THE ROBERTS COURT'S TRANSFORMATIVE RELIGIOUS FREEDOM CASES: THE DOCTRINE AND THE POLITICS OF GRIEVANCE

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Numerous commentators are speculating about where the new incarnation of the Roberts Court, with its solid bloc of six conservative justices, will take constitutional law.[1] Will the Court resurrect the nondelegation doctrine, dormant since 1935, as a way to undermine the administrative state?[2] Will the Court overrule *Roe v. Wade* and eliminate the right to choose abortion?[3] The justices themselves have hinted in their opinions at potential dramatic changes.[4] But in one area, First Amendment

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[1] Adam Liptak, *New Supreme Court Term Could End Roberts's Dominant Role*, N.Y. TIMES (Oct. 4, 2020), https://www.nytimes.com/2020/10/04/us/politics/supreme-court-roberts.html; Cass R. Sunstein, *What's at stake in a new Supreme Court*, BOSTON GLOBE (Sept. 19, 2020), https://www.bostonglobe.com/2020/09/19/opinion/whats-stake-new-supreme-court/; *How Amy Coney Barrett Would Reshape the Court—and the Country*, POLITICO (Sept. 26, 2020), https://www.politico.com/news/magazine/2020/09/26/amy-barrett-scotus-legal-experts-422028 (compiling comments from several constitutional law experts).

[2] *E.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating regulation adopted pursuant to National Industrial Recovery Act as violating nondelegation doctrine).

[3] Roe v. Wade, 410 U.S. 113 (1973). Editor's Note: As of time of publication, the Court has announced its intention to overrule Roe. The author and the Cardozo Journal of Equal Rights and Social Justice stands firm in their belief that the right to an abortion is fundamental and protected by the Constitution.

[4] *See* Food & Drug Admin. v. Am. College of Obstetricians & Gynecologists, _ S. Ct. _ (No. 20A34; U.S. Jan. 12, 2021) (order allowing reinstatement of restrictive rule on use of abortifacient pill); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2142 (2020) (Thomas, J., dissenting) (arguing that

religious freedom cases, the justices have already gone further. Under the Establishment and Free Exercise Clauses, the Court has begun to dismantle decades-old doctrines while articulating new approaches.[5] This Article analyzes where the justices are taking religious freedom and why they are doing it.[6]

A premise of this analysis is that law and politics dynamically interact in Supreme Court decision making, as an increasing number of legal scholars and political scientists recognize.[7] Supreme Court adjudication is not separate and independent from politics, though the law is neither mere window-dressing nor subterfuge for the justices' political machinations.[8] In

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the Court's "abortion precedents are grievously wrong and should be overruled"); Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment) (expressing desire to resurrect nondelegation doctrine).

[5] U.S. CONST. amend. I; *see* Marc O. DeGirolami, Constitutional Contraction: Religion and the Roberts Court, 26 STAN. L. & POL'Y REV. 385 (2015) (arguing the Roberts Court is narrowing the scope of both religion clauses).

[6] Useful sources on the history of religious freedom include the following: NAOMI W. COHEN, JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY (1992); NOAH FELDMAN, DIVIDED BY GOD (2006); STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (1997) [HEREINAFTER FELDMAN, PLEASE DON'T]; PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986). ON THE HISTORY OF AMERICAN RELIGION, SEE THE FOLLOWING: SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE (1972); JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE (1990); ROBERT T. HANDY, A CHRISTIAN AMERICA (2D ED. 1984); NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989); WINTHROP S. HUDSON & JOHN CORRIGAN, RELIGION IN AMERICA (5TH ED. 1992); MARTIN E. MARTY, PROTESTANTISM IN THE UNITED STATES: RIGHTEOUS EMPIRE (2D ED. 1986).

[7] MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 15-16, 65-66 (2011); CHARLES GARDNER GEYH, COURTING PERIOL 8 (2016); LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789-2008 (2009); Lawrence Baum, *Law and Policy: More and Less Than a Dichotomy*, *in* WHAT'S LAW GOT TO DO WITH IT? 71 (Charles Gardner Geyh ed., 2011); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001); Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465 (2001). "Everyone ought to agree that decisions on highly contentious matters blend law and politics." MARK TUSHNET, TAKING BACK THE CONSTITUTION 219 (2020). "[N]o serious analyst would today contend that the decisions of the justices of the Supreme Court are independent of the personal ideologies of the judges. In this sense, legal realism has carried the day." James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 196 (2011).

[8] Some political scientists treat Supreme Court decision making as being determined solely by politics. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). With regard to legal reasoning and judicial opinions, Martin Shapiro wrote: "Courts and judges always lie. Lying is the nature of the judicial activity." Martin Shapiro, *Judges As Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994). Of course, many legal scholars still insist that courts should decide cases without politics having any influence. For example, originalists maintain that originalist methodology produces purely legal conclusions and removes politics from adjudication. ROBERT BORK, THE TEMPTING OF AMERICA 5-6, 143-44 (1990); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOYOLA L. REV. 611 (1999).

most cases, the justices sincerely interpret the relevant legal texts—the Constitution, statutes, executive orders, and so on—but interpretation is never mechanical. No algorithmic method reveals the correct meaning of the text; constitutional interpretation, in particular, is never merely two plus two equals four.[9] Instead, the justices' political horizons always influence their interpretive understandings of the texts.[10] For this reason, the justices' legal interpretations and conclusions typically coincide with their respective political preferences.[11]

Given the normal political characterizations of the justices, as explained by many political scientists, we can readily understand why the Roberts Court consistently hands down conservative decisions.[12] Empirical studies underscore the political tilt of the Court.[13] Ever since the conservative Clarence Thomas replaced the liberal Thurgood Marshall in 1991, conservative blocs of justices have controlled the Rehnquist and Roberts Courts. These conservative justices have interpreted (and continue to interpret) the Constitution and other legal texts from within their conservative political (or interpretive) horizons. On the Rehnquist Court, running from 1986 to 2005, the bloc of Chief Justice William Rehnquist and Justices

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[9] HANS-GEORG GADAMER, TRUTH AND METHOD 295, 309, 365 (Joel Weinsheimer & Donald Marshall trans., 2d rev. ed. 1989); Ronald Dworkin, *How Law is Like Literature*, *in* A MATTER OF PRINCIPLE 146, 160 (1985).

[10] Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics Into Mayonnaise*, 12 GEO. J. L. & PUB. POL'Y 57, 79-80 (2014) [hereinafter Feldman, Alchemy] (explaining the concept of an interpretive horizon and the formation of horizons); Calvin TerBeek, *Originalism's Obituary*, 2015 UTAH L. REV. ONLAW 29, 47 (2015) (criticizing originalism's quest for objectivity because constitutional interpretation is "inextricably intertwined with politics").

[11] Feldman, Alchemy, *supra* note 10, at 79-80.

[12] *E.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (refusing to invalidate extreme partisan gerrymandering); Abbott v. Perez, 138 S. Ct. 2305 (2018) (upholding Texas voting restrictions); Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (invalidating state law restricting corporate sale of medical data); Citizens United v. FEC, 558 U.S. 310 (2010) (invalidating restriction on corporate campaign expenditures); Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (invalidating race-based affirmative action programs); *see* STEVEN M. FELDMAN, PACK THE COURT! A DEFENSE OF SUPREME COURT EXPANSION (Temple University Press 2021) [hereinafter FELDMAN, PACK] (discussing conservatism of Roberts Court decisions); STEPHEN M. FELDMAN, THE NEW ROBERTS COURT, DONALD TRUMP, AND OUR FAILING CONSTITUTION 173-86 (2017) [hereinafter FELDMAN, NEW] (same).

[13] For rankings of Supreme Court justices based on political ideology, see LEE EPSTEIN, WILLIAM M. LANDES, AND RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 106-16 (2013), which includes comparisons with the Martin-Quinn scores (accounting for changes over time) <http://mqscores.wustl.edu/index.php>, and the Segal-Cover scores (quantifying Court nominees' perceived political ideologies at the time of appointment) <http://www.sunysb.edu/polsci/jsegal/qualtable.pdf> (data drawn from Jeffrey Segal & Albert Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 AM. POL. SCI. REV. 557-565 (1989); updated in LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005)); *see also* Lee Epstein, William M. Landes, and Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013) (focusing on the politics of justices in relation to business-related decisions).

Antonin Scalia, Sandra Day O'Connor, Anthony Kennedy, and Thomas often voted together and handed down conservative decisions.[14] On the early Roberts Court, beginning in the fall of 2005, the bloc of Chief Justice John Roberts and Justices Scalia, Thomas, Kennedy, and Samuel Alito likewise voted together to hand down conservative decisions.[15] Nevertheless, on both the Rehnquist and the early Roberts Courts, at least one conservative justice could occasionally be persuaded to vote with the progressive justices, even in politically salient cases.[16] But during the years of Donald Trump's presidency, because of justices' deaths and retirements (and the Republican-controlled Senate's maneuverings), the Roberts Court has become even more conservative—with Neil Gorsuch replacing Scalia, Brett Kavanaugh replacing Kennedy, and most important, Amy Coney Barrett replacing Ruth Bader Ginsburg.[17] With a conservative bloc of six justices, the Court seems even less likely to reach progressive conclusions.

The current conservative justices hold their six-to-three majority, it should be emphasized, even though the Democrats have won the popular vote in seven out of the last eight presidential elections.[18] In fact, since Earl Warren retired as Chief Justice in 1968, Republican candidates have won the popular vote in only six of the fourteen presidential elections, yet Republican presidents have nominated sixteen of the nineteen confirmed justices.[19]

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[14] *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act); City of Boerne v. Flores, 521 U.S. 527 (1997) (invalidating Religious Freedom Restoration Act of 1993); United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act); New York v. United States, 505 U.S. 144 (1992) (focusing on Tenth Amendment).

[15] *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that political gerrymandering, no matter how extreme, is a nonjusticiable political question); Shelby County v. Holder, 133 S. Ct. 2612 (2013) (invalidating section of Voting Rights Act).

[16] *See, e.g.*, National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012) (upholding statutory individual mandate under congressional taxing power).

[17] *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (invalidating California governor's executive order restricting religious gatherings because of Covid-19, after Court had previously upheld a similar order).

[18] Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court; *Share of Popular Votes for the Democratic and Republican Parties in Presidential Elections From 1860 to 2020*, STATISTA, https://www.statista.com/statistics/1035521/popular-votes-republican-democratic-parties-since-1828/.

[19] I am not double-counting justices nominated and confirmed twice, first as an associate justice and then as the chief justice. Supreme Court of the United States, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_of_the_United_States; United States Senate, Supreme Court Nominations (1789-Present), SENATE.GOV, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm. In 2020, Geoffrey R. Stone and David A. Strauss wrote: "[In] the 50 years after Earl Warren's retirement, Republican presidents appointed fourteen of the eighteen justices who joined the Supreme Court. This was so even though Republican presidential candidates won the popular vote in only six of thirteen elections in that era." GEOFFREY R. STONE & DAVID A. STRAUSS, DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT 160 (2020). Given these facts, one would

Significantly, though, the Court's conservatism does not reflect merely the changing personnel sitting on the bench. We must recognize that political and judicial conservatism has changed over recent decades (just as liberalism or progressivism has changed).[20] And much of judicial conservatism today revolves around 1937—or more precisely, an abhorrence of 1937.[21]

As many scholars, both conservative and progressive, have recognized, the Supreme Court transformed its constitutional jurisprudence starting around 1937.[22] Most important, the Court became friendlier toward the New Deal.[23] Thus, the Court began deferring to Congress's decisions about the scope of its commerce power rather than limiting Congress to the Court's formalist conceptions of a common good.[24] But the post-1937 Court also began emphasizing individual rights to believe and express diverse

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be hard-pressed to argue reasonably that the justices' political views during recent years (and decades) coincide with the views of an American majority.

[20] Useful sources on conservatism during the latter half of the twentieth century and the early-twenty-first century include the following: SARA DIAMOND, ROADS TO DOMINION (1995); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (2001); GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945 (2008 ED.; 1ST ED. 1976); DANIEL T. RODGERS, AGE OF FRACTURE (2011); ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S (2012); SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY, 1974-2008 (2008); PETER BERKOWITZ, INTRODUCTION, IN VARIETIES OF CONSERVATISM IN AMERICA XIII (2004); Adam Wolfson, *Conservatives and Neoconservatives* (2004), *reprinted in* THE NEOCON READER 213 (Irwin Stelzer ed., 2004). Useful sources on neoliberalism, which has influenced conservatism for decades, include the following: DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005); DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS (2012). Useful sources on the white power movement, which has merged into the conservative political mainstream, include the following: KATHLEEN BELEW, BRING THE WAR HOME (2018); LEONARD ZESKIND, BLOOD AND POLITICS: THE HISTORY OF THE WHITE NATIONALIST MOVEMENT FROM THE MARGINS TO THE MAINSTREAM (2009). On the influence of the white power movement during the Trump years, *see* BELEW, *supra* note 20 at 237-39.

[21] I am focusing on the substance of judicial conservatism rather than its methodology, which many would characterize as originalist. *See* Stephen M. Feldman, *Justice Scalia and the Originalist Fallacy*, *in* THE CONSERVATIVE REVOLUTION OF ANTONIN SCALIA 189 (arguing that Scalia reached conservative results without being a thoroughgoing originalist).

[22] BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); DAVID E. BERNSTEIN, REHABILITATING LOCHNER (2011); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 349-82 (2008) [hereinafter FELDMAN, FREE EXPRESSION]; HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUIONAL LAW (2004); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN (1995); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

[23] LEUCHTENBURG, *supra* note 22 at 213-36.

[24] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *see* FELDMAN, *supra* note 22 at 383-419. (explaining the Court's transition). For a discussion of the Court's post-1937 treatment of religious freedom cases, see FELDMAN, PLEASE DON'T, *supra* note 6 at 218-54. For a discussion of the Court's post-1937 treatment of free-expression cases, see FELDMAN, *supra* note 22, at 383-419.

values, especially within the democratic process.[25] And once the Warren Court further invigorated the judicial protection of individual rights, many conservatives began advocating for judicial restraint.[26] According to this conservative outlook, voiced mostly from the 1960s to the mid-1980s, the Court should have deferred more to the democratic process in individual rights cases.[27] Often, the conservative judicial restraint position included a federalism component: The Court should show special respect and deference for the sovereign power of state governments.[28] Eventually, some conservative scholars began to develop more sophisticated historical arguments to support their advocacy for judicial restraint; these scholars were among the first originalists.[29]

Yet, once Thomas replaced Marshall on the Court and created a solid conservative majority, conservative scholars and jurists became less interested in judicial restraint and federalism and more committed to "judicial engagement."[30] Around this time, originalists began to argue that the Court should assertively articulate and implement conservative positions rather than defer to democracy and state sovereignty.[31] Following in this vein, conservative scholars and jurists more aggressively denigrated the Court's 1937 transformation. One-time Supreme Court nominee, Douglas Ginsburg, maintained that the Court should restore the "Constitution in exile."[32] The

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[25] *Martin v. City of Struthers* invalidated a conviction under an ordinance proscribing door-to-door distributions of written materials. 319 U.S. 141 (1943). The Court stressed that "[f]reedom to distribute information … is so clearly vital to the preservation of a free society that … it must be fully preserved." *Id*. at 146-47; *see* FELDMAN, *supra* note 22, at 392-407 (discussing free expression after 1937 turn).

[26] LUCAS A. POWE, JR. THE WARREN COURT AND AMERICAN POLITICS (Harv. Univ. Press 2002) (placing the Warren Court in a political context).

[27] Alexander Bickel, late in his life, and Robert Bork, early in his career, were leading advocates of judicial restraint. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 25-28 (Yale Univ. Press 1977); Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L. Q. 695, 695 (arguing against a right to welfare as being neither a specified right nor a secondary right necessary to government processes); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L .J. 1, 6-11 (1971) [hereinafter Bork, *Neutral*] (arguing that legislatures should choose fundamental values).

[28] *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION (Aspen Publishers 5th ed. 2007) (discussing concept of "Our Federalism").

[29] Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 251-52 (2019); Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. Pol'y 599, 602 (2004) (arguing that new originalists tend not to urge judicial restraint); *see, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (Liberty Fund, 1977) (arguing to follow the framers' original intentions).

[30] CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 10 (Encounter Books 2013); Balkin, *supra* note 29, at 255.

[31] Balkin, *supra* note 29, at 255-60; Whittington, *supra* note 29, at 608-09.

