in which only a religious accommodation to a neutral law of general applicability exists. Aside from RFRA repeals or revisions (the former of which has not yet occurred and the latter of which has been exceedingly rare), situations involving the repeal of religious accommodations have typically involved the presence of other, nonreligious accommodations which were permitted to persist. Consequently, religious claimants would have a strong argument that a religious accommodation is constitutionally compelled under such circumstances, thereby mooting the issue of whether its repeal was constitutionally impermissible.

---

435. See Lund, *supra* note 14, at 495 (discussing his primary concern that subjecting the revocation of religious exemptions to strict scrutiny would disincentivize the legislature from allowing religious exemptions from the very start).

436. *Id.*

437. See Lund, *supra* note 14, at 495 (arguing that when legislatures have the same power to rescind religious exemptions as they do to reject them initially, this power can be abused as evidenced by the *St. John’s* and *Freeman* cases).

Second, and the most principled of my three responses, is the perspective that we ought to interpret the Constitution as correctly as possible, regardless of our personal policy preferences.

Third, American society is increasingly turning away from religion and, concomitantly, its historical embrace of religious freedom.<sup>438</sup> A vivid sign of this is, indeed, the repeal of long-established religious accommodations that has been the focus of this Article.<sup>439</sup> This suggests that fears regarding any disinclination to recognize future religious accommodations on account of the conclusions reached herein may be overblown. Rather, the greater risk is in continued acceptance of the prevailing wisdom that governments have largely free rein to revoke religious accommodations. For this invites abuse, particularly of those religious groups and minorities that find themselves too unpopular to sustain an accommodation accruing to their benefit.<sup>440</sup> Thus, for those who cherish a robust approach to religious liberty, an interpretation of the Constitution that obstructs the rescission of existing religious accommodations while perhaps simultaneously disincentivizing future ones may be a welcomed trade-off.<sup>441</sup>

---

438. See Ronald J. Colombo, *The Past, Present, and Future of Christian ADR*, 22 *CARDOZO J. CONFLICT RESOL.* 45, 67–68 (2020) (noting the rise of nonreligious affiliations by the American public and the increasing sentiment that religious tolerance may not be necessary as it once was).

439. See *supra* Section III.A (providing an overview of historical repeals of religious accommodations, including vaccine exemptions for healthcare workers and in schools, child-endangerment laws, and modification of state RFRAs).

440. See Lund, *supra* note 14, at 495 (discussing Florida's modification of its RFRA by requiring full-face photographs for identification cards, which excludes unpopular religious groups from coverage under the law).

441. As a post-script, I cannot fail to acknowledge that much—although certainly not all—of the analysis herein may be mooted should the Supreme Court decide to overrule its 1990 decision in *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), the possibility of which is far from negligible.