[32] Douglas H. Ginsburg, *Delegation Running Riot,* REGULATION NO. 1, 83-84 (1995).

conservative scholar, Randy Barnett, titled one of his books, *Restoring the Lost Constitution*,[33] while Richard Epstein argued the Court should reverse "the mistakes of 1937."[34] Meanwhile, Justice Thomas declared that the Court took a "wrong turn" in 1937.[35]

In short, conservatives argued that the Court needed to repudiate its post-1937 constitutional jurisprudence in order to return to the true American Constitution. To be sure, many of these arguments focused on the scope of Congress's power and the development of an administrative state—elements central to the New Deal.[36] Yet, some scholars extended the anti-1937 position to First Amendment issues, primarily related to free expression but also to religious freedom.[37] "[T]he constitutional law of the First Amendment [after 1937] has not been built on the precedents and principles of the past," Walter Berns wrote, in criticizing the Court.[38] "One looks almost in vain for references in the Court's opinions to what the great [nineteenth-century] commentators—Story, Kent, and Cooley, for example—have written on freedom of speech and religion, or to what the Founders intended with the First Amendment."[39] Robert Bork, discussing religion, castigated the post-1937 Court for creating a strict wall of separation between church and state contrary to the original meaning of the First Amendment.[40] Based on that wall of separation, the Court had held, for example, that prayers in public schools were unconstitutional—a religious practice that "the states had employed for many years."[41]

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[33] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (Princeton Univ. Press 2004).

[34] Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON L. REV. 5, 20 (1988-1989).

[35] United States v. Lopez, 514 U.S. 549, 599 (1995) (Thomas, J., concurring).

[36] *E.g.*, RICHARD A. EPSTEIN, TAKING: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 280-81 (Harv. Univ. Press 1985) (arguing that most current economic and social welfare laws, including those rooted in the New Deal, are invalid).

[37] WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (Basic Books 1976) [hereinafter BERNS, FUTURE]; WALTER BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT (1957); BORK, *supra* note 8, at 94-95; Bork, *Neutral*, *supra* note 27, at 20-35 (discussing free speech but not religion); Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion,* 103 HARV. L. REV. 1409 (1990). Berns was a political scientist, while Bork and McConnell were law professors.

[38] BERNS, FUTURE, *supra* note 37, at 233.

[39] *Id.*

[40] BORK, *supra* note 8, at 94-95.

[41] *Id.* at 95; Engel v. Vitale, 370 U.S. 421 (1962); *see* ROBERT CORD, SEPARATION OF CHURCH AND STATE (1982) (articulating a conservative history of the separation of church and state). In a renowned article, Michael McConnell argued that, pursuant to the original meaning of free exercise, the Court should not defer to the political process when a law of general applicability burdens religious conduct. McConnell, *supra* note 37, at 1488-1500. For a more recent examination of the historical evidence concerning religious exemptions, see Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55 (2020).

The thesis of this Article is that the Roberts Court, to a great extent, has adopted this conservative approach in religious freedom cases, returning to some supposedly idyllic pre-1937 constitutional jurisprudence—sustaining a white, Christian America.[42] The result is an emerging First Amendment jurisprudence that not only allows government support for Christian activities and symbols but also sometimes forces the government to provide such support. This emerging jurisprudence, moreover, allows Christian institutions to discriminate with impunity while anxiously protecting Christians from ostensible discrimination.[43] With ominous frequency, the conservative justices have expressed a type of Christian grievance, indignant that the nation's religiously diverse population does not welcome manifestations of de facto Christianity.[44] The Roberts Court's engaged judicial conservatism, to be clear, ignores prior conservative concerns for judicial restraint and federalism.[45]

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[42] While this Article focuses on religion and the Court's favoring of Christianity, the conservative justices also favor whites over people of color. FELDMAN, PACK, *supra* note 12. Moreover, the politics of religion and race overlap. Christian fundamentalists and evangelicals have become deeply conservative, often aligning themselves with "nationalistic, and racist politics." AHLSTROM, *supra* note 6, at 959; *see* JEMAR TISBY, THE COLOR OF COMPROMISE: THE TRUTH ABOUT THE AMERICAN CHURCH'S COMPLICITY IN RACISM 153 (2019) (on racism and evangelicalism). As Tisby writes: "American evangelicalism became virtually synonymous with the GOP and whiteness." TISBY, *supra*, at 153. Unsurprisingly, then, despite Donald Trump's character flaws, white evangelicals closely identified with his message of white, Christian grievance. TISBY, *supra*, at 188-89; *see* ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 329 (2020) (emphasizing that white evangelicals are now the Republican base). To be clear, white evangelicals, partly from a sense of resentment and anxiety, are far more conservative than Black American, Latinx, and Asian American evangelicals. Janelle Wong, *The Evangelical Vote and Race in the 2016 Presidential Election*, 3 J. RACE, ETHNICITY, AND POLITICS 81, 81-82, 94 (2018); *see* Seth Dowland, *American Evangelicism and the Politics of Whiteness*, The Christian Century (June 19, 2018) (emphasizing that white evangelicals "rallied around Trump to defend a white Protestant nation"). In fact, a majority of white evangelicals believe that, as white Christians, they face greater discrimination than do people of color and non-Christians, including Muslims. Wong, *supra*, at 82, 95-101.

[43] *See* Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, _ S. CT. REV. _ (forthcoming) (quantitative study concluding that the religious views of the Roberts Court justices have influenced their religious freedom votes and decisions).

[44] On white Christian resentment and grievance in general, see the following: TISBY, *supra* note 42, at 188-89; WILKERSON, *supra* note 42, at 330-32; Dowland, *supra* note 42; Wong, *supra* note 42.

[45] Empirical studies have shown that non-legal (or non-judicial) factors, including political orientations, influence judicial decisions in religious freedom cases. *See* Epstein & Posner, *supra* note 43 (focusing on the Roberts Court justices and religion); Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371 (2013) (empirical study of federal court of appeals and district court judges showing that extra-judicial factors influenced Free Exercise Clause decisions); Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201 (2012) (empirical study of federal court of appeals and district court judges showing that politics strongly influences their decisions in Establishment Clause cases); Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision Making*, 15 WM. & MARY BILL RTS. J. 43 (2006) (summarizing empirical studies related to the influence of non-legal factors in religious freedom cases).

Part I of this Article sketches the American understanding of religious freedom before 1937. From the framing to around 1937, most (Christian) Americans simultaneously believed that they enjoyed religious freedom and that the United States was de facto Christian. Part II explores how the Court interpreted religious freedom after 1937; this part focuses first on the Establishment Clause and then the Free Exercise Clause. During this post-1937 era, the Court expanded protections of religious freedom under both clauses, with the justices often displaying sensitivity toward non-Christian and other minority religions. Part III turns to the Roberts Court and its transformation of religious freedom. This part also focuses first on the Establishment Clause and then the Free Exercise Clause. The discussion of free exercise culminates with a focus on *Fulton v. City of Philadelphia*, the Court's most prominent free exercise decision from last term.[46] Part IV is a brief conclusion.

I. THE LIMITS OF RELIGIOUS FREEDOM BEFORE 1937

Before 1937, the Supreme Court rarely decided cases involving religious freedom. And in those handful of cases, the Court primarily protected and bolstered a societal commitment to being a de facto Protestant Christian nation.[47] Joseph Story, a Supreme Court justice and the leading legal scholar of the antebellum period, asserted his firm belief in religious freedom.[48] Yet he emphasized that "it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects."[49] The government, through its laws and institutions, can "foster and encourage the Christian religion" because Christianity is "the religion of liberty."[50] Thus, when he focused on the Establishment Clause, Story unequivocally stated that religious freedom did not entail the

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[46] Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

[47] *E.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (upholding federal conviction for polygamy). To be clear, for much of the nation's history, Protestant anti-Catholicism influenced the American understanding of religious freedom. FELDMAN, PLEASE DON'T, *supra* note 6, at 119-20, 190, 201, 203, 207, 223-24; HAMBURGER, *supra* note 6, at 193-251. Thus, one can accurately depict the nation as de facto Protestant—certainly throughout the nineteenth century—but sometime during the twentieth century, as Protestant-Catholic tensions eased, the nation became de facto Christian, encompassing both Protestantism and Catholicism. Other helpful sources on Protestant-Catholic relations and their implications for the Supreme Court's religious freedom decisions include the following: Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121 (2001); John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

[48] Story emphasized "the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1865 (1833); *see id.* at §1870 (emphasizing freedom of conscience).

[49] Id. at §1865.

[50] *Id.* at §1867.

equivalence of non-Christian religions with Christianity: "The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment."[51]

Given that such views of religious freedom were typical among legal scholars,[52] one should not be surprised to find government officials acting in ways to reinforce Christianity. For example, the Governor of South Carolina, James H. Hammond, issued a Thanksgiving proclamation in 1844 that called the United States a Christian nation and invited "our Citizens of all denominations to Assemble at their respective places of worship to offer up their devotions to God the Creator, and his Son Jesus Christ, the redeemer of the world."[53] When Jewish citizens of Charleston, South Carolina, protested, Hammond did not mince his words in response:

The simple truth is, that at the time of writing my Proclamation it did not occur to me, that there might be Israelites, Deists, Atheists, or any other class of persons in the State who denied the divinity of Jesus Christ. [But] as you force me to speak, it is due to candour to say, that had I been fully on my guard, I do not think I should have changed the language of my Proclamation! and that I have no apology to make for it now.… I must say that up to this time, I have always thought it a settled matter that I lived in a Christian land![54]

Hammond, in other words, first maintained that he did not realize that some South Carolinians were Jewish or otherwise non-Christian. But even if he had realized as much, he would not have changed his message because South Carolina, like the nation as a whole, was Christian. Moreover, as if this response were insufficient, Hammond proceeded to add a standard Christian antisemitic trope, memorialized in the New Testament, by accusing the Jews of bearing responsibility for crucifying Jesus.[55]

Alexis de Tocqueville, when visiting the United States in the 1830s, observed that "there is no country in the world where the Christian religion retains a greater influence over the souls of men than in America."[56]

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[51] *Id.* at §1871. Story therefore believed state establishments were acceptable.

[52] For example, James Kent wrote: "[W]e are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of [non-Christian] impostors." *People v. Ruggles*, 8 Johns. R. 290 (N.Y. 1811), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 101, 101 (Philip B. Kurland & Ralph Lerner eds., 1987).

[53] Exchange of Letters on South Carolina Gov. Hammond's Thanksgiving Proclamation of 1844, with a Public Protest, *reprinted in* RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 112, 113 (Jonathan D. Sarna & David G. Dalin eds., 1997).

[54] *Id.* at 116.

[55] *Id.* at 117; *see* FELDMAN, PLEASE DON'T, *supra* note 6, at 10-21 (explaining the development of this antisemitic trope).

[56] ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA (Henry Reeve trans., Francis Bowen & Phillip Bradley eds, Vintage Books ed. 1990)

Government and Protestantism, he added, flowed together "in one undivided current."[57] In short, "[i]n the United States, Christianity itself is an established and irresistible fact."[58] Near the close of the nineteenth century, in 1888, another visitor to the United States, James Bryce, observed similarly that "Christianity is in fact understood to be, though not the legally established religion, yet the national religion."[59] Americans, he added, "deem the general acceptance of Christianity to be one of the main sources of their national prosperity, and their nation a special object of the Divine favour."[60]

Predictably, through much of American history, judges proclaimed that Christianity was part of the common law (or some similar maxim).[61] An 1844 case, *Vidal v. Girard's Executors*, involved the legality of a will in the state of Pennsylvania.[62] Justice Story reasoned that, even though the state constitution included anti-establishment and free exercise clauses, "Christianity [is] a part of the common law of the state [in that] its divine origin and truth are admitted.…"[63] Therefore, Story added, Christianity was "not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public."[64] In dicta, Story noted, the Court did not need to consider the "legal effect of a devise in Pennsylvania … for the propagation of Judaism, or Deism, or any other form of infidelity [because such] a case is not to be presumed to exist in a Christian country."[65] Likewise, in a unanimous 1892 decision, *Church of the Holy Trinity v. United States*, the Supreme Court declared that "this is a Christian nation."[66] Even in 1931, the Supreme Court stated: "We are a Christian people.…"[67]

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[57] *Id.* at 302.

[58] *Id.*

[59] JAMES BRYCE, 2 THE AMERICAN COMMONWEALTH (3d ed. 1894).

[60] *Id.*

[61] Stuart Banner, *When Christianity was Part of the Common Law*, 16 LAW & HISTORY REV. 27, 27 (1998).

[62] Vidal v. Girard's Executors, 43 U.S. 127 (1844).

[63] *Id.* at 198.

[64] *Id.*

[65] *Id.*

[66] 143 U.S. 457, 471 (1892).

[67] United States v. MacIntosh, 283 U.S. 605, 625 (1931); *see* COHEN, *supra* note 6, at 55-58 (discussing the notion that Christianity was part of the common law); B.H. Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 YALE L.J. 659 (1930) (tracing the notion that Christianity is part of the common law to Lord Coke). On the development of church-state separation during the nineteenth century, *see* FELDMAN, PLEASE DON'T, *supra* note 6, at 175-203 (1997); HAMBURGER, *supra* note 6. In 1952, the Court stated: "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." Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

In 1853, clergyman and professor Bela Bates Edwards pithily summarized the traditional American view of religious freedom: "Perfect religious liberty does not imply that government of the country is not a Christian government."[68] Moreover, when Christians have perceived a threat to their traditional dominance of American society, they have reacted by reasserting and reinforcing Christian power. For instance, in the late-nineteenth and early-twentieth centuries, immigration from southern and eastern Europe was heavy—some years saw more than one million immigrants.[69] Large swaths of these immigrants were eastern European Jews. Many old-stock white Protestant Americans warily viewed these immigrants as racially inferior—a threat to the integrity and demographic makeup of the United States.[70] In 1911, the United States Immigration Commission (the Dillingham Commission) issued a multi-volume report, including a *Dictionary of Races or Peoples*.[71] The Commission report ostensibly proved that Jews, Slavs, and Italians—southern and eastern Europeans—constituted races of lower morality and intelligence than white Anglo-Saxon Protestants.[72] In short, the report and its *Dictionary* were unapologetically and virulently racist and antisemitic: "The 'Jewish nose,' and to a less degree other facial characteristics," the *Dictionary* asserted,[73] "are found well-nigh everywhere throughout the race, although the form of the head seems to have become quite the reverse of the Semitic type."[74] Such racist and antisemitic views were commonplace in the United States. To take one illustration, an anthropologist at the American Museum of Natural History condemned Jews in 1916 for their "dwarf stature, peculiar mentality, and ruthless concentration on self-interest [which were then, through

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[68] HANDY, *supra* note 6, at 49 (quoting BELA BATES EDWARDS, 1 WRITINGS OF BELA BATES EDWARDS 490 (Boston 1853)); *accord* Philip Schaff, *Church and State in the United States* (1888), *reprinted in* CHURCH AND STATE IN AMERICAN HISTORY 151 (John F. Wilson & Donald L. Drakeman eds., 2d ed. 1987).

[69] *Total Number of Immigrants Arriving Annually in the United States, 1820-1980*, *in* ERIK W. AUSTIN, POLITICAL FACTS OF THE UNITED STATES SINCE 1789 470 (1986) (Table 7.4).

[70] For example, in 1909, the General Assembly of Virginia sent a petition to Congress that emphasized "Anglo-Saxon supremacy" and sought a limitation on southern European immigration. E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, 145 (1981). This hostility was not unique in American history. For instance, during the mid-nineteenth century, many Protestant Americans similarly viewed Irish Catholic immigrants with hostility. FELDMAN, *supra* note 22, at 39.

[71] U. S. IMMIGR. COMM'N, DICTIONARY OF RACES OR PEOPLES (Dec. 5, 1910) (printed 1911).

[72] *E.g., id*. at 81-83 (describing Italians as "having little adaptibility to highly organized society" and displaying a high degree of criminality and illiteracy); The *Dictionary* expressly stated its purpose: "[to promote] a better understanding of the many different racial elements that are being added to the population of the United States through immigration." *Id.* at 2.

[73] *Id.* at 74.

[74] *Id.*

immigration] being engrafted upon the stock of the nation."[75] The Commission report supported a push for legislative restrictions on immigration, a push that succeeded with the imposition, in 1921 and again in 1924, of severe quotas restricting immigration from southern and eastern Europe.[76]

To be sure, Jews and other religious minorities frequently wanted to immigrate to the United States because they hoped to fare better here than in their countries of origin. In the late-nineteenth and early-twentieth centuries, for instance, Jews desperately wanted to flee from the pogroms of eastern Europe, particularly in Russia.[77] Yet, the widespread Jewish preference for the United States over czarist Russia and other eastern European countries did not diminish the degree to which America was de facto Christian, and often aggressively so. For most of American history, religious freedom was understood largely from that perspective. American society formally and informally recognized and supported white, Christian supremacy and privilege. The Supreme Court's interpretation of religious freedom would change after 1937, as is discussed in the next part of this Article. But these judicial changes should not obscure that de facto Christianity and the concomitant antisemitism never disappeared in the United States. One poll taken toward the end of World War II underscores this fact. In 1944, while the United States continued to battle against Japan and Germany, twenty-four percent of Americans identified Jews as the single national, religious, or racial group that presented the greatest menace to Americans; only nine percent identified Japanese, and six percent chose Germans.[78]

II. RELIGIOUS FREEDOM AFTER 1937 (PRE-ROBERTS COURT)

A. Establishment Clause

The Court did not even apply (or incorporate) the Establishment Clause against state and local governments until 1947.[79] Before that point, any state or local infringements on anti-establishment principles could be challenged, for the most part, only pursuant to state constitutional provisions.[80] In the 1947 case, *Everson v. Board of Education*, the Court

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[75] HOWARD M. SACHAR, A HISTORY OF THE JEWS IN AMERICA 321 (1992) (quoting Madison Grant, The Passing of the Great Race (1916)).

[76] HUTCHINSON, *supra* note 70, at 175-76, 187-92; *e.g.*, *Immigration Act of 1924*, *reprinted in* 2 DOCUMENTS OF AMERICAN HISTORY 372 (Henry Steele Commager ed., 3d ed. 1947).

[77] SACHAR, *supra* note 75, at 323-24. From 1919 to 1921, approximately 60,000 Jews were killed near the Russian-Polish border. ARTHUR HERTZBERG, THE JEWS IN AMERICA 298 (1989).

[78] LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA 131 (1994).

[79] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[80] Before 1947, issues related to religious freedom (and free expression) were occasionally brought as substantive due process cases (though not specifically involving the Establishment Clause, itself). *E.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (involving parental right to send children to private

adjudicated a First Amendment challenge to a state statute that provided public reimbursement to parents for the transportation costs of children attending either public schools or private Catholic schools. The Court applied the Establishment Clause but ultimately rejected the claim.[81] Yet the Court drew on a metaphor, articulated by Thomas Jefferson, to describe the Establishment Clause as creating a wall of separation between church and state[82]—a wall that, in the Court's words, "must be kept high and impregnable."[83]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[84]

One year later, in 1948, the Court for the first time invalidated a government action as violating the Establishment Clause.[85] *McCollum v. Board of Education*, arose from a challenge to a program that released children early from their public-school classes once each week so they could attend religious classes, which were held in the public school buildings. Invoking the wall of separation,[86] the Court held the program unconstitutional: "This [released time program] is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban

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religious schools); *see* Meyer v. Nebraska, 262 U.S. 390 (1923) (protecting free-expression values pursuant to substantive due process).

[81] *Everson*, 330 U.S. at 17-18.

[82] *Id.* at 16; *see* Reynolds v. United States, 98 U.S. 145, 164 (1878) (the first time the Court used this metaphor); *Letter from Thomas Jefferson to Danbury Baptist Association* (Jan. 1, 1802), *reprinted in* CHURCH AND STATE IN AMERICAN HISTORY 78, 79 (John F. Wilson & Donald L. Drakeman eds., 2d ed. 1987) (articulating wall of separation metaphor).

[83] *Everson*, 330 U.S. at 17-18.

[84] *Everson*, 330 U.S. at 15-16.

[85] McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

[86] *Id.* at 211. An amicus brief had emphasized the wall of separation. Brief of Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae Supporting Petitioners, McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (October Term 1947, No. 90).

of the First Amendment.…"[87] The Court acknowledged an American tradition or principle of religiosity, but nonetheless emphasized that the separation of church and state protects and bolsters such religiosity.[88]

Despite the Court's articulation of a wall of separation between church and state, the nation's commitment to de facto Christianity remained strong. In particular, the reading of the Protestant Bible and the recitation of prayers in public schools had long been common practices.[89] These practices could be problematic for non-Christian students, to say the least. For example, a Jewish writer, Pat Arnow, reflected on her attendance at a Virginia high school where the principal recited a daily prayer over the loudspeaker.[90] The prayer always ended the same: "In the name of Jesus Christ our Lord, Amen."[91] Arnow wrote: "I didn't know what to do. As a Jew, I prayed straight to God, not in anyone else's name. To accept the prayer as mine was more of a sin, according to what I had been taught, than not praying at all."[92] But Arnow adamantly rejected one potential solution: "[I] would have jumped in front of our school bus sooner than ask to be excused."[93] Such student reactions did not stop the New York State Board of Regents from recommending in 1951 that school teachers lead their students in reciting a supposedly "nondenominational" prayer each day to promote religious commitment and moral and spiritual values.[94] In one of the Court's most controversial decisions, *Engel v. Vitale* held in 1962 that this daily recitation of prayer in the public schools violated the Establishment Clause.[95] The Court's reasoning demonstrated an awareness of and sensitivity for diverse religious views and values.

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief

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[87] *McCollum*, 333 U.S. at 210.

[88] "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Id.* at 211-12.

[89] FELDMAN, PLEASE DON'T, *supra* note 6, at 191, 208, 223 (1997).

[90] Pat Arnow, *The Year We Hid Our Religion*, LIBERTY 3 (May/June 1985).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] Engel v. Vitale, 370 U.S. 421, 430 (1962). The prayer was as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

[95] *Engel*, 370 U.S. 421.

> that a union of government and religion tends to destroy government and to degrade religion.[96]

Although the *Engel* Court stressed that banning public school prayers did not "indicate a hostility toward religion or toward prayer,"[97] reactions against the decision were swift and harsh. Local school districts defied the ruling.[98] Members of Congress called for a constitutional amendment to allow school prayer: In 1962 alone, forty-nine such bills were introduced.[99] Newspapers published editorials and letters condemning the Court: The *Wall Street Journal*, for instance, complained that the Court would probably prevent children from singing "Christmas carols."[100]

In subsequent cases, the Court continued to invoke a wall of separation,[101] but to be clear, the Court did not invalidate every symbol and practice of de facto Christianity during the post-1937 era.[102] The Court

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[96] *Id.* at 430-31.

[97] *Id.* at 434. The Court wrote:

> It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, or course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.' It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Id. at 433-35.

[98] COHEN, *supra* note 6, at 171-73; FELDMAN, *supra* note 6, at 234; GREGG IVERS, TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE 137 (1995).

[99] SACHAR, *supra* note 75, at 796.

[100] WALL STREET JOURNAL, *In the Name of Freedom* (1962), *reprinted in* RELIGIOUS LIBERTY IN THE SUPREME COURT 138, 138 (Terry Eastland ed., 1993); *see* COHEN, *supra* note 6, at 172 (discussing newspaper reactions).

[101] Stone v. Graham, 449 U.S. 39 (1980) (holding unconstitutional the posting of the Ten Commandments in public school classrooms); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (holding unconstitutional the recitation of the Lord's prayer in public schools).

[102] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding public display of a crèche as part of a larger Christmas display); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding released time program where the religious instruction occurred off the public-school grounds); Doremus v. Bd. of Educ., 342 U.S. 429 (1952) (holding that challengers lacked standing to litigate bible reading in public schools).

nonetheless "rejected unequivocally" the conservative non-preferentialist position, which contends that the Establishment Clause forbids the government from preferring one religion over another while allowing it to favor religion over non-religion.[103] In any event, the Court synthesized its various Establishment Clause opinions in a 1971 decision, *Lemon v. Kurtzman*.[104] For many years afterward, the three-pronged *Lemon* test was the predominant doctrine for determining whether government action violated the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[105]

To be sure, conservative justices and scholars have complained that the *Lemon* test was too hostile toward religion—that it resonated too much with a wall of strict separation.[106] In fact, with the hope of displacing *Lemon*, conservative justices over the years introduced alternative doctrinal tests. In 1984, the Court in *Lynch v. Donnelly* applied the *Lemon* test and upheld the display of a crèche as part of a larger public Christmas exhibition.[107] Justice O'Connor wrote a concurrence, however, which articulated a two-pronged endorsement test: First, does the state action create excessive government entanglement with religion, and second, does the state action amount to government endorsement or disapproval of religion.[108] In 1989, *County of Allegheny v. American Civil Liberties Union* held unconstitutional the public display of a crèche, standing alone, while simultaneously holding constitutional the display of a Chanukah menorah as part of a larger public exhibition (including a Christmas tree and a sign saluting liberty).[109] The Court invoked both the *Lemon* and endorsement tests,[110] but Justice Kennedy, concurring and dissenting, articulated a two-pronged coercion test: First, the "government may not coerce anyone to support or participate in any religion

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[103] *Abington*, 374 U.S. at 216 (1963) (citing Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)); *see* LEVY, *supra* note 6, at 91-92, 192, 208 n.1 (tying non-preferentialist position to multiple conservatives, including Rehnquist and Reagan's Attorney General, Ed Meese).

[104] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[105] *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[106] *E.g.*, McCreary Cty. v. ACLU, 545 U.S. 844, 889-90 (2005) (Scalia, J., dissenting) (criticizing the *Lemon* test and advocating for the non-preferentialist position); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (criticizing *Lemon*); Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting) (criticizing the wall metaphor and advocating for the non-preferentialist position).

[107] *Lynch*, 465 U.S. at 668.

[108] *Id.* at 687-88 (O'Connor, J., concurring).

[109] Cty. of Allegheny v. ACLU, 492 U.S. 573 (1989).

[110] *Id.* at 592-94 (suggesting the endorsement test refined the *Lemon* test). A plurality argued for acceptance of the endorsement test. *Id.* at 595-97 (plurality).

or its exercise,"[111] and second, the government "may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"[112] Kennedy constructed this two-pronged test to resonate with the non-preferentialist position, despite the Court's prior rejection of it. Kennedy insisted the Court should not enforce an "absolute 'wall of separation,'"[113] but rather should accept "[g]overnment policies of accommodation, acknowledgment, and support for religion.…"[114]

In subsequent years, the justices have invoked all of these doctrinal tests.[115] Indeed, despite the criticisms of *Lemon* and the articulation (and application) of alternative doctrines, the Court (prior to Roberts's appointment as Chief Justice) never repudiated *Lemon*; it remained as one legitimate interpretive approach to the Establishment Clause.[116] The Court, moreover, has used one additional approach, though it is less a doctrine (for instance, a multi-pronged test) than an invocation of tradition. In 1983, *Marsh v. Chambers* upheld the constitutionality of opening (Nebraska) state legislative sessions with a prayer, offered by a publicly paid chaplain.[117] The Court did not mention *Lemon* or any other doctrinal test. Instead, the Court reasoned that the opening of legislative sessions "with prayer is deeply embedded in the history and tradition of this country."[118] Given this reliance on American tradition, the Court unsurprisingly reiterated that "[w]e are a religious people."[119] Nebraska, it is worth noting, had selected the same Protestant (Presbyterian) chaplain for sixteen straight years, and although he described his prayers as "nonsectarian," some of them were distinctly Christian. For instance, in one prayer, the chaplain said: "The power of the cross reveals your concern for the world and the wonder of Christ crucified. The days of his life-giving death and glorious resurrection are approaching."[120]

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[111] *Id.* at 659 (Kennedy, J., concurring and dissenting).

[112] *Id.* at 659 (Kennedy, J., concurring and dissenting) (quoting *Lynch*, 465 U.S. at 678). Kennedy criticized judicial attempts to enforce "an absolute 'wall of separation.'" *Id.* at 659 (Kennedy, J., concurring and dissenting).

[113] *Id.* at 657 (Kennedy, J., concurring and dissenting).

[114] *Id.* (Kennedy, J., concurring and dissenting).

[115] *E.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (invoking *Lemon*); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). (four justices invoked endorsement test, while four other justices criticized it); Lee v. Weisman, 505 U.S. 577 (1992) (applying coercion test).

[116] *See, e.g.*, McCreary Cty. v. ACLU, 545 U.S. 844 (2005) (applying *Lemon*).

[117] Marsh v. Chambers, 463 U.S. 783 (1983).

[118] *Id.* at 786. In dissent, Justice Brennan invoked *Lemon*. *Id.* at 796-97 (Brennan, J., dissenting). For a pre-*Lemon* case emphasizing tradition, see Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding the constitutionality of granting churches exemptions from property taxes).

[119] *Marsh*, 463 U.S. at 792 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

[120] *Marsh*, 463 U.S. at 823 n.2 (Stevens, J., dissenting).

Two cases decided in 2005, during the last term of the Rehnquist Court, underscored the unsettled nature of the pre-Roberts Court Establishment Clause jurisprudence.[121] Both cases involved public displays of the Ten Commandments, but the Court reached opposite results in the cases. In *McCreary County v. American Civil Liberties Union of Kentucky*, a five-to-four decision, the Court invalidated the posting of the Ten Commandments in county courthouses, with Souter's majority opinion applying *Lemon* and focusing on the government's purposes (the first prong).[122] But in *Van Orden v. Perry*, also a five-to-four decision, the Court upheld an etching of the Ten Commandments on a monument in a public park.[123] Justice Stephen Breyer flipped his vote—he was in the majority in both cases—though in *Van Orden*, he did not join Rehnquist's opinion. Rehnquist, writing for a four-justice plurality, refused to apply the *Lemon* test.[124] He instead emphasized tradition: The government had, throughout history, displayed similar religious symbols and communicated religious messages, so the government should be allowed to continue doing the same.[125]

B. Free Exercise Clause

The Court began applying the Free Exercise Clause to state and local governments in 1940.[126] Then, in 1963, the Court articulated a doctrinal test that would, at least nominally, determine the scope of free exercise for more

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[121] In some cases, justices agreed about which doctrine to apply but disagreed about the interpretation and application of the doctrine. In *Lee v. Weisman*, 505 U.S. 577 (1992), the majority applied the coercion test, interpreting coercion to include indirect and psychological pressure on adolescents. *Id.* at 593-94. Meanwhile the dissent applied the same test but limited coercion to be "by force of law and threat of penalty." *Id.* at 631 (Scalia, J., dissenting).

[122] McCreary Cty. v. ACLU, 545 U.S. 844, 860 (2005). In discussing the government's purposes, Souter also discussed political divisiveness, which had been an aspect of the *Lemon* entanglements prong as well as a concern under endorsement test. *Id*. at 860.

[123] Van Orden v. Perry, 545 U.S. 677 (2005).

[124] *Id.* at 686.

[125] *Id.* at 686-90. *Elk Grove Unified School District v. Newdow* held that the claimant, a student's father, lacked standing to challenge under the Establishment Clause a public-school recitation of the phrase, "under God," in the Pledge of Allegiance. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). Rehnquist, concurring in the judgment and joined by Thomas and O'Connor, argued that Newdow had standing but that the school had not violated the Establishment Clause. Rehnquist emphasized a deep national tradition "of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history." *Id.* at 26 (Rehnquist, C.J., concurring in the judgment). The First Amendment, Rehnquist added, required schools only to permit students "to abstain from the ceremony if they chose to do so." *Id*. at 33 (Rehnquist, C.J., concurring in the judgment). Thomas, concurring in the judgment, argued that an originalist analysis of the Establishment Clause revealed it to be a federalism provision that should not apply against state and local governments. *Id.* at 50 (Thomas, J., concurring in the judgment).

[126] Cantwell v. Conn., 310 U.S. 296 (1940) (incorporating Free Exercise Clause).

than the next twenty-five years.[127] According to the Court in *Sherbert v. Verner*, the government could justify a burden on an individual's free exercise of religion only by showing that the state action was narrowly tailored (or necessary) to achieve a compelling state interest.[128] In the decades after *Sherbert* articulated this strict scrutiny test, the typical free exercise case involved an exemption claim.[129] In such a case, an individual seeks a court-ordered exception (or exemption) from a neutral law of general applicability that allegedly burdens the individual's exercise of religion.[130] The generally applicable law might be related to education, employment, or any other area amenable to widely applicable laws.[131] Since these cases were to be resolved pursuant to a strict scrutiny test, one might expect free exercise claimants to win frequently and to be granted exemptions. Nevertheless, the Court consistently concluded that the government had satisfied strict scrutiny or that, in the specific factual circumstances, strict scrutiny was inappropriate.[132] From 1973 until 1990, the Court concluded that a government action contravened the free exercise clause only three times.[133]

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[127] Sherbert v. Verner, 374 U.S. 398 (1963).

[128] *Id.* at 403, 406-08.

[129] HENRY J. ABRAHAM, FREEDOM AND THE COURT 308-18 (5th ed. 1988) (Tables 6.1 & 6.2: listing the Supreme Court's free exercise decisions); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1368-75 (6th ed. 2019) (discussing several free exercise cases).

[130] *E.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (denying an Orthodox Jewish Air Force officer a free exercise exemption from Air Force regulations prohibiting hats of any kind).

[131] *E.g.*, Frazee v. Ill. Dep't of Empr't Sec., 489 U.S. 829 (1989) (holding unconstitutional the denial of unemployment benefits to a Christian who refused to work on Sundays but did not belong to established church or sect); Wisconsin v. Yoder, 406 U.S. 205 (1972) (granting an Old Order Amish claimant a free exercise exemption from a state compulsory-education law).

[132] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (needing to defer to prison officials, Court viewed strict scrutiny as inappropriate); Goldman v. Weinberger, 475 U.S. 503 (1986) (emphasizing context of military, Court did not apply strict scrutiny); United States v. Lee, 455 U.S. 252 (1982) (concluding government satisfied strict scrutiny and did not need to exempt an Old Order Amish employer from collecting and paying Social Security taxes).

[133] *Frazee*, 489 U.S. at 829 (1989) (holding unconstitutional the denial of unemployment benefits to a Christian who did not belong to established church or sect); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (holding unconstitutional the denial of unemployment benefits to a convert to Seventh-day Adventism); Thomas v. Rev. Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981) (holding unconstitutional the denial of unemployment benefits to a Jehovah's Witness who refused to continue working in a munitions factory). In a quantitative study, Lee Epstein and Eric A. Posner note that, during this period, "the Free Exercise clause was largely used to protect religious minorities—Christian or otherwise—who were burdened by general laws that advanced secular or mainstream Christian values (or both)." Epstein & Posner, *supra* note 43. It is worth pointing out, then, that Epstein and Posner's categorization of religious minorities as including Christian minorities and non-Christians can be misleading. In fact, during this time, non-Christians never won a free exercise exemption case at the Supreme Court. Stephen M. Feldman, *A Christian America and the Separation of Church and State, in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 262-63, 273 n.5 (Stephen M. Feldman ed., New York University Press, 2000).

In any event, in *Employment Division, Department of Human Resources v. Smith*, decided in 1990, the Court repudiated the application of strict scrutiny for most free exercise cases.[134] The claimant, a member of the Native American Church, sought a free exercise exemption from a criminal law prohibiting the use of peyote. The Court denied the claim, reasoning that the "political process" should, for the most part, determine the scope of free exercise.[135] Therefore, in most free exercise cases brought after *Smith*, the government would only need to satisfy a rational basis test, showing that the government action was rationally related to a legitimate government interest.[136] The *Smith* Court, however, recognized three exceptions to this doctrinal approach. Strict scrutiny would still be appropriate in the following situations: first, if the government purposefully discriminated against religion;[137] second, if the claimant challenged the denial of unemployment compensation;[138] and third, if the free exercise claim was combined with another constitutional claim—typically, free expression—to form a type of "hybrid" case.[139]

With a majority opinion written by Justice Scalia, *Smith* culminated the era of judicial conservatism stressing judicial restraint and deference to democracy.[140] While the Court itself had rarely validated free exercise claims, strict scrutiny at least appeared to favor claimants, and they in fact fared better in the lower courts.[141] Scalia and the *Smith* majority seemed wary of non-Christians and other religious minorities who might use the courts to limit the (Christian) majoritarian will. "[We] cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[142] Continued judicial application of the strict scrutiny test "would be courting anarchy, [a] danger [that] increases in direct proportion to the society's

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[134] Emp't Div. v. Smith, 494 U.S. 872 (1990).

[135] *Id.* at 890.

[136] Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 163-64 (2016).

[137] *Smith*, 494 U.S. at 877-78.

[138] *Id.* at 883.

[139] *Id.* at 882. *Smith* spurred numerous scholarly reactions. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1990); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

[140] Stephen M. Feldman, *Conservative Eras in Supreme Court Decision Making: Employment Division v. Smith, Judicial Restraint, and Neoconservatism*, 32 CARDOZO L. REV. 1791 (2011).

[141] For empirical studies of free exercise claims in the lower courts, *see* James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236 (1999); Frank Way & Barbara J. Burt, Religious Marginality and the Free Exercise Clause, 77 AM. POL. SCI. REV. 652 (1983).

[142] *Smith*, 494 U.S. at 888.

diversity of religious beliefs."[143] Scalia acknowledged that the Court's new rational basis test and deference to democracy favored the Christian mainstream while potentially harming religious minorities: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government…."[144] *Smith*, it should be added, not only deferred to democracy, but also, at least in that decision itself, deferred to state sovereignty (as the challenged law was from the state of Oregon).

When the Court decided *Smith*, the most important of the Court's three exceptions—any of which would trigger the judicial application of strict scrutiny rather than rational basis review—appeared to be the hybrid case situation.[145] The first exception, for cases of purposeful government discrimination against religion, seemed unlikely to arise with any frequency.[146] In fact, prior to the Roberts Court years, the Supreme Court found such purposeful discrimination in only one post-*Smith* case, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[147] Members of the Church of the Lukumi Babalu Aye practiced the Santeria religion, combining elements of the African Yoruba religion with Catholicism and including animal sacrifices.[148] The *Lukumi* case arose when the City of Hialeah enacted ordinances prohibiting religious sacrifices of animals but not otherwise restricting animal slaughter (for instance, for food).[149] After reviewing the record, the Court concluded that the City had not been religiously neutral but rather had purposefully discriminated against the Santeria religion.[150] Emphasizing that "the First Amendment forbids an official purpose to

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[143] *Id.*

[144] *Id.* at 890. After *Smith*, Congress acted to reinstate the strict scrutiny interest test for laws of general applicability infringing free exercise rights. Religious Freedom Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)). In *City of Boerne v. Flores*, 521 U.S. 527 (1997), the Court invalidated RFRA as beyond congressional power, at least vis-à-vis state and local governments. Then, in response to *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), PL 106–274, 114 Stat 803 (2000) (codified at 42 USCA § 2000cc (2000)), which again reinstated the strict scrutiny test when a state or local government substantially burdens the religious exercise of an institutionalized individual. *Holt v. Hobbs*, 574 U.S. 352, 357-58 (2015).

[145] *E.g.*, Widmar v. Vincent, 454 U.S. 276 (1981) (combining religious-freedom claim with a free-expression claim); *see* Laycock, *supra* note 139, at 44-47 (discussing combination of free exercise and free speech claims).

[146] DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 91-92 (2003).

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

[148] *Id.* at 524-26.

[149] *Id.* at 527-28.

[150] *Id.* at 531-34. "The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* at 534.

disapprove of a particular religion or of religion in general,"[151] the Court applied strict scrutiny and held that the City had violated the Free Exercise Clause.[152] While *Lukumi* was an unusual case, it illustrated an important aspect of the *Smith* approach. If the government purposefully discriminated against (or targeted) religion, either explicitly or implicitly, then the government law or action was not neutral and generally applicable in the first place. Strict scrutiny was therefore appropriate because the government had not satisfied the prerequisite for applying the deferential *Smith* rational basis test—neutral government action pursuant to a generally applicable law.[153]

III. THE ROBERTS COURT AND RELIGIOUS FREEDOM

A. Establishment Clause

The Roberts Court has transformed Establishment Clause doctrine to protect Christianity while not similarly protecting non-Christian religions. The first key case is *Town of Greece v. Galloway*, decided in 2014.[154] The town, in 1999, began inviting clergy to deliver prayers at the start of town board meetings. In a five-to-four decision, with the then-standard conservative-progressive divide, the Court upheld this practice under the Establishment Clause.[155] Justice Kennedy's majority opinion was significant in three ways. First, the opinion did not even mention the *Lemon* test.[156] Given that the conservative justices had long been wary of *Lemon*—and the Court had previously applied *Lemon* to prohibit nondenominational prayers in public schools,[157] moments of silence in the public schools,[158] and the posting of the Ten Commandments in county buildings[159]—the failure to mention *Lemon* was portentous. Moreover, the majority opinion did not invoke either of the alternative multi-pronged doctrinal tests: the endorsement test and the coercion test.[160]

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[151] *Id.* at 532.

[152] *Id.* at 546-47.

[153] *See Smith*, 494 U.S. at 877-78 (giving examples of ways government might purposefully discriminate against or target religion).

[154] *See* Town of Greece v. Galloway, 572 U.S. 565 (2014).

[155] The majority was Scalia, Thomas, Kennedy, Roberts, and Alito. The dissenters were Ginsburg, Breyer, Kagan, and Sotomayor. *Id.*

[156] *Galloway*, 572 U.S. at 572-92.

[157] Engel v. Vitale, 370 U.S. 421 (1962).

[158] Wallace v. Jaffree, 472 U.S. 38 (1985).

[159] McCreary Cty. v. ACLU, 545 U.S. 844 (2005).

[160] As will be discussed *infra*, a section of Kennedy's opinion applying the coercion test was only plurality—joined solely by Roberts and Alito. *Galloway*, 572 U.S. at 586-91.

Second, and related to the first point, the majority opinion relied on tradition to justify the opening of the town board meetings with prayers.[161] Citing *Marsh v. Chambers* as precedent, the Court emphasized that tradition does not create an exception to the usual coverage of the Establishment Clause.[162] Rather, tradition determines the scope of the anti-establishment principle.[163] The majority opinion's reliance on tradition is underscored when one realizes that Kennedy, in fact, also discussed the coercion test—yet, two of the conservative justices, Scalia and Thomas, refused to join that portion of Kennedy's opinion.[164] That is, when Kennedy relied on tradition, his opinion was majority, but when he applied the coercion test, he wrote for a plurality of only three, including himself.

Third, in relying on tradition, the majority opinion did not temper its invocation of an American religious history defined by de facto Christianity. The Court emphasized that the prayers did not need to be nonsectarian (or nondenominational).[165] Indeed, in the town of Greece, clergy had sometimes opened the town board meetings with overtly Christian prayers, referring to the "'death, resurrection, and ascension of the Savior Jesus Christ,'"[166] the "'saving sacrifice of Jesus Christ on the cross,'"[167] and "'the plan of redemption that is fulfilled in Jesus Christ.'"[168] The Court added that the religious changes of the nation—as it went from being overwhelmingly Protestant at the time of the constitutional framing to being religiously diverse—neither changed American tradition nor the meaning of the Establishment Clause.[169] "The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today."[170] Alito wrote a concurrence underscoring this point.[171] The fact that overtly Christian prayers might offend some non-Christians was irrelevant: "Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and

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[161] *Id.* at 575-76.

[162] *Id.* at 576 (citing Marsh v. Chambers, 463 U.S. 783 (1983)).

[163] *Marsh* "teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings."" *Galloway*, 572 U.S. at 576.

[164] *Id.* at 586-91.

[165] *Id.* at 577-79.

[166] Id. at 577.

[167] *Id.*

[168] *Id.* at 618 (Kagan, J., dissenting).

[169] *Id.* at 577-79.

[170] *Id.* at 579.

[171] *Id.* at 595-96 (Alito, J., concurring).

harder."[172] Given the Court's invocation of the nation's de facto Christian history, the actual tradition in the town of Greece—before 1999, prayers were not offered at town board meetings—was rendered irrelevant.[173]

One might be tempted to categorize *Town of Greece* as no more significant than *Marsh* or *Van Orden*, prior cases where the Court had invoked tradition. In other words, rather than manifesting a transformed Establishment Clause doctrine, might *Town of Greece* merely be another instance where the Court invokes tradition instead of *Lemon* or one of the other multi-pronged tests? Almost certainly not. First, remember that, in *Town of Greece*, Scalia and Thomas did not join Kennedy's opinion when it applied the coercion test, even though conservatives had previously favored that approach.[174] Scalia and Thomas appeared to be expressing a strong preference for determining the scope of the Establishment Clause in accord with tradition.[175] Second, when *Town of Greece* is viewed with subsequent Establishment Clause decisions, its transformative status becomes distinct.

American Legion v. American Humanist Association, decided in 2019, underscored the Court's conservative turn to tradition and repudiation of *Lemon*.[176] *American Legion* involved a challenge to the constitutionality of a 32-foot Christian cross displayed on a traffic island (public land) in a busy intersection of Bladensburg, Maryland. Tellingly, the Fourth Circuit Court of Appeals had applied the *Lemon* test and held the Bladensburg Cross to be unconstitutional.[177] The Supreme Court reversed, holding the cross display to be constitutional, with Justice Alito writing the opinion for the Court, though parts of his opinion were plurality. Alito explicitly criticized the *Lemon* test, running through a litany of its "shortcomings."[178]

> [The *Lemon* test] could not "explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings, . . . certain

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[172] *Id.* at 595 (Alito, J., concurring).

[173] The Court added that there might be limits on what would be acceptable in the prayers. *Id.* at 582-83. An example of a potentially unacceptable prayer would be one that "denigrated nonbelievers or religious minorities." *Id.* at 583. But the Court then acknowledged that some of the prayers in the town of Greece might fit that description, but "they do not despoil a practice that on the whole reflects and embraces our tradition." *Id.* at 585.

[174] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 636-44 (1992) (Scalia, J., dissenting) (applying coercion test). Scalia's dissenting opinion was joined by three other conservative justices. *Id.* at 631; *see* STEPHEN M. FELDMAN, NEOCONSERVATIVE POLITICS AND THE SUPREME COURT: LAW, POWER, AND DEMOCRACY 132 (2013).

[175] While Scalia had been willing to apply the coercion test, he had previously emphasized the importance of tradition. *Lee*, 505 U.S. at 631-36 (Scalia, J., dissenting).

[176] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

[177] *Id.* at 2074, 2079; *see* Am. Humanist Ass'n v. Maryland-Natl. Capital Park and Plan. Comm'n, 874 F.3d 195, 206-12 (4th Cir. 2017), *rev'd sub nom.* Am. Legion v. Am. Humanist Assn., 139 S. Ct. 2067 (2019) (applying *Lemon* test).

[178] *Am. Legion*, 139 S. Ct. at 2080 (plurality).

> references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving." The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.[179]

After rejecting *Lemon*, Alito's opinion emphasized the importance of tradition, reasoning that the Court should view the Bladensburg Cross in its "historical context."[180] Considering the cross and its meaning in that context, Alito concluded that its public display did not violate the Establishment Clause. In a striking statement of that conclusion, Alito wrote: "The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim."[181] The implication appears to be that all individuals are welcome to live "together harmoniously,"[182] so long they accept de facto Christianity, symbolized in this instance by the government display of a 32-foot Christian cross.[183] Justice Ginsburg's dissent put the lie to Alito's conclusion—that members of all religions should genially live together while gazing at a giant Christian cross. Ginsburg made a simple point: A public display of a cross does not honor those fallen soldiers who observed non-Christian religions or no religion at all.[184] "Just as a Star of David is not suitable to honor Christians who died serving their country,"[185] Ginsburg explained, "so a cross is not suitable to honor those of other faiths who died

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[179] *Id.* at 2080-81 (plurality).

[180] *Id.* at 2074. This part of the opinion is probably majority, though it is unclear. It is from Alito's introduction. Various justices joined parts of his opinion, making it either plurality or majority. But the introduction was identified neither as within Parts I, II–B, II–C, III, and IV, which were specified as majority, nor as within Parts II–A and II–D, which were specified as plurality. In one of the plurality sections of his opinion, Alito urged "a presumption of constitutionality for longstanding monuments, symbols, and practices." *Id.* at 2082.

[181] *Id.* at 2074 (part of introduction, unidentified as majority or plurality).

[182] *Id.* (part of introduction, unidentified as majority or plurality).

[183] Given Alito's conservatism, he strangely reasons that the meaning of the Bladensburg cross had changed over time. Even if a Christian cross was often religious, this particular cross had become secular. *Id.* at 2082-85 (majority). In another case revolving around an Establishment Clause issue, the Court invalidated on procedural grounds an injunction that, if allowed to stand, would have prevented the continuing display of a large Christian cross. Salazar v. Buono, 559 U.S. 700 (2010). Kennedy's plurality opinion explained that a Christian cross could universally honor all fallen soldiers, regardless of their religious beliefs. *Id.* at 715; *see id.* at 725 (Alito, J., concurring in part and concurring in the judgment) (suggesting cross was appropriate symbol "to commemorate American war dead").

[184] *Am. Legion*, 139 S. Ct. at 2103-13 (Ginsburg, J., dissenting). "The cross was never perceived as an appropriate headstone or memorial for Jewish soldiers and others who did not adhere to Christianity." *Id*. at 2109 (Ginsburg, J., dissenting).

[185] *Id.* at 2104 (Ginsburg, J., dissenting).

defending their nation. Soldiers of all faiths 'are united by their love of country, but they are not united by the cross.'"[186]

The significance of the *American Legion* decision is clarified when Alito's opinion is viewed in conjunction with the concurrences. Two progressive justices, Breyer and Kagan, joined Alito's opinion in full and part, respectively. They both wrote concurrences, however, which accentuated their concerns that history and tradition should not become the touchstone for an Establishment Clause analysis. Breyer explicitly wrote: "Nor do I understand the Court's opinion today to adopt a 'history and tradition test.'"[187] But the conservative justices' concurrences expressed the exact opposite sentiment. In fact, two of the conservatives, Thomas and Gorsuch, concurred in the judgment only, refusing to join Alito's opinion because they viewed it as insufficiently clear in its repudiation of *Lemon* and turn to tradition. After Thomas reiterated his previously articulated argument that the Establishment Clause should not apply against state and local governments,[188] he explained that, even if the Establishment Clause applied, the Bladensburg Cross should be constitutional based on history and tradition: "'[An] insistence on nonsectarian' religious speech is inconsistent with our Nation's history and traditions."[189] And of course, Thomas repudiated *Lemon* as a "long-discredited test."[190] Gorsuch, also repudiating *Lemon*, explained that lower courts had mistakenly granted standing to offended observers bringing Establishment Clause claims because of the *Lemon* "misadventure."[191] He then emphasized that the Bladensburg Cross was undoubtedly constitutional "in light of the nation's traditions."[192] The correct judicial approach was to "apply *Town of Greece*, not *Lemon*."[193] Likewise, Kavanaugh, who joined Alito's opinion in full, wrote a concurrence that repudiated *Lemon* and emphasized history and tradition.[194]

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[186] *Id.* (Ginsburg, J., dissenting).

[187] *Id.* at 2091 (Breyer, J., concurring). Kagan wrote: "Although I too 'look[ ] to history for guidance,' I prefer at least for now to do so case-by-case, rather than to sign on to any broader statements about history's role in Establishment Clause analysis." *Id.* at 2094 (Kagan, J., concurring in part).

[188] *Id.* at 2095 (Thomas, J., concurring in the judgment); *see, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment) (arguing that original meaning of the Establishment Clause would preclude applying it against state and local governments); Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819, 852-55 (1995) (Thomas, J., concurring) (same).

[189] *Am. Legion*, 139 S. Ct. at 2096 (Thomas, J., concurring in the judgment).

[190] *Id.* at 2097 (Thomas, J., concurring in the judgment).

[191] *Id.* at 2101 (Gorsuch, J., concurring in the judgment).

[192] *Id.* at 2102 (Gorsuch, J., concurring in the judgment).

[193] *Id.* (Gorsuch, J., concurring in the judgment). Gorsuch added that the time in which a practice was begun or a symbol erected or displayed was irrelevant: "The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago." *Id.* (Gorsuch, J., concurring in the judgment).

[194] *Id.* at 2093 (Kavanaugh, J., concurring).

The conservative bloc's turn to tradition in Establishment Clause cases marks the justices' acceptance of the non-preferentialist position within a de facto Christian society. In other words, based on American history and tradition, the government can recognize and favor religion over nonreligion. And even beyond that—again, because of the nation's history of de facto Christianity—the government's recognition and favoring of religion can be manifested in explicitly Christian terms, including Christian prayers to open legislative sessions (and town board meetings) and public displays of giant Christian crosses. Given the conservative bloc's approach, the Court's decisions in other cases that resonate with Establishment Clause issues have been unsurprising.[195] For example, in two taxpayer standing cases, the Court found that the taxpayers lacked standing to challenge government practices favoring Christianity. The Court has long used the standing doctrine to preclude taxpayers from suing the government because they did not like government policies or expenditures.[196] In *Flast v. Cohen*, however, the Court in 1968 created an exception to this taxpayer-standing barrier for cases raising Establishment Clause issues, such as a challenge to government subsidies for religious schools.[197] The Roberts Court confronted the *Flast* exception first in 2007 and then in 2011.[198]

Hein v. Freedom From Religion Foundation, Inc., arose as an Establishment Clause challenge to President George W. Bush's "Faith-Based and Community Initiatives program," created pursuant to executive order.[199] The program was supposed to provide government funds to faith-based institutions, including churches, synagogues, and mosques, to help provide for social services. The lower court granted taxpayer standing under *Flast*, but the Supreme Court reversed in a five-to-four decision, with the typical conservative-progressive split. Alito, writing another plurality opinion, distinguished *Flast* from *Hein*. *Flast* involved expenditures made pursuant to a congressionally enacted statute, while *Hein* involved general

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[195] *See* Salazar v. Buono, 559 U.S. 700 (2010) (invalidating, on procedural grounds, injunction that would have prevented the continuing display of large Christian cross). In a free speech case, the Court held that the First Amendment prevented the government from requiring family planning clinics to provide information about abortion, although the Court had previously upheld laws requiring pro-life (anti-abortion) statements. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018); *see id.* at 2384–86 (Breyer, J., dissenting) (emphasizing inconsistency of Court's decision with prior decisions).

[196] Warth v. Seldin, 422 U.S. 490, 508-10 (1975); Frothingham v. Mellon, 262 U.S. 447 (1923).

[197] 392 U.S. 83 (1968). *Flast* involved an Establishment Clause claim but potentially had implications for many other types of taxpayer claims. In subsequent cases, though, the Court limited *Flast* to its facts and, hence, Establishment Clause claims. *E.g.*, United States v. Richardson, 418 U.S. 166 (1974); *see* CHEMERINSKY, *supra* note 129, at 98-104 (explaining evolution of taxpayer-standing doctrine).

[198] Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007).

[199] *Hein*, 551 U.S. at 592, 594.

executive expenditures.[200] Scalia, joined by Thomas, concurred in the judgment, arguing that Alito did not go far enough: *Flast*, Scalia maintained, should be overruled.[201] The dissenters argued that Alito's distinction between funding under a statute and funding pursuant to executive action was nonsensical under Establishment Clause principles.[202] Regardless, the Court reasoned similarly in *Arizona Christian School Tuition Organization v. Winn*, another five-to-four decision rejecting a taxpayer standing claim under the Establishment Clause.[203] State law granted a tax credit to taxpayers who contributed money to school tuition organizations (STOs), which then provided scholarships to students attending private schools, most of which were religious. The Court denied standing, again distinguishing *Flast*: *Flast* involved government expenditures, while *Winn* involved tax credits, which individual taxpayers triggered by choosing to contribute to STOs.[204]

The consequences of these two taxpayer standing cases, *Hein* and *Winn*, were clear: Government funding of Christianity will be insulated from judicial scrutiny.[205] After all, in the United States, any government program or policy that provides subsidies, funding, tax credits, or other financial support for either specifically religious institutions or private schools in general will inevitably channel most of the money to Christians.[206] As Kagan's *Winn* dissent put it, these cases will "result [in] the effective demise of taxpayer standing [which] will diminish the Establishment Clause's force

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[200] *Id.* at 603-09.

[201] *Id.* at 618 (Scalia, J., concurring in the judgment).

[202] *Id.* at 637 (Souter, J., dissenting).

[203] *Winn*, 563 U.S. 125.

[204] *Id.* at 142.

[205] Gorsuch's *American Legion* concurrence, joined by Thomas, resonated with these taxpayer standing decisions, as Gorsuch argued that people offended by religious displays lack standing to raise Establishment Clause challenges. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2098-2103 (2019) (Gorsuch, J., concurring in the judgment). In a recent free speech case brought by an evangelical Christian, however, the Court concluded that a claim for nominal damages was sufficient to establish constitutional standing. Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021).

[206] The large majority of private schools are Christian. NAT. CTR. FOR EDUC. STAT., THE CONDITION OF EDUCATION: PRIVATE SCHOOL ENROLLMENT (https://nces.ed.gov/programs/coe/indicator_cgc.asp); NAT. CTR. FOR EDUC. STAT., SCHOOL CHOICE IN THE UNITED STATES: 2019 (https://nces.ed.gov/programs/schoolchoice/ind_03.asp#:~:text=In%20fall%202015%2C%20of%20the,33%20percent%20were%20nonsectarian%20schools); COUNCIL FOR AM. PRIV. EDUC, *Private School FAQs*, https://www.capenet.org/facts.html#FAQ. In 2006, of the total number of hospital beds own by religiously affiliated organizations, seventy percent were Catholic. Martha A. Boden, *Compassion Inaction: Why President Bush's Faith-Based Initiatives Violate the Establishment Clause*, 29 SEATTLE U. L. REV. 991, 1022 (2006); *see, e.g.*, Americans United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 866 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007) (holding unconstitutional a prison fellowship program because of its Christian evangelical nature); DAVID KUO, TEMPTING FAITH (2006) (criticizing Bush for using faith-based initiative to curry political favor with evangelicals); Jonathan Larsen, *Book Says Bush Just Using Christians*, NBCNEWS.COM (Oct. 11, 2006) (emphasizing that Bush used faith-based initiative to curry political favor with evangelicals).

and meaning."[207] In fact, even if the Roberts Court had granted standing in *Winn*, the Court's Establishment Clause jurisprudence would have undoubtedly led to a decision upholding Arizona's tax credit program. In *Espinoza v. Montana Department of Revenue*, which also involved tax credits, the Court focused on the Free Exercise Clause while brushing past an Establishment Clause claim (the free exercise claim will be discussed in the next section).[208] Roberts's majority opinion reasoned "that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."[209] According to Roberts, the First Amendment allows government funding to be channeled to religious institutions, including schools, so long as individuals are "independently choosing" to give their patronage (and hence, the government funding) to the religious institutions.[210]

While the Roberts Court has found multiple ways to protect and bolster Christianity, despite the Establishment Clause, the Court's rejection of *Lemon* and turn toward tradition does not bode well for non-Christians. *Trump v. Hawaii*, decided in 2018, illustrates this point.[211] The case involved an Establishment Clause challenge to a presidentially imposed travel ban that restricted entry into the United States. The Trump administration had adopted the ban supposedly to protect national security, though in response to various legal challenges, the administration had modified the ban several times.[212] When it reached the Supreme Court for final adjudication, the ban (as modified) applied to nationals from eight nations—"Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen"—six of which were predominantly Muslim.[213] Moreover, throughout the processes of revision and litigation, President Trump vehemently and persistently denounced Islam.[214] In another five-to-four decision, the Court upheld the travel ban, with Chief Justice Roberts writing the majority opinion.

Interestingly, in her dissent, Justice Sotomayor described the Establishment Clause as if it embodied the least controversial aspect of the non-preferentialist position—but without accepting de facto Christianity.

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[207] *Winn*, 563 U.S. at 148 (Kagan, J., dissenting).

[208] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

[209] *Id.* at 2254.

[210] *Id.* I will also discuss in the next section two other Roberts Court cases that raised Establishment Clause issues but that have stronger free exercise implications. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

[211] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[212] The dispute was twice at the Court before returning for this final resolution. Trump v. IRAP, 138 S. Ct. 353 (2017); Trump v. Hawaii, 138 S. Ct. 377 (2017). The final ban was Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017).

[213] *Trump*, 138 S. Ct. at 2405 (2018).

[214] *See id.* at 2438-39 (Sotomayor, J., dissenting) (describing how Trump denounced Muslims).

"The 'clearest command' of the Establishment Clause," she wrote, "is that the Government cannot favor or disfavor one religion over another."[215] Based on that principle, Sotomayor argued the travel ban could not be constitutional:

> Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that "Islam hates us," warned that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country," promised to enact a "total and complete shutdown of Muslims entering the United States," and instructed one of his advisers to find a "lega[l]" way to enact a Muslim ban. The President continued to make similar statements well after his inauguration.… Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam. Instead, he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers.[216]

In fact, the administration appeared to include the non-Muslim countries of North Korea and Venezuela on the final list of targeted nations merely to disguise the travel ban's "otherwise clear targeting of Muslims."[217]

In response, Roberts and the conservative bloc diluted the Establishment Clause protections to the point of evasion. Roberts emphasized that the travel ban was a presidentially issued "national security directive regulating the entry of aliens abroad."[218] Because the ban related to immigration and national security, Roberts reasoned the Court should defer to the administration's judgments, at least to a degree.[219] Thus, "[the Court] may consider plaintiffs' extrinsic evidence [of anti-Muslim animus]," Roberts explained, "but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."[220] Applying this deferential standard, the Court concluded that the ban did not violate the Establishment Clause. From Sotomayor's perspective, though, the Court failed "to safeguard [the] fundamental principle [of religious liberty].[221] [The Court's decision] leaves undisturbed a policy first advertised openly and unequivocally as a 'total and complete shutdown of

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[215] *Id.* at 2434 (Sotomayor, J., dissenting).

[216] *Id.* at 2438-39 (Sotomayor, J., dissenting).

[217] *Id.* at 2442 (Sotomayor, J., dissenting).

[218] *Id.* at 2418.

[219] *Id.* at 2419-20.

[220] *Id.* at 2420.

[221] *Id.* at 2420-23.

Muslims entering the United States' because the policy now masquerades behind a facade of national-security concerns."[222]

Unfortunately, *Trump v. Hawaii* is not the only case where the conservative bloc evaded constitutional principles that might have otherwise protected non-Christians. *Pleasant Grove City v. Summum*, decided in 2009, involved religious speech—specifically the display of a religious monument.[223] Pleasant Grove City exhibited, among other monuments, a Ten Commandments monument contributed years earlier by the Fraternal Order of Eagles. Summum, a non-Christian religion, offered to donate a monument showing its Seven Aphorisms, but the city declined.[224] Significantly, Rehnquist Court decisions involving religious speech had designated certain public school properties to be public forums, which therefore had to be held open to Christian organizations pursuant to free speech principles.[225] These precedents appeared to require Pleasant Grove to display the Summum monument in its public park, a traditional public forum.[226] But the Roberts Court allowed the city to evade the First Amendment: "[T]he placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."[227] That is, pursuant to the Court's "recently minted" government speech doctrine,[228] the Summum monument was "not a form of expression to which [public] forum analysis applies."[229]

Scalia once lamented the persistent vitality of *Lemon*: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence.…"[230] Well, Scalia can now rest assured: The conservative justices have killed *Lemon*, once and for all. In its stead, the Court has adopted an approach protecting an American tradition of

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[222] *Id.* at 2433 (Sotomayor, J., dissenting).

[223] Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

[224] *Id.* at 465; SUMMUM IS GNOSTIC CHRISTIANITY, https://www.summum.us/philosophy/gnosticism.shtml (last visited Feb. 18, 2022).; *see* Stephen M. Feldman, *Democracy and Dissent: Strauss, Arendt, and Voegelin in America*, 89 DENV. L. REV. 671 (2012) (discussing Voegelin's concept of gnosticism).

[225] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001) (holding that a public elementary school needed to allow a private Christian organization to hold club meetings on school property); Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819, 852-55 (1995) (holding that a public university needed to fund an overtly Christian student newspaper).

[226] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (streets and parks had been public forums since time immemorial).

[227] *See Summum*, 555 U.S. at 464.

[228] *Id.* at 481 (Stevens, J., concurring).

[229] *Id.* at 464.

[230] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (Scalia, J., concurring in the judgment).

de facto Christianity. Opposition to manifestations of that tradition will be met with ominous expressions of Christian resentment. In *American Legion*, the Bladensburg Cross case, Alito warned: "[T]earing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion."[231] So far, such expressions of Christian grievance have been rare in Establishment Clause cases, but they have been made frequently in recent free exercise cases.[232]

B. Free Exercise Clause

The Roberts Court has not explicitly overruled *Smith*, but it has in effect repudiated most of its doctrinal significance. First, the Court has held that the Free Exercise Clause requires a ministerial exception to laws of general applicability. *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, decided in 2012,[233] arose when an evangelical church and school fired Cheryl Perich, a teacher who was also commissioned as a minister.[234] Perich had been unable to perform her duties because she had been suffering from narcolepsy.[235] She claimed that her termination violated the Americans with Disabilities Act (ADA), which prohibits employment discrimination based on a disability.[236] As the Court acknowledged, the ADA "is a valid and neutral law of general applicability," so *Smith* would seem, in effect, to preclude the judicial granting of a free exercise exemption.[237] But the *Hosanna-Tabor* Court

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[231] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (majority).

[232] In a case revolving around an Establishment Clause issue but decided on procedural grounds, related to the granting of injunctions, Kennedy wrote in a plurality opinion: "The 2002 injunction thus presented the Government with a dilemma. It could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those the cross was seen as honoring." Salazar v. Buono, 559 U.S. 700, 716 (2010). In the same case, Alito wrote: "The demolition of this venerable if unsophisticated, monument [the Christian cross] would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage." *Buono*, 559 U.S. at 726 (Alito, J., concurring in part and concurring in the judgment). Alito revealed a similar attitude in a free-expression case, Christian Legal Soc. of Univ. Cal. Hastings Coll. of Law v. Hastings Christian Fellowship, 561 U.S. 661 (2010). The CLS chapter at the University of California, Hastings College of the Law, argued that the school's "all comers" policy, prohibiting student funded organizations from discriminating against gays and lesbians (and others), violated the First Amendment. *Christian Legal Society*, 561 U.S. at 669-74. The Court upheld the policy, but Alito's dissent emphasized the importance of protecting CLS, a religious organization dedicated to encouraging a Christian outlook. According to Alito, the only way to explain the school's policy and the Court's decision was that the school and the Court reacted against the Christian identity of the student organization and the content of its message. *Id.* at 720-22 (Alito, J., dissenting).

[233] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

[234] *Id.* at 177-79.

[235] *Id.* at 178.

[236] *Id.* at 179-80; Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101 et seq (West 2009).

[237] *Hosanna-Tabor*, 565 U.S. at 190.

distinguished *Smith*: *Smith* involved government regulation of conduct—"outward physical acts"[238]—while *Hosanna-Tabor* involved "an internal church decision that affects the faith and mission of the church itself."[239] The Free Exercise Clause, the Court reasoned, prohibits the government from interfering with "the internal governance of [a] church."[240] If the government tries to dictate to a church who will be hired (or fired) as a minister, then the government violates the First Amendment, "which protects a religious group's right to shape its own faith and mission through its appointments."[241] In short, the First Amendment mandates the judicial recognition of a ministerial exception from laws of general applicability.[242]

The Court expanded this ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*, decided in 2020.[243] In this case, the Court considered two instances in which private Catholic schools fired elementary school "lay teachers" in violation of anti-discrimination statutes.[244] One teacher had breast cancer and was protected under the ADA. The other teacher, fired because of her age, was protected under the Age Discrimination in Employment Act (ADEA).[245] Although the *Hosanna-Tabor* Court had emphasized that Perich, the fired teacher, had also been a minister, Alito's majority opinion in *Morrissey-Berru* expanded the ministerial exception to include all teachers at private religious schools—which, as mentioned earlier, are predominantly Christian.[246] Alito emphasized that the purpose of religious schools was to educate students consistently with the particular religion and that, therefore, government interference with employment decisions would contravene religious freedom.[247] Yet, as Sotomayor pointed out in dissent, these "teachers taught primarily secular subjects, lacked substantial religious titles and training, and

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[238] *Id.* at 190.

[239] *Id.* at 190.

[240] *Id.* at 188.

[241] *Id.* at 188.

[242] While the Court primarily discussed free exercise, it also relied on the Establishment Clause. Hence, the Court wrote: "According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 188-89.

[243] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

[244] *Id.* at 2071 (Thomas, J., concurring).

[245] Age Discrimination in Employment Act of 1967, 29 U.S.C.A. § 621 et seq.

[246] *Our Lady of Guadelupe Sch.*, 140 S. Ct. at 2069; NAT. CTR. FOR EDUC. STAT., THE CONDITION OF EDUCATION: PRIVATE SCHOOL ENROLLMENT (https://nces.ed.gov/programs/coe/indicator_cgc.asp); NAT. CTR. FOR EDUC. STAT., SCHOOL CHOICE IN THE UNITED STATES: 2019 (https://nces.ed.gov/programs/schoolchoice/ind_03.asp#:~:text=In%20fall%202015%2C%20of%20the,33%20percent%20were%20nonsectarian%20schools); COUNCIL FOR AM. PRIV. EDUC, *Private School FAQs*, https://www.capenet.org/facts.html#FAQ.

[247] *Morrisey-Berru,* 140 S. Ct. at 2055, 2063-66. Like in *Hosanna-Tabor*, the *Morrissey-Berru* Court not only invoked the Free Exercise Clause but also the Establishment Clause. *Id.* at 2060-61.

were not even required to be Catholic."[248] Thus, *Morrissey-Berru* has enormous consequences: Teachers (and presumably other employees) at religious schools can "be fired for any reason, whether religious or nonreligious, benign or bigoted, without legal recourse."[249]

While *Hosanna-Tabor* and *Morrissey-Berru* allow "religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs,"[250] a second line of Roberts Court cases now protects Christians and Christian institutions from even a whiff of discrimination. These cases focus mostly on the first *Smith* exception, cases where the government purposefully discriminates against religion. Although the Rehnquist Court had relied on this exception only once, in *Lukumi*,[251] the Roberts Court has found the government to be discriminating against religion so frequently that the exception has, in effect, swallowed the *Smith* rational basis test (at least for Christians). The first such case was *Trinity Lutheran Church of Columbia, Inc. v. Comer*, decided in 2017.[252] Pursuant to a Missouri state program, Trinity Lutheran Church applied for funding to resurface a preschool and daycare playground. The state policy was to deny all applications from religious entities because of an anti-establishment provision in the Missouri constitution, and consequently, the state denied the Trinity Lutheran application.[253] The Court, with an opinion by Roberts, held that the state's policy and denial of funding to Trinity Lutheran violated the Free Exercise Clause. Roberts acknowledged *Smith*,[254] but immediately emphasized the purposeful-discrimination exception and *Lukumi*.[255] Roberts then determined that the state was purposefully penalizing religion, which triggered the Court's application of strict scrutiny.[256] Finding that the state's anti-establishment principle did not amount to a compelling purpose—an

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[248] *Id.* at 2072 (Sotomayor, J., dissenting).

[249] *Id.* at 2071 (Sotomayor, J., dissenting).

[250] *Id.* at 2082 (Sotomayor, J., dissenting).

[251] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

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

[253] MO. CONST. art. 1 § 7 (quoted in *Trinity Lutheran*, 137 S. Ct. at 2017).

[254] *Trinity Lutheran*, 137 S. Ct. at 2020-21. The Court wrote that *Smith* "held that the Free Exercise Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion." *Id.* at 2021.

[255] *Id.* at 2021.

[256] *Id.* at 2021-22, 2024. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Id.* at 2019 (quoting *Lukumi*, 508 U.S. at 533 (1993)). The Court distinguished a Rehnquist Court decision, *Locke v. Davey*, 540 U.S. 712 (2004), which allowed a state to refuse to fund college scholarships for those studying for the ministry. *Trinity Lutheran*, 137 S. Ct. at 2022-24.

"interest 'of the highest order'"—the Court concluded that the state failed the strict scrutiny test and therefore violated free exercise.[257]

In *Trinity Lutheran*, the state policy explicitly discriminated against religious entities—albeit in an effort to remain consistent with anti-establishment principles under the state constitution. One year later, however, the Court confronted a state anti-discrimination law of general applicability.[258] The Colorado Civil Rights Commission had concluded that a baker, Jack Phillips, violated the Colorado Anti–Discrimination Act (CADA), a statute prohibiting discrimination based on sexual orientation.[259] Phillips, "a devout Christian," had refused to bake a cake for a same-sex couple's wedding reception because he opposed such marriages on religious grounds.[260] Consequently, he argued that the Commission had violated his right to the free exercise of religion.[261] The Court, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, agreed with Phillips and held that the Commission had violated the First Amendment.

From one angle, *Masterpiece Cakeshop* appeared to be a standard free exercise exemption case. Since CADA was a law of general applicability, Phillips would be entitled to an exemption—allowing him to discriminate in contravention of CADA—only if the state could not satisfy the deferential rational basis test, as mandated by *Smith*.[262] Yet, the *Masterpiece Cakeshop* Court dug down into the Commission's proceedings and uncovered ostensible hostility toward Phillips's religion. According to Justice Kennedy, who wrote the majority opinion, the most important evidence of hostility was a statement by one commissioner made during a Commission meeting. The commissioner said:

> 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.[263]

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[257] *Trinity Lutheran*, 137 S. Ct. at 2024. The Court stated that the state's anti-establishment principle went beyond that required by the Establishment Clause. *Id.* at 2024.

[258] Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[259] COLO. REV. STAT. ANN. § 24-34-301 (West 2021).

[260] *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

[261] *Id.* at 1726.

[262] "The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws." *Id.* at 1723-24.

[263] *Id.* at 1729.

According to the Court, this statement demonstrated "religious hostility"[264] and "animosity."[265] And once the Court found that the Commission had been hostile to Phillips's religion, the Commission's conclusion—that Phillips had violated CADA—was no longer subject to mere rational basis review. Now the case fell into the purposeful discrimination exception from *Smith*. From this perspective, the most important precedent became *Lukumi*, not *Smith*.[266] The Commission's failure to maintain "religious neutrality" violated free exercise, which led the Court to invalidate the Commission's decision.[267]

To be clear, the *Masterpiece Cakeshop* Court did not hold that either Christian beliefs, specifically, or religious beliefs, in general, must always justify an exemption from anti-discrimination statutes, such as CADA.[268] The Court even suggested that its decision might have little precedential value: "The outcome of cases like this in other circumstances must await further elaboration in the courts."[269] Yet, the Court's worried search for anti-Christian animus in this case seemed significant, particularly when contrasted with, for example, the Court's casual disregard for explicit anti-Muslim animus in *Trump v. Hawaii*, the travel ban case discussed above (in the Establishment Clause section).[270] Moreover, the *Masterpiece Cakeshop* Court's emphasis on the one commissioner's statement was problematic in at least two ways.[271] First, the commissioner was factually correct: Many times throughout history, people have justified discrimination and persecution based on their religious convictions. For instance, numerous European rulers, acting on their Christian beliefs, forced Jews to live in isolated ghettos or exiled them completely.[272] In the United States, Christians invoked the Bible as justifying slavery,[273] and then, in the twentieth century, as

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[264] *Id.* at 1724.

[265] *Id.* at 1731.

[266] *Id.* at 1730-31.

[267] *Id.* at 1723-24.

[268] *Id.* at 1732.

[269] *Id.* at 1732.

[270] Trump v. Hawaii, 138 S. Ct. 2392, 2446-47 (2018) (Sotomayor, J., dissenting)

[271] The Court bolstered its conclusion by comparing the Commission's treatment of Phillips with that of William Jack. Jack had requested bakers to create cakes decorated with images and Biblical invocations disparaging same-sex marriage. When the bakers refused, Jack claimed that he had been discriminated against because of his religion. *Masterpiece Cakeshop*, 138 S. Ct. at 1730-31.

[272] PAUL JOHNSON, A HISTORY OF THE JEWS 169-310 (1987); JAMES PARKES, JUDAISM AND CHRISTIANITY 135 & n.35 (1948); *see, e.g.*, *That Jews Should be Distinguished From Christians in Dress*, *reprinted in* JACOB R. MARCUS, THE JEW IN THE MEDIEVAL WORLD 138-39 (1938) (thirteenth-century decree requiring Jews to wear conical hats or yellow patches).

[273] Drew Gilpin Faust, *A Southern Stewardship: The Intellectual and the Proslavery Argument*, 31 AM. Q. 63, 71 (1979); *see, e.g.*, Thornton Stringfellow, *The Bible Argument: Or, Slavery in the Light of Divine Revelation*, *in* COTTON IS KING (E.N. Elliot ed., 1860).

legitimating Jim Crow segregation and anti-miscegenation laws.[274] Second, as Justice Ginsburg emphasized in her *Masterpiece Cakeshop* dissent, the state of Colorado had concluded that Phillips had violated CADA only after a multilayered series of proceedings, including a decision by the Colorado Court of Appeals.[275] The commissioner's statement constituted a minor element in those proceedings and did not undermine the unequivocal fact that Phillips had indeed discriminated by refusing to bake a cake for a couple because they were LGBTQ.[276] Nevertheless, Gorsuch's concurrence, joined by Alito, highlighted the justices' sensitivity toward government slights of religion: "[I]t is our job [to] afford legal protection to any sincere act of faith."[277]

The Court's next free exercise case was part of the Court's so-called "shadow docket," cases where the petitioners seek emergency or temporary relief.[278] The Court typically decides such cases without full argument and without issuing a full opinion. In theory, the Court should grant such petitions in only extraordinary circumstances, but the Trump administration began requesting relief frequently—and the Roberts Court responded favorably in nearly two-thirds of the cases.[279] *South Bay United Pentecostal Church v. Newsom*, decided on May 29, 2020, was the first of a series of cases arising during the Covid-19 (coronavirus) pandemic.[280] In *South Bay*, the governor of California, trying to stem the spread of the disease, issued an executive order that restricted the number of people allowed in public gatherings. South Bay United Pentecostal Church and others sought an injunction preventing enforcement of the executive order. The Court, in one sentence, refused to grant the injunction.[281] Roberts wrote a concurrence emphasizing that the requested relief was extraordinary and that the Court should defer to local officials during an emergency.[282] Significantly, though, four of the conservative justices dissented—all but Roberts—and Kavanaugh

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[274] Jane Dailey, *Sex, Segregation, and the Sacred after Brown*, 91 J. AM. HIST. 119, 121, 125-26 (2004).

[275] *Masterpiece Cakeshop*, 138 S. Ct. at 1749, 1751 (Ginsburg, J., dissenting).

[276] *Id.* at 1751 (Ginsburg, J., dissenting).

[277] *Id.* at 1738 (Gorsuch, J., concurring); *see* Obergefell v. Hodges, 576 U.S. 644, 741 (2015) (Alito, J. dissenting) (worrying that the Court's constitutional protection of same-sex marriage would demean the religiously faithful).

[278] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 5 (2015).

[279] Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 161-63 (2019); On the standards for relief: Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2083 (2017); Philip Morris USA v. Henley, 2004 WL 2386754 (2004).

[280] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

[281] "The application for injunctive relief presented to Justice Kagan and by her referred to the Court is denied." *Id.* at 1613.

[282] *Id.* at 1614 (Roberts, C.J., concurring).

wrote a dissenting opinion joined by Thomas and Gorsuch. Kavanaugh worried that California was discriminating against religion in violation of the First Amendment.[283] Quoting *Lukumi*, he emphasized that the government could justify such discrimination only if it could satisfy strict scrutiny.[284]

Approximately one month later, on June 30, 2020, the Court decided another free exercise case, though this time with full argument and a signed opinion.[285] *Espinoza v. Montana Department of Revenue* arose after the Montana state legislature created a scholarship program for students attending private schools in the state. Under the program, anyone donating money to student scholarship organizations received a tax credit, and the scholarship money could be used at any private school, which would include religious schools.[286] Yet, because the state constitution precluded public funding of religious schools, the Montana Department of Revenue promulgated a rule prohibiting families from using the scholarship money at religious schools.[287] Parents of children attending the Stillwater Christian School challenged the Department of Revenue rule. In response to this challenge, the Montana Supreme Court eliminated the entire tax credit program: Going forward, no private schools, religious or otherwise, would receive scholarship money.[288]

The U.S. Supreme Court reversed—Roberts voted with his conservative cohort and wrote the opinion for the five-justice majority. The *Espinoza* Court did not even cite *Smith*.[289] Instead, citing and quoting *Lukumi* and *Trinity Lutheran*,[290] the Court reasoned that the Free Exercise Clause "'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'"[291] If the government penalizes religion, then the government must justify its action by satisfying strict scrutiny.[292] And of course, the Court held that the state could not do so: The Department of Revenue rule and the state court decision violated free exercise.[293] Ginsburg's dissent, joined by Kagan, found the Court's decision puzzling: The parent-petitioners argued "that the Free Exercise Clause requires a State to treat institutions and people neutrally

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[283] *Id.* at 1614 (Kavanaugh, J., dissenting).

[284] *Id.* (Kavanaugh, J., dissenting).

[285] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

[286] *Id.* at 2251.

[287] *Id.* at 2252.

[288] *Id.* at 2253.

[289] *Id.* at 2251-64.

[290] *E.g.*, *id.* at 2254, 2257.

[291] *Id.* at 2254 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017)).

[292] *Id.* at 2255.

[293] *Id.* at 2262-63.

when doling out a benefit—and neutrally is how Montana treats them in the wake of the state court's decision."[294] In other words, the Court's decision would in effect force the state to provide financial support to religious schools.[295] And as even Roberts admitted, "most of the private schools that would benefit from the [scholarship] program were 'religiously affiliated' and 'controlled by churches.'"[296] In fact, "94 percent of the scholarships [in 2018] went to students attending religious schools,"[297] with religious schools constituting seventy percent of the private schools in the state—and the vast majority of the religious schools being associated with some form of Christianity.[298]

The Court decided one more free exercise case on its shadow docket during the summer of 2020—and it would be Ginsburg's final free exercise case before her death on September 18, 2020. Like *South Bay United Pentecostal Church*, the dispute in *Calvary Chapel Dayton Valley v. Sisolak* arose after a governor—this time, the governor of Nevada—issued an order limiting attendance at religious services because of the Covid-19 pandemic.[299] And again, as in *South Bay*, Roberts joined the progressive justices in a five-to-four decision, with another one-sentence order denying the request for an injunction.[300] Alito, joined by Thomas and Kavanaugh, wrote a lengthy dissent. Citing and quoting *Lukumi* and *Masterpiece Cakeshop*, Alito emphasized that the government must remain neutral in relation to religion: "[R]estrictions on religious exercise that are not 'neutral and of general applicability' must survive strict scrutiny."[301] Alito seemed particularly aggrieved because, from his perspective, Nevada favored casinos over houses of worship. "The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance. But

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[294] *Id.* at 2279 (Ginsburg, J., dissenting).

[295] "Today's ruling is perverse. Without any need or power to do so, the Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place." *Id.* at 2297 (Sotomayor, J., dissenting).

[296] *Id.* at 2256.

[297] Adam Liptak, *Supreme Court Gives Religious Schools More Access to State Aid*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/us/supreme-court-religious-schools-aid.html.

[298] Nina Totenberg & Brian Naylor, *Supreme Court: Montana Can't Exclude Religious Schools From Scholarship Program*, NPR (June 30, 2020), https://prod-text.npr.org/2020/06/30/88307/4890/supreme-court-montana-cant-exclude-religious-schools-from-scholarship-program; *Best Religiously Affiliated Private Schools in Montana*, PRIV. SCH. REV., https://www.privateschoolreview.com/montana/religiously-affiliated-schools (last visited July 2, 2020).

[299] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

[300] "Application for injunctive relief presented to Justice Kagan and by her referred to the Court denied." *Id.* at 2603.

[301] *Id.* at 2605 (Alito, J., dissenting).

the Governor of Nevada apparently has different priorities."[302] Not only did the state fail to satisfy strict scrutiny,[303] according to Alito, but also "the State's efforts to justify the [religious] discrimination [were] feeble."[304]

After Ginsburg died, the Court's treatment of these free exercise cases in the era of Covid-19 changed dramatically. The first free exercise case with new Justice Amy Coney Barrett on the Court arose on the shadow docket. While the Court had denied injunctions in prior shadow docket free exercise cases dealing with Covid-19 restrictions—*South Bay* and *Calvary Chapel*—the Court granted the requested injunction in *Roman Catholic Diocese of Brooklyn v. Cuomo*, decided on November 25, 2020.[305] The Roman Catholic Diocese of Brooklyn and Agudath Israel of America (representing Orthodox Jews) challenged an executive order from the governor of New York that restricted attendance at religious services. A five-justice majority consisting of Thomas, Alito, Gorsuch, Kavanaugh, and Barrett issued a per curiam opinion. Citing *Lukumi*, the Court emphasized that government actions violating "'the minimum requirement of neutrality' to religion" can be justified only pursuant to strict scrutiny.[306] And as in *Masterpiece Cakebox*—but unlike *Trump v. Hawaii*—the Court here dug into a government official's comments (it was the governor) to demonstrate hostility against religion (specifically targeting the Orthodox Jewish community).[307] The Court added, though, that "even if we put those comments aside, the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."[308] In applying strict scrutiny, the Court acknowledged that preventing the spread of Covid-19 amounted to a compelling interest, but the restrictions on religious services were not narrowly tailored to achieving that result.[309] Therefore, the Court enjoined enforcement of the governor's order and concluded: "[Even] in a pandemic, the Constitution cannot be put away and forgotten."[310]

Concurrences written by Gorsuch and Kavanaugh demonstrated again a sharp sensitivity toward government slights of religion. Gorsuch, for example, worried that the executive order revealed the governor believed that

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[302] *Id.* at 2603-04 (Alito, J., dissenting).

[303] *Id.* at 2608 (Alito, J., dissenting).

[304] *Id.* at 2606 (Alito, J., dissenting).

[305] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

[306] *Id.* at 66. "Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." *Id.* at 67.

[307] *Id.* at 66; *see id.* at 80 (Sotomayor, J., dissenting) (contrasting the Court's treatment of official's comments in this case and *Trump v. Hawaii*).

[308] *Id.* at 66.

[309] *Id.* at 67.

[310] *Id.* at 68.

"what happens [in religious places] just isn't as 'essential' as what happens in secular spaces."[311] Gorsuch therefore emphasized that the First Amendment prohibits the government "from treating religious exercises worse than comparable secular activities," unless the government can satisfy strict scrutiny.[312] But Kavanaugh went even further in articulating free exercise doctrine to protect against government discrimination of religion (or the religious). Citing *Lukumi* and *Smith*, Kavanaugh explained that "once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class."[313] In other words, if a government creates a policy or rule and, in doing so, simultaneously carves out exceptions to that policy or rule, then the government must justify, pursuant to strict scrutiny, its decision not to include religion (houses of worship) within the exceptions. But as Sotomayor emphasized in dissent, *Lukumi* and *Smith* did not stand for "the proposition that states must justify treating even *noncomparable* secular institutions more favorably than houses of worship."[314] In fact, contrary to the Court's conservative majority, Sotomayor maintained that in this case New York had treated "houses of worship far more favorably than their secular comparators."[315]

After *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court disposed of three more shadow docket cases in short order, two on December 15 and one on December 17, 2020. *High Plains Harvest Church v. Polis* challenged the Colorado governor's Covid-19 order limiting worship services.[316] The Court granted the injunction and remanded the case with instructions to follow *Roman Catholic Diocese of Brooklyn*.[317] The Court similarly resolved *Robinson v. Murphy*, out of New Jersey.[318] In *Danville Christian Academy, Inc. v. Beshear*, the challenge was to the Kentucky governor's order closing the schools, including religious schools.[319] The

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311 *Id.* at 69 (Gorsuch, J., concurring). "New York's restrictions on houses of worship not only are severe, but also are discriminatory." *Id.* at 73 (Kavanaugh, J., concurring).

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

313 *Id.* at 73 (Kavanaugh, J., concurring).

314 *Id.* at 80 n.2 (Sotomayor, J., dissenting) (emphasis added).

315 *Id.* at 80 (Sotomayor, J., dissenting). Roberts dissented because New York had already changed its restrictions on religious services, so he viewed the case as effectively moot. *Id.* at 75 (Roberts, C.J., dissenting). Breyer dissented, largely emphasizing that the granting of an injunction should be limited to extraordinary circumstances. In this case, given the uncertainty of the science related to Covid-19, he argued that the applicants' claim of a constitutional violation could not be deemed sufficiently clear to justify an injunction. *Id.* at 77-78 (Breyer, J., dissenting).

316 High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020).

317 Sotomayor dissented because of mootness: Colorado had already lifted its restrictions in response to *Roman Catholic Diocese of Brooklyn*. *Id.* at 527 (Sotomayor, J., dissenting).

318 Robinson v. Murphy, 141 S. Ct. 972 (2020).

319 Danville Christian Academy, Inc. v. Beshear, 141 S. Ct. 527 (2020).

Court denied the application for an injunction solely because of timing: The governor's order was expiring soon. Regardless, Gorsuch wrote a dissenting opinion, joined by Alito, which explicitly questioned the logic and vitality of *Smith* as a precedent for free exercise cases.[320]

Eventually, the case from California, *South Bay United Pentecostal Church v. Newsom*, returned to the Court's shadow docket.[321] In the first *South Bay* decision, Ginsburg was still on the Court, and Roberts joined the progressive justices in denying injunctive relief.[322] The second time around, the Court, in a six-to-three decision issued on February 5, 2021, granted the requested injunction in part, with the six conservatives aligned against the remaining three progressives.[323] In the first *South Bay* decision, Roberts had voted to deny the injunction while emphasizing the need to defer to local officials during an emergency, but in this second decision (*South Bay II*), he flipped his vote while writing: "Deference, though broad, has its limits."[324] Gorsuch wrote an opinion, joined by Thomas and Alito, that maintained California was "obviously" targeting religion[325]: "California has openly imposed more stringent regulations on religious institutions than on many businesses."[326] Consequently, he argued that the Court must apply strict scrutiny, and in apparent response to Roberts, emphasized that strict scrutiny is a rigorous judicial test, citing *Lukumi*, which does not allow for deference to the government or political process.[327] In applying strict scrutiny, Gorsuch

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[320] Alito wrote:

Perhaps the Sixth Circuit's errors are understandable. *Smith*'s rules about how to determine when laws are "neutral" and "generally applicable" have long proved perplexing. … It is far from clear, too, why the First Amendment's right to free exercise should be treated less favorably than other rights, or ought to depend on the presence of another right before strict scrutiny applies.

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

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

[322] S. Bay United Pentecostal Church v. Newsom (*S. Bay I*), 140 S. Ct. 1613 (2020).

[323] *S. Bay II*, 141 S. Ct. 716 (2021). Specifically, the Court wrote:

Application for injunctive relief presented to Justice KAGAN and by her referred to the Court is granted in part. Respondents are enjoined from enforcing the Blueprint's Tier 1 prohibition on indoor worship services against the applicants pending disposition of the petition for a writ of certiorari. The application is denied with respect to the percentage capacity limitations, and respondents are not enjoined from imposing a 25% capacity limitation on indoor worship services in Tier 1. The application is denied with respect to the prohibition on singing and chanting during indoor services.

Id. at 716.

[324] *S. Bay I*, 140 S. Ct. at 1613 (Roberts, C.J., concurring); *S. Bay II*, 141 S. Ct. at 717 (Roberts, C.J., concurring).

[325] *S. Bay II*, 141 S. Ct. at 717 (Gorsuch, J., statement). Gorsuch's opinion is labeled as a "statement" rather than a concurrence or dissent, though it appears to be concurring in part and dissenting in part. *Id.* at 717-20 (Gorsuch, J., statement).

[326] *Id.* at 717 (Gorsuch, J., statement).

[327] *Id.* at 717-18 (Gorsuch, J., statement). "The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard." *Id*. at 718 (Gorsuch, J., statement).

acknowledged, as the Court had done in *Roman Catholic Diocese of Brooklyn*, that reducing the risk of spreading Covid-19 amounted to a compelling state interest.[328] Nevertheless, California failed strict scrutiny because the state's restrictions, according to Gorsuch, were not narrowly tailored to achieve that goal.[329]

In a dissenting opinion joined by Breyer and Sotomayor, Kagan accentuated the emerging doctrinal disagreement between the conservative and progressive justices—a disagreement that first clearly surfaced in *Roman Catholic Diocese of Brooklyn*. Namely, at least some of the conservative justices, being hypersensitive about possible government slights of religion, demand that the government treat religious activities more favorably than similar secular activities—a demand that contravenes the *Smith* rational basis test with its deference to the political process. From this conservative standpoint, the government must treat religious activities as well as the most favored secular activities, even if the religious and secular activities differ significantly.[330]

Meanwhile, the progressive justices argue that the Court should require the government to treat like cases alike. Thus, Kagan began her *South Bay* dissent as follows:

> Justices of this Court are not scientists. Nor do we know much about public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic. The Court orders California to weaken its restrictions on public gatherings by making a special exception for worship services. The majority does so even though the State's policies treat worship just as favorably as secular activities (including political assemblies) that, according to medical evidence, pose the same risk of COVID transmission. Under the Court's injunction, the State must instead treat worship services like secular activities that pose a much lesser danger.[331]

Kagan then detailed the expert evidence that California had relied upon in developing its Covid-19 restrictions, including those applied to religious gatherings. Specifically, the evidence showed that the virus spread more readily in indoor rather than outdoor gatherings.[332] Given that information, California had tailored and applied its "rules equivalently to religious activities and to secular activities."[333] In other words, the state had treated like cases alike while treating unlike cases differently. The problem

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[328] *Id.* at 718 (Gorsuch, J., statement).

[329] *Id.* at 718-19 (Gorsuch, J., statement).

[330] *See* Laycock, *supra* note 139, at 49 (suggesting one way to read *Smith* was that it, in effect, granted religion "most-favored nation status").

[331] *S. Bay II*, 141 S. Ct. at 720 (Kagan, J., dissenting).

[332] *Id.* at 721 (Kagan, J., dissenting).

[333] *Id.* at 722 (Kagan, J., dissenting).

for Kagan, then, was that the Court, not California, "insists on treating unlike cases, not like ones, equivalently."[334]

California's Covid-19 restrictions returned yet again to the Court in another shadow docket decision, *Tandon v. Newsom*, issued on April 9, 2021.[335] In this instance, the state applied its restrictions on private gatherings to limit at-home religious exercises. All too predictably, the Court concluded that the state's action violated the First Amendment, with the per curiam opinion clarifying its new approach to free exercise. In particular, the Court elaborated the judicial comparison of religious and secular activities. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.… Comparability is concerned with the risks various activities pose, not the reasons why people gather."[336] If the government treats "any comparable secular activity more favorably than religious exercise,"[337] as the Court found in this case, then the government must satisfy strict scrutiny. And the Court emphasized that strict scrutiny in free exercise cases demands the most rigorous judicial scrutiny. As Gorsuch had suggested in *South Bay II*, the Court would not be applying some "watered down" strict scrutiny lite.[338] Kagan's dissent, joined again by Breyer and Sotomayor, accentuated the same problems the dissenters had articulated in *Roman Catholic Diocese of Brooklyn* and *South Bay II*. Namely, the conservative justices were comparing dissimilar religious and secular activities and ignoring expert public-health evidence.[339]

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[334] *Id.* (Kagan, J., dissenting).

[335] Tandon v. Newsom, 141 S. Ct. 1294 (2021). The Court also granted an injunction against California in *Gateway City Church v. Newsom*. 141 S. Ct. 1460 (2021). In *Gateway City Church*, the Court justified its decision merely by referring to *South Bay United Pentecostal Church v. Newsom*. 141 S. Ct. 716 (2021).

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

[337] *Id.*

[338] *Id.* at 1298. "[H]istorically, strict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.' … That standard 'is not watered down'; it 'really means what it says.'" *Id.*; *see* Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & SOC. INQUIRY 89, 121-22 (2005) (on strict scrutiny lite). Whether the Court interprets strict scrutiny in free exercise cases to be strict in theory, but fatal in fact, remains to be seen. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (introducing terminology of strict in theory, fatal in fact). It should be noted that one can reasonably read the post-*Sherbert* and pre-*Smith* free exercise cases as applying a type of strict scrutiny lite insofar as the Court did not consistently invalidate government actions. *See supra* II.B. (discussing cases from that time period).

[339] *Tandon*, 141 S. Ct. at 1298-99 (Kagan, J., dissenting) (the dissent expressly states that the majority "commands California to ignore its experts' scientific findings, thus impairing the State's effort to address a public health emergency").

Meanwhile, the Court had already heard oral argument in yet another free exercise case, *Fulton v. City of Philadelphia*.[340] Given that the petition for certiorari had asked the Court to revisit *Smith* and that the case received full argument—including more than eighty amicus briefs—Court observers anticipated that the conservative justices would seize on *Fulton* as the perfect vehicle for explicitly overruling *Smith*.[341] In *Fulton*, Catholic Social Services (CSS) had contracted with the City of Philadelphia to provide foster care services. When the City realized that CSS was violating a contractual non-discrimination requirement by not considering same-sex couples for foster care placements, the City stopped referring children to CSS. CSS, which "believes that 'marriage is a sacred bond between a man and a woman,'" sued the City for violating the First Amendment.[342] In a unanimous decision, the Court held that the City had violated the Free Exercise Clause, but Roberts's majority opinion, joined by the most recent conservative appointees, Kavanaugh and Barrett, as well as the progressives, Kagan, Sotomayor, and Breyer, avoided deciding whether to overrule *Smith*. Alito, joined by Thomas and Gorsuch, wrote an opinion concurring in the judgment and argued the Court should explicitly overrule *Smith*.[343] Gorsuch did the same (also joined by Alito and Thomas).[344]

Roberts's majority opinion in *Fulton* pushed beyond prior decisions insofar as it invoked two rather than one of the *Smith* exceptions—recall that *Smith* had identified three exceptions in which rational basis review would be insufficiently rigorous.[345] Based on the two exceptions, Roberts reasoned that the City's contract was not generally applicable—therefore, the prerequisite for applying the deferential *Smith* rational basis test was not satisfied. With regard to the two exceptions, Roberts unsurprisingly invoked the prohibition against purposeful discrimination (of religion), the exception that the conservative justices had already expanded and applied repeatedly. As Roberts interpreted this *Smith* exception, if the government has discretion

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[340] Fulton v. City of Phila., 140 S. Ct. 1104 (2020) (for filing and oral argument dates, *see* Supreme Court of the United States, No. 19-123, Fulton v. City of Philadelphia https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-123.html).

[341] *Fulton*, 140 S. Ct. 1104 (2020) (granting the petition for certiorari); Fulton v. City of Phila., 2019 WL 3380520 (U.S.); *e.g.*, Ian Millhiser, *The Fight Over Whether Religion is a License to Discriminate is Back Before the Supreme Court*, VOX (Feb. 25, 2020), https://www.vox.com/2020/2/25/21150692/supreme-court-religion-discrimination-lgbtq-foster-fulton-philadelphia-first-amendment; *see* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (suggesting possibility of revisiting *Smith*).

[342] Fulton v. City of Phila., 141 S. Ct. 1868, 1875 (2021).

[343] *Id.* at 1883 (Alito, J., concurring in the judgment).

[344] *Id.* at 1926 (Gorsuch, J., concurring in the judgment). Barrett, who joined Roberts's opinion, also wrote a concurrence, agreeing that the Court did not need to reexamine *Smith*. *Id.* at 1882-83 (Barrett, J., concurring).

[345] Emp't Div. v. Smith, 494 U.S. 872, 877-78, 882-83 (1990).

to grant exemptions to its law (or contractual provision, in this case), then the government is discriminating against religion if it can grant exemptions to secular activities without granting exemptions to religious activities that similarly threaten the government's interests.[346] "A law … lacks general applicability,"[347] Roberts wrote, "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[348]

Going beyond prior cases and opinions, Roberts also drew upon the *Smith* exception for government denials of unemployment compensation.[349] While this *Smith* exception could have been understood as little more than an attempt to harmonize *Smith* with prior free exercise decisions involving unemployment compensation,[350] Roberts articulated a deeper justification for it. A problem arose with an unemployment compensation law, Roberts explained, if the law allowed the government to grant exemptions to otherwise mandated denials of unemployment compensation. For instance, in *Sherbert v. Verner*, the government had denied benefits to the claimant pursuant to a law prohibiting compensation to those "who had 'failed without good cause … to accept available suitable work.'"[351] This statutory exception might allow the government to find good cause for an unemployment-compensation claimant who relied on a secular justification (for refusing a job offer) while denying compensation for a claimant who relied on a religious justification (for similarly refusing a job offer). In short, an unemployment compensation law that allowed the government to grant individual exemptions was not a law of general applicability.[352]

In *Fulton*, Roberts reasoned that the City's contract with CSS allowed the government to grant "an exception" from its non-discrimination requirement.[353] Thus, under the two *Smith* exceptions, as interpreted by Roberts, the City's contract with CSS was not generally applicable, and the City consequently needed to satisfy strict scrutiny rather than rational basis.[354] The Court did not need to overrule *Smith*, Roberts concluded,

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[346] *Fulton*, 141 S. Ct. at 1879 (deeming the fact that the City had never actually granted any exceptions to be irrelevant).

[347] *Id.* at 1877.

[348] *Id.*

[349] *Smith*, 494 U.S. at 883 (stated that strict scrutiny rather than rational basis would be the appropriate standard if the challenged government action was a denial of unemployment compensation).

[350] *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); *see* Laycock, *supra* note 139, at 47 (suggesting this limited reading of the unemployment-compensation exception as one reading of *Smith*).

[351] *Fulton*, 141 S. Ct. at 1877 (quoting *Sherbert*, 374 U.S. at 401).

[352] *Id.* at 1877 (citing to *Lukumi* when discussing each exception); Laycock, *supra* note 139, at 47-53 (recognizing the potential consequences of this possible reading of the unemployment-compensation exception after *Smith* was decided).

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

[354] *Id.* at 1877.

because it was already applying the most rigorous level of judicial scrutiny—the likely judicial standard if the Court were to explicitly overrule *Smith*.[355] Citing *Lukumi* while echoing *Tandon* and Gorsuch in *South Bay II*, Roberts also emphasized that strict scrutiny would not be diluted: "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so."[356] Then, when applying strict scrutiny, Roberts found that none of the City's asserted interests could be deemed compelling.[357] Most important, even the City's desire to prevent CSS from discriminating against same-sex couples did not amount to a compelling interest.[358] Ultimately, Roberts concluded, the City failed to satisfy strict scrutiny.[359]

Alito's long opinion, concurring in the judgment, laid out the argument for overruling *Smith*,[360] yet the failure of the Court to do so explicitly is unlikely to have any long-term significance. To be sure, some petitioners will continue asking the Court to revisit *Smith*,[361] but the Court already has effectively overruled it to a large degree. Supreme Court history is littered with examples where the Court has effectively repudiated the doctrinal rule of an earlier precedent without explicitly overruling the precedent. Most famously, *Brown v. Board of Education* is celebrated for holding unconstitutional the separate-but-equal doctrine of *Plessy v. Ferguson*, yet *Brown* did not explicitly overrule *Plessy*.[362] More recently, *City of Boerne v. Flores* severely limited Congress's power under section five of the Fourteenth Amendment,[363] thus contravening the rule articulated in *Katzenbach v. Morgan*, which had recognized a broad congressional

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[355] *Id.* at 1881; *see id.* at 1924-26 (Alito, J., concurring in the judgment) (arguing that strict scrutiny would once again become the appropriate standard).

[356] *Id.* at 1881.

[357] *Id.* at 1881-82.

[358] *Id.* at 1882 (expressly agreed with by Alito on this point); *Id.* at 1924 (Alito, J., concurring in the judgment).

[359] *Id.* at 1881-82.

[360] *Id.* at 1883-1926 (Alito, J., concurring in the judgment).

[361] *Id.* at 1887-88, 1931 (Alito, J., concurring in the judgment) (Gorsuch, J., concurring in the judgment) (both arguing that one reason for overruling *Smith* explicitly was that the issue was likely to return to the Court).

[362] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493-96 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896).

[363] City of Boerne v. Flores, 521 U.S. 507 (1997).

power.[364] Rather than admitting it was overruling *Katzenbach*, though, the *Boerne* Court claimed to be merely clarifying its meaning.[365]

With regard to *Smith* and free exercise, no single Roberts Court decision has either explicitly overruled *Smith* or repudiated its rational basis doctrine.[366] Yet, the extensive line of Roberts Court free exercise decisions leaves no doubt that the Court has effectively rejected the application of rational basis (in most circumstances) while adopting a rigorous strict scrutiny, particularly when Christians are bringing free exercise claims.[367] The Court has interpreted the *Smith* exceptions so broadly—especially the prohibition against purposeful discrimination of religion—that the exceptions have swallowed the *Smith* doctrinal rule. If anything, *Lukumi*, with its application of strict scrutiny, has supplanted *Smith* as the preeminent free exercise precedent. Indeed, Alito's opinion in *Fulton* amply demonstrated the current unimportance of *Smith*. In arguing to overrule *Smith* explicitly, he underscored that numerous recent free exercise decisions are inconsistent with *Smith*.[368] On this point, Alito was correct: The *Smith* doctrinal approach has not endured. Given this, the path forward in free exercise cases is unlikely to change regardless of whether the Court explicitly overrules *Smith*.

IV. CONCLUSION

The Roberts Court has turned religious freedom in a sharply conservative direction. In Establishment Clause cases, the Court has, in effect, rejected the long-standing *Lemon* test and the alternative multi-pronged doctrines, the endorsement and coercion tests. Instead, the

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[364] Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (holding that Congress could exercise its section five power either to remedy (or deter) violations of the Fourteenth Amendment or to define Fourteenth-Amendment substantive protections (though in exercising its power to define substantively, Congress could only expand and not dilute fourteenth-amendment protections)). Thus, Congress could act only to remedy (or deter) violations of the Fourteenth Amendment. *Flores*, 521 U.S. at 517-20 (Congress lacked the constitutional power to define Fourteenth-Amendment substantive protections).

[365] *Flores*, 521 U.S. at 527-28.

[366] Roe v. Wade, 410 U.S. 113 (1973) (another example of the Court undermining a doctrinal rule without explicitly overruling the original precedent revolves around the Court's treatment of *Roe v. Wade* and a woman's right to choose abortion); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Court has not overturned *Roe*, yet it has hollowed out the original doctrine, which required the government to satisfy strict scrutiny if infringing on the right to choose).

[367] As I discuss in the Conclusion, the Roberts Court seems less concerned with protecting non-Christian minority religions. Thus, it is imaginable that the Court might resurrect the *Smith* rational basis test if a non-Christians were seeking a free exercise exemption.

[368] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Fulton v. City of Phila., 141 S. Ct. 1868, 1915-16 (2021) (Alito, J., concurring in the judgment).

conservative justices have turned to tradition to determine the parameters of the Establishment Clause, and they interpret tradition in accord with the nation's long history of de facto Christianity. Pursuant to this new approach, the government not only can recognize and favor religion over nonreligion but also can express its recognition and favoring of religion in explicitly Christian terms, publicly displaying Christian crosses, uttering Christian prayers, and so on. The conservative justices have taken a sledgehammer to Jefferson's wall of separation.

In free exercise cases, the Court has effectively rejected the *Smith* rational basis test, with its deference to the political process. Indeed, for the Roberts Court, judicial restraint and deference to democracy—the hallmarks of the *Smith* Court's judicial conservatism—are no longer sufficiently conservative.[369] Whereas conservatives used to rail against judicial activism, they now encourage and celebrate judicial engagement. Thus, in free exercise cases, the Court has created and expansively interpreted a ministerial exception that allows religious institutions to discriminate despite generally applicable anti-discrimination laws. Furthermore, the conservative justices worry exceedingly about government slights of religion, particularly Christianity, and readily find that the government has purposefully discriminated against Christianity or religion in general. And if any such discrimination is found, then the Court requires the government to satisfy strict scrutiny. At least some of the conservative justices seem to go further, applying strict scrutiny if the government merely fails to favor religious over secular institutions and activities. Moreover, it should be underscored, the Roberts Court's free exercise decisions have invalidated numerous state government actions; respect for state sovereignty and federalism principles, a prior hallmark of judicial conservatism, is apparently now irrelevant.[370]

Overall, the conservative justices manifest Christian grievance, indignant that the nation's religiously diverse population does not welcome manifestations of de facto Christianity.[371] The justices allow Christian

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[369] The Roberts Court is skeptical of and even hostile to democratic government. FELDMAN, PACK, *supra* note 12; FELDMAN, NEW, *supra* note 12, at 159-226. It is worth underscoring an irony from the free exercise decisions: Alito's opinion in *Fulton*, while acknowledging Scalia's originalist bona fides. *Fulton*, 141 S. Ct. at 1892-97 (Alito, J., concurring in the judgment) (criticizing Scalia's *Smith* opinion for being insufficiently originalist).

[370] *E.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

[371] *See* Michael J. Klarman, *Foreword: The Degradation of American Democracy-and the Court*, 134 HARV. L. REV. 1, 125-35 (2020) (discussing Christians' perceptions of their ostensible loss of power); Epstein & Posner, *supra* note 43 ("[M]any Christians, who were once accustomed in most places to seeing their views and practices being accepted without question, now see themselves as victims of religious discrimination. A recent poll indicates that while most Americans do not believe that their religious liberty is under threat, large majorities of evangelicals and religious Republicans do. Justice

organizations and institutions to discriminate, yet zealously protect Christians from discrimination. One might wonder, though, whether the conservative justices truly manifest *Christian* grievance and resentment. To be sure, they accept the non-preferentialist position, allowing government to favor religion over nonreligion, but are they equally protective of all religions and not just Christianity? After all, in several of the free exercise, Covid-19 cases, the conservative justices wrote as if they had an ecumenical concern for all religious believers, not solely Christians.[372] For instance, in *Calvary Chapel*, decided before Ginsburg's death, Alito's, Gorsuch's, and Kavanaugh's respective dissents repeatedly mentioned how the Nevada executive order applied to "churches, synagogues, and mosques."[373] In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the conservatives' per curiam opinion discussed the New York governor's targeting of the Orthodox Jewish community as well as the Roman Catholic Diocese of Brooklyn and other religious institutions.[374] And in *South Bay II*, Gorsuch fretted about how the California executive order might affect not only Lent but also Passover and Ramadan.[375]

Yet, one should not read too much into these more ecumenical statements from the conservative justices. To be sure, they willingly protect

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Alito belongs to the latter group. As he said in a speech to the Federalist Society, 'It pains me to say this, but in certain quarters, religious liberty is fast becoming a disfavored right'").

[372] Also, the Roberts Court has occasionally interpreted statutes so that non-Christians win and Christians lose. The Court has interpreted RFRA to protect the practices of a religious sect that originated in the Amazon rainforest. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). The sect, though, had some connection to Christianity: "O Centro Espírita Beneficente Uniã do Vegetal (UDV) is a Christian Spiritist sect based in Brazil, with an American branch of approximately 130 individuals." *Id.* at 425. The Court has also held that state sovereign immunity precluded a Christian prisoner from suing under RLUIPA. Sossamon v. Texas, 563 U.S. 277 (2011). In a subsequent case, the Court held that a state could not satisfy strict scrutiny under RLUIPA, thus allowing a Muslim to win his claim. Holt v. Hobbs, 574 U.S. 352 (2015). To be sure, the Court has also interpreted statutes in ways benefitting Christians. Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367 (2020) (upholding agency interpretation of Affordable Care Act allowing employers to avoid paying for insurance coverage for contraceptives based on religious or moral objections; favoring a Christian employer); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (interpreting RFRA to allow religiously-motivated corporations—specifically a Christian-oriented corporation—to avoid compliance with the Affordable Care Act provision requiring corporations to provide health insurance coverage to employees for various types of contraceptives).

[373] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting); *see id.* at 2615 (Kavanaugh, J., dissenting) ("churches, synagogues, temples, and mosques"); *id.* at 2604 (Alito, J., dissenting) ("church, synagogue, or mosque").

[374] *Roman Catholic Diocese*, 141 S. Ct. at 66 (2020).

[375] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720 (2021) (Gorsuch, J., statement) ("Even if a full congregation singing hymns is too risky, California does not explain why even a single masked cantor cannot lead worship behind a mask and a plexiglass shield. Or why even a lone muezzin may not sing the call to prayer from a remote location inside a mosque as worshippers file in.").

non-Christians when their interests converge with those of Christians.[376] In other words, the justices will protect the religious freedom of non-Christians so long as it harmonizes with de facto Christianity. Thus, in the free exercise, Covid-19 cases, the conservative justices talked of an expansive religious freedom that protected non-Christians *and Christians*. Nevertheless, in multiple cases, these same justices have interpreted religious freedom in ways that resurrect and bolster de facto Christianity. In short, as *Pleasant Grove City v. Summum*[377] and *Trump v. Hawaii*[378] demonstrated, the conservative justices have not interpreted the First Amendment in ways that diverge from Christian interests. As New York Times columnist, Michelle Goldberg, recently wrote, if one believes that "God deeded America to the [Christian] faithful, then pluralism will feel like the theft of your birthright."[379]

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[376] Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (explaining interest-convergence principle); Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. L. REV. 248 (2012) (same).

[377] Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

[378] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[379] Michelle Goldberg, *It's Marjorie Taylor Greene's Party Now*, N.Y. TIMES (February 2, 2021), https://www.nytimes.com/2021/02/01/opinion/marjorie-taylor-greene-gop.html